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Faculty of Law

Foreign Direct Investment in the Zambian Mining Sector: The Need for Environmental Protection  
and Human Rights

By

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Centre for Human Rights

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***Declaration of originality***

I declare that this thesis entitled, **Foreign direct investment in the Zambian mining sector: The need for environmental protection and human rights**, which is hereby submitted for the award of the Doctor of Laws (LLD) Degree at the University of Pretoria is my own original work and it has not been previously submitted for the award of a degree at this or any other tertiary institution.

I understand what plagiarism entails and am aware of the policy of the University in this regard. Where I have used other people's work, this has been properly acknowledged. The errors or omissions in this work are solely mine.

**Chipasha Mulenga**

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**2017**

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## ***Dedication***

I dedicate this work to Chengelo and Chisungusho who have been the source of my pride.

### ***Abbreviations***

ACHPR	African Charter on Human and People's Rights
COMESA	Common Market for Eastern and Southern Africa
EIA	Environmental Impact Assessment
EITI	Extractive Industries Transparency Initiative
EMA	Environmental Management Act
EP	Equator Principles
EPF	Environmental Protection Fund
FDI	Foreign Direct Investment
ISO	International Standardisation Organisation
KCM	Konkola Copper Mines
MCM	Mopani Copper Mines
MRDP	Mineral Resources Development Policy
MMDA	Mines and Minerals Development Act
MMMD	Ministry of Mines and Mineral Development
MWDSEP	Ministry of Water Development, Sanitation and Environmental Protection
NPE	National Policy on Environment
OECD	Organisation for Economic Cooperation and Development
SADC	Southern African Development Community
UNCTAD	United Nations Conference on Trade and Development
UNEGMO	United Nations Environmental Guidelines on Mining Operations
ZDA	Zambia Development Agency
ZEMA	Zambia Environmental Management Agency

## **Legislation**

### **Angola**

Constitution

Environmental Framework Act (No. 5/98 of 19 June 1998)

Mining Code No. 31 of September 2011

### **Botswana**

Environmental Assessment Act, 2011

Mines and Minerals Act, Chapter 66:01

### **Democratic Republic of Congo**

Constitution of the Third Republic, 18 February 2006

Environmental Protection Code No. 11/2009

Mining Code Law No. 007/2002

### **Malawi**

Constitution, 1998

Environment Management Act, Cap 69:01

Mines and Minerals Act, Chapter 61:01

### **Mozambique**

Constitution

Mining Code, Law No. 14/2002 of June 26

Environmental Law No. 20/97 of 1 October 1997

### **Namibia**

Constitution

Minerals (Prospecting and Mining) Act, 1992

Environmental Management Act, 2007

### **South Africa**

Constitution, 1996

Mineral and Petroleum Resources Development Act 28 of 2002

National Environmental Management Act 108 of 1998

### **United Republic of Tanzania**

Constitution, 2005

Environmental Management Act, 2004

Mining Act, 2010

### **Zimbabwe**

Constitution (amendment), Act No. 20 of 2013

Environmental Management Act, Chapter 20:27

Mines and Minerals Act, Chapter 21:05

### **Zambia**

Constitution of Zambia (Amendment Act No. 2 of 2016)

Environmental Management Act, 2011

Environmental Management (Licensing) Regulations, 2013

Environmental Protection and Pollution Control (Environmental Impact Assessment) Regulations,  
1997, S.I No 28 of 1997

Immigration and Deportation Act No. 18 of 2010

Mines and Minerals Development Act, 2015

Mines and Minerals (Environmental) Regulations, S.I. No 29 of 1997

Mines and Minerals (Environmental Protection Fund) Regulations, S.I. No 102 of 1998

Public Health Act, Chapter 295

Ratification of International Agreements Act No. 34 of 2016

Water Resources Management Act, 2011

Water Supply and Sanitation Act, 1997

Water Pollution Control (Effluent and Waste Water) Regulations, 1997

Zambia Wildlife Act, 1998

Zambia Wildlife Act, 2015



## **Table of cases**

### **International Courts**

*Dominic Liswaniso Lungowe & Others v Vedanta Resources Plc & Konkola Copper Mines Plc* [2016] EWHC 975 (TCC)

*Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* I.C.J. Reports 1997

*International Thunderbird Gaming Corporation v The United Mexican States* Arbitral Award of 26 January 2006

*Juan Antonio Opasa & Others v the Honourable Fulgencio S. Factoran* G.R. No. 101083

*Lopez Ostra v Spain* Judgment of 9 December 1994, Case No. 41/1993/436/515

*Mayagna (Sumo) Awas Tingni Indigenous Community v Nicaragua* Judgment of 31 August 2001, Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001)

*Social and Economic Rights Action Centre (SERAC) & the Centre for Economic and Social Rights v Nigeria*, ACHPR, Communication, 155/19, 2001

### **Kenya**

*Mtikila v Attorney General* H.C.C.S No. 5 of 1993

*Rodgers Muema Nzioka & 2 Others v Tiomin Kenya Limited* H.C.C.C 97 of 2001

### **South Africa**

*Fuel Retailers Association of SA (Pty) Ltd v Director-General Environmental Management Mpumalanga & Others* 2007 (10) BCLR 1059

*Government of the Republic of South Africa & Others v Grootboom & Others* 2001(1) SA 46  
CC

*Hichange Investments (Pty) Ltd v Cape Produce Co. (Pty) Ltd T/A Pelts Products* 2004(2) SA  
393(E) 415D

*HTF Developers (PTY) Ltd v Minister of Environmental Affairs and Tourism, Member of the  
Executive Council of the Department of Agriculture, Conservation and Environment, Dr ST  
Cornelius & City of Tshwane Metropolitan Municipality* [2006] ZAGPHC 132

*Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Limited, Roger Ainsley  
Ralph Kebble, Hendrik Christoffel Buitendag, Roger Brett Kebble, Gordon Trevlyn Miller,  
Harmony Gold Mining Company Limited, DRDGOLD Limited, Buffelsfontein Gold Mines Limited  
(In Liquidation), AngloGold Ashanti Limited, Hartbeesfontein Gold Mining Company Limited,  
Minister of Minerals and Energy & Minister of Environmental Affairs & Tourism* [2006] ZAGPHC  
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## **Tanzania**

*Festo Balegele v Dar es Salaam City Council* Misc. Civil Case No. 90 of 1991, High Court of  
Tanzania

## **Uganda**

*Uganda Electricity Transmission Co. Ltd v De Samaline Incorporation Ltd* Misc. Cause No. 181 of  
2004, High Court of Uganda

## **Zambia**

*Citizens for a Better Environment v Bwana Mkubwa Mining Limited* [2002] NK 513

*Doris Chinsambwe & 65 others v NFC Africa Mining* [2014] HK 374

*James Nyasulu & 2000 others v Konkola Copper Mines, Environmental Council of Zambia & Chingola Municipal Council* [2007] HP 1286

*Konkola Copper Mines v James Nyasulu & 2000 others* Appeal No. 1 of 2012

*Lafarge Cement Zambia Limited v Peter Sinkamba* [2013] ZMSC 31 (Appeal No. 169 of 2009)

*Martha Muzithe Kangwa & 27 others v Environmental Council of Zambia, Nasla Cement Limited & Attorney General* [2008] HP 245

*Martha Muzithe Kangwa & 29 others v Zambia Environmental Management Agency, Nasla Cement Limited & Attorney General* [2014] SC 1145

*Minister of Information and Broadcasting Services and Another v Chembo and Others* [2007] ZMSC 11

*Nkumbula v Attorney General* [1972] Z.R. 204

*The People v Indeni Petroleum Company Limited* SSN/51/1995 (unreported)

*William David Carlisle Wise v Attorney General* [1990 – 1992] Z.R. 124 (HC)

*Zambia Community Based Natural Resource Management Forum, Zambia Institute of Environment Management, Zambia Climate Change Network, Chalimbana River Head Waters Conservation Trust, Green Living Movement & David Ngwenyama v Attorney General & Mwembeshi Resources Limited* (2014) HP/A.006

## ***Abstract***

Promotion of foreign direct investment in Zambia's mining sector has been a key priority of the government ever since large scale mining commenced in the country. The sector, which confers on the country numerous benefits either from the economic or social front, has continued to grow with a number of mines being opened in most parts of the country. However, mining, by nature, leads to degradation of the environment and consequently affects the right of persons to enjoy a clean, safe and healthy environment. In light of this, it became imperative that a study is undertaken to investigate the extent to which the environment and human rights are protected from the effects of mining activities in Zambia. The purpose of undertaking this study is to suggest an approach that could be adopted in order to ensure protection of the environment from the negative effects of mining activities. In achieving this goal, a comparative approach was embraced and a qualitative method of data collection employed.

The study has revealed that foreign direct investment, environmental protection, and human rights are interrelated with one common objective— enhancing the livelihood of human beings. This is evident from the policies developed and legislation enacted to protect human rights and also control mining activities in Zambia. The study has also revealed that at the international level, standards have been developed to ensure minimisation of the effects of mining activities on the environment. However, these standards are not legally binding. A key finding of the study is that although there a number of domestic policies (such as the Mineral Resources Development Policy and National Policy on Environment) and legislation (Environmental Management Act and the Mines and Mineral Development Act) that prescribe the expected standards to be upheld by mining companies, these do not contain adequate mechanisms to curtail environmentally degrading mining activities. Furthermore, institutions such as the Human Rights Commission, Mines Safety Department and Zambia Environmental Management Agency that have the responsibility of ensuring that mining companies comply with the applicable legislation have not been effective in this regard largely as a result of the numerous challenges that they face, including insufficient funding, inadequate capacity and political interference. This has led some spirited non-governmental organisations to bring court actions against erring mining companies. The analysis of the decisions rendered by the courts shows that the courts have, in these cases, taken a dim view of claims brought before them by complainants against the actions of respondent mining companies.

The thesis concludes that while there has been an increase in investment in the mining sector, there are no corresponding legislative or policy measures to curtail mining activities that have negative impacts on the environment. The absence of such measures has left mining companies at liberty to act with impunity at the expense of a sound environment and consequentially, protection of the human rights of persons that live in the vicinity of the mines. It is therefore argued that the framework for foreign investment has neither facilitated protection of the environment nor guaranteed respect for human rights. In order to address this problem, a suggestion is made to the effect that Zambia's legislation needs to adopt some of the best practices that exist in the mining and environmental legislation enacted by some SADC Member States. Doing so would ensure mutual reinforcement of the framework on foreign direct investment and mining on the one hand, and environmental protection and human rights on the other.

### ***Key words***

Constitution; Environmental Protection; Foreign Direct Investment; Human Rights; Mining Pollution; Zambia Environmental Management Agency.

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# Chapter 1

## General introduction

### 1.1 Background to the study

The economic progress of the country is a priority for the Government of Zambia. In order to harness economic growth, the government has committed itself to 'create an economic environment' which 'promotes investment, employment and wealth.'<sup>1</sup> It has further committed itself to encourage investment, local and foreign, as well as protecting and guaranteeing such investments.<sup>2</sup> Although there is a plethora of priority areas for investment in the country, the main focus has been on four areas: agriculture, manufacturing, tourism, and mining.<sup>3</sup> Notwithstanding these priority areas, the mining sector seems to receive more attention than other sectors due to the perceived inherent benefits that it yields.<sup>4</sup> The significance of the sector can be seen from its contribution of over 70% of the country's Gross Domestic Product while creating employment for over 100 000 people. It is also estimated that, between the periods 1996-2015, over \$5 billion worth of investment was been injected into the mining industry. Likewise, the development model for Zambia also seems to promote and prioritise economic growth through mining activities.<sup>5</sup>

In order to encourage orderly exploitation of mineral resources, it is imperative that government creates an enabling environment. Ndulo observes that the principal 'aim of any country's mining legislation is to encourage the orderly exploitation and development of its mineral resources so as to maximise economic benefit to the country.'<sup>6</sup> In attaining this objective, there must be policies and laws put in place whose aim is to create a regime

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<sup>1</sup>Article 10(1) of the Constitution of Zambia 2016 provides: 'The Government shall create an economic environment which encourages individual initiative and self-reliance among the people, so as to promote investment, employment and wealth.'

<sup>2</sup> Article 10(3) of the Constitution.

<sup>3</sup> The priority sectors are outlined under the Third Schedule of the ZDA Act.

<sup>4</sup> Although the government has emphasised the need to diversify the economy from its total dependence on mining, the sector still remains the most prominent recipient of investment— most notably, foreign direct investment. According to Ministry of Commerce Trade and Industry, 'The traditional focus of the Zambian economy has been mining and quarrying, in particular the mining and refining of copper and cobalt. The country holds ten per cent of the world's copper internationally. Zambia is also the world's largest cobalt producer.'  
<http://www.mcti.gov.zm/index.php/investing-in-zambia/zambian-economy/key-sectors> (accessed 17 May 2016).

<sup>5</sup> The objective of the government, in this vein, is to ensure that investment in the sector has a positive effect on the quality of life by directing investments into sectors that have potential to create decent employment as well as positively impact on poverty.

<sup>6</sup> M Ndulo 'Legal and regulatory frameworks for resource exploration and extraction— global experience' African Development Bank high-level policy seminar on 'optimizing the benefits of coal & gas in Mozambique' 27-28 February 2013, Maputo, Mozambique, 2.

conducive to the mining sector. Such a regime must not only attract investment and innovation in the sector, but also confer positive benefits on the country.

In recognition of this fact, legislation has been put in place to attract investment in the mining sector as well as prescribe conditions that are to be met for mining rights to be conferred. Examples of such legislation are the Zambia Development Agency (ZDA) Act of 2006, and the Mines and Minerals Development Act (MMDA) of 2015. The ZDA Act allows a person to invest in all regions of the Republic and in all sectors.<sup>7</sup> To encourage meaningful investment in the sector, incentives are granted to foreign companies with a precondition that they must first obtain a Certificate of Registration.<sup>8</sup> The MMDA requires a person that desires to exploit mineral resources to apply to the Mining Licensing Committee for the grant of mining rights.

It is not possible that mining activities can be carried out without interfering with the soundness of the environment. In fact, mining activities inevitably affect the environment adversely not only during the life of the mine but also long after it has ceased to operate. Although the exercise of any mining right potentially has an impact on the environment, it is typically large scale mining that poses more harm. It is in this regard that large scale mining has been singled out for investigation for two reasons: first, the concentration on the operations of these mines has been keenly done by government which has offered generous incentives to foreign investors; and second, given their size of production, they pose a significant effect on the environment either through historical and/or ongoing pollution.<sup>9</sup> In comparison with small scale and artisanal mining, the scale of production by large scale mining is immense and has significant environmental consequences.

In order to address the adverse effects of mining activities, policies and legislation that are aimed at emphasising sustainable mining practices have been put in place. In terms of Policy, the government developed the National Policy on the Environment (NPE) in 2007, and the Mineral Resources Development Policy (MRDP) in 2013. The NPE's core objective is to ensure sound environmental management within the framework of sustainable development

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<sup>7</sup> Sec. 2(1)(2). In line with its preamble, the objective of the Act is to 'Foster economic growth and development by promoting trade and investment in Zambia through an efficient, effective and coordinated private sector led economic development strategy...[and]...attract and facilitate inward and after care investment.'

<sup>8</sup> Currently, the government offers incentives such as carry-over of losses for a period of 10 years, 0% taxation of dividends, 25% capital allowance claim back, and 10% payment of property transfer tax in the event of a transfer of mine assets to another investor. Further, for those companies that are publicly traded on the stock exchange, there is a reduction of 30% corporate tax from 35%. Informal discussion with ActionAid Zambia, Thursday, 23 July 2015.

<sup>9</sup> A few large scale, locally-owned mines, have been opened in Luapula Province.

and placing emphasis on the duty of any institution, community, or individual to conduct their activities in a manner that does not negatively affect the environment. The MRDP seeks to attract both local and foreign participation in mineral exploitation while simultaneously aiming to attain an acceptable balance between mining and health, safety and environmental protection.

The Environmental Management Act (EMA) is the principal piece of legislation on environmental management in Zambia. The Act requires that the activities of mining companies comply with the standards set out therein, including the regulations that have been adopted pursuant to it. Considering that minerals are non-renewable natural resources, mining companies are to exploit such resources cautiously taking into consideration the needs of present and future generations.<sup>10</sup> Besides the EMA, the MMDA requires that mining practices are carried out in a sustainable manner taking into consideration the present and future generations.<sup>11</sup> The ZDA Act also requires compliance with the EMA as a condition for the grant of a certificate of registration. The gist of these pieces of legislation is to provide for the protection of the environment and human life from adverse effects of mining activities. Where the environment is degraded, human beings would not be able to live at a level proportionate to the basic standards of human life.

In all this, the role of the government is to afford effective, predictable and transparent governance; measures to hold investors responsible for their environmental practices; and controls to ensure accountability of those government officials who make decisions concerning whether to permit investments to proceed and under what conditions.<sup>12</sup> In this context, various institutions have been established to implement the relevant legislative and policy measures. The mandate of these institutions is to ensure that mining companies comply with the environmental standards. Examples of these are the Zambia Environmental Management Agency (ZEMA) and the Mines Safety Department (MSD). In addition to these, other institutions such as the courts and the Human Rights Commission (HRC) are significant in enforcing environmental laws. Also worthy of mention is the role of communities and non-governmental organisations in ensuring that erring mining companies are brought to task.

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<sup>10</sup> Sec. 6(i), EMA.

<sup>11</sup> Sec. 4.

<sup>12</sup> X He 'Incorporating environmental considerations into investment decision-making: the potential role of strategic environmental assessment in foreign direct investment' (2004) IAS Working Paper 121, 11.

## **1.2 Thesis statement**

The thesis argues that the current policy and legal frameworks on foreign direct investment (FDI) in the mining sector and environmental protection are not mutually supportive and as such, inadequate to hold mining companies liable for polluting the environment.

## **1.3 Statement of the problem**

Mining operations, by their nature, lead to environmental degradation as they limit the surrounding communities' ability to sustain their livelihood, especially where a natural environment is a source of food, shelter, and other necessities. The problem is not the generation of waste per se but the management of such waste in a way that does not negatively affect the environment or those that depend on it for their survival. Despite the massive investment by foreign companies in the mining sector, pollution emanating from mining activities continues to be a problem. This raises concerns relating to the contribution of FDI to sustainable development, the role of government in maximising FDI benefits in the mining sector, the contribution of foreign companies to the management of environmental and resulting social issues, and the role played by state and non-state institutions in ensuring attainment of a sound environment.

There have been put in place legal and institutional mechanisms aimed at addressing pollution emanating from mining activities, however, these have not achieved any meaningful result. The problem is that, while the government has permitted massive foreign investment in the mining sector, there is no corresponding policy or legal framework that holds mining companies accountable for the adverse effects of their mining activities on the environment. The policies and legislation relating to FDI in the mining sector and environmental objectives are not mutually supportive. This is compounded by the inherent weaknesses in the provisions of the legislation that relates to mineral resource extraction and environmental protection. In a bid to ensure that mining companies remedy the problem caused by their mining activities, some non-governmental organisations (NGOs) have brought legal actions against them. Although in some respect this has yielded a positive result, for the most part, it has not as the courts do not seem to hold erring mining companies responsible for polluting the environment. It is asserted that, in the absence of a reinforced framework, the end result is weak or poor enforcement or lack thereof, and increased openness to FDI that accelerates unsustainable mining practices at the expense of environmental (and ultimately human rights) protection.

#### **1.4 Research questions**

The key question for this study is: How effective is Zambia's legal, policy and institutional framework in addressing the adverse effects of mining activities on the environment and human rights?

Subsidiary research questions raised are:

1. What is the relationship between foreign direct investment, environmental protection, and human rights in Zambia's domestic framework?
2. To what extent have the international, regional and domestic standards, which have been developed as a benchmark for environmental protection, ensured the protection of the environment from the effects of mining activities?
3. How effective are the regulatory/oversight institutions in ensuring the accountability of mining companies with respect to the adverse effects of their activities on the environment and human rights in Zambia?
4. What lessons can Zambia draw from the legislative and institutional frameworks for mining and environmental protection that are in place in other SADC States in order to enhance protection of the environment and human life from the adverse effects of mining activities?

#### **1.5 Research objectives**

The key objective of this study is to investigate the effectiveness of the legal, policy and institutional framework in addressing the adverse effects of mining activities on the environment and human rights.

The specific objectives raised in this thesis are:

1. To examine the relationship between foreign direct investment, environmental protection, and human rights in Zambia's domestic framework.

2. To assess the extent to which international, regional and domestic standards, which have been developed as a benchmark for environmental protection, ensured protection of the environment from the effects of mining activities.
3. To critically ascertain the effectiveness of regulatory/oversight institutions in ensuring accountability of the mining companies with respect to the adverse effects of their activities on the environment and human rights.
4. To interrogate other SADC Member States' mining and environmental legislation with a view of ascertaining the best practices from which Zambia can learn and adapt in enhancing the protection of the environment and human life from the adverse effects of mining activities.

## **1.6 Review of related literature**

Foreign direct investment is an essential component for the growth of developing economies such as Zambia. This explains why the government considers attracting FDI as a priority. It is particularly important not only because it increases the capital formation, but also because it contributes to the country's economic development. This has generated considerable studies on the effects (both positive and negative) of FDI on a country. The literature reviewed has shown that numerous studies have been done on FDI and how it impacts on the economies of states (i.e. labour, environment, human rights, etc.), however, there is hardly literature that particularly addresses the desirability of FDI in the Zambian mining sector and the need to protect the environment and human rights. The studies that exist, although similar, lack specificity, depth and in some instances, are not recent. This scarcity of literature necessitates a further study. In other words, the subject requires further research that provides an assessment of the existing legal framework on FDI and mining and its deficiencies in addressing protection of the environment and human rights.

Ajayi discusses the relevance of FDI in a country's quest for economic development. His study concludes that FDI is a key driver of economic growth and development and this has led most governments to consider attracting FDI as a priority.<sup>13</sup> While this may be generally correct, it is not a priority in certain sectors, e.g. in Zambia, the government has not enlisted

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<sup>13</sup> SI Ajayi *Foreign direct investment in sub-Saharan Africa: origins, targets, impact and potential* (2006) 12.

FDI in the mining sector as a priority even though the sector is key to the country's development. In the thesis, it is demonstrated that FDI attraction in the mining sector, though not a priority for the government, there is heavy emphasis placed on the sector by it.

In support of Ajayi, Ndulo emphasises the need for governments to attract FDI (especially in the mining sector) by putting in place a robust regulatory framework.<sup>14</sup> In his work, Ndulo concludes by highlighting the salient issues that must be considered in coming up with a robust regulatory framework. The weakness with Ndulo's work is that he has not established the link between a robust regulatory framework and attraction of FDI. His focus is mostly on the general aspects of the nature of a regulatory framework based on the global practices. The thesis argues that the regulatory framework is inadequate with regard to the proper regulation of mining activities in Zambia.

In order for there to be orderly exploitation of mineral resources, legislation has to be in place. Ndulo argues that the legal regime for mining has been put in place to encourage the orderly exploitation and development of minerals while securing the interest of the government in revenue collection.<sup>15</sup> The concentration of Ndulo's work has taken a narrow approach to 'orderly exploitation' in that, the focus is skewed towards procedures and process of licensing and not on other aspects such as environmental protection. Discussing the need for legislation, Silwamba and Jalasi have attempted to give an understanding of mining law in Zambia by explaining the numerous provisions of the MMDA.<sup>16</sup> The weakness in their work lies in the fact that, it is of a cursory nature and gives just an overview of the provisions. In this thesis, the provisions of the MMDA are examined for purposes of ascertaining the problem while attempting to resolve it.

Notwithstanding the presence of legislation on mining, the concern relates to negative factors brought by mining activities. Ndulo concludes that there is no doubt that the importance of mining in the Zambian society transcends its economic value and that it has social and political significance. He goes further to list a number of disadvantages that FDI in the mining

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<sup>14</sup> M Ndulo 'Legal and regulatory frameworks for resource exploration and extraction– global experience' African Development Bank high-level policy seminar on optimising the benefits of coal & gas in Mozambique, 27-28 February 2013, Maputo, Mozambique, 2.

<sup>15</sup> M Ndulo 'Mining legislation and mineral development in Zambia' (1986) 19 *Cornell International Law Journal* 33.

<sup>16</sup> E Silwamba & J Jalasi *A practical cross-border insight into mining law: Zambia* (4th edition)(2017) 2. See: <https://iclg.com/practice-areas/mining-law/mining-law-2017/zambia#chaptercontent1> (accessed 20 February 2017).



sector can pose on the country.<sup>17</sup> He does not, however, list environmental pollution from mining activities as a disadvantage something which the thesis argues to be a major disadvantage. Unlike Ndulo, Saasa does not acknowledge that mining activities have two facets— the positives and the negatives. He observes that in an economy where the mining sector is dominant, the extent to which the sector has integrated its activities in the rest of the economy necessarily determines its overall effect on the country's socio-economic development.<sup>18</sup> The weakness in this conclusion lies in his focus on the effects of mining activities on the economy without considering that the overall effect of economic sectors on socio-economic development has yielded both positive and negative effects. Hassaballa posits that FDI, though playing an important role in stimulating growth in developing countries, it is accused of being one of the major factors that may contribute to environmental degradation and resource depletion, and hence to welfare losses.<sup>19</sup> This observation is firm as it acknowledges that FDI, as received in Zambia's mining sector, may contribute to environmental degradation.

It is clear from the discussion that scholars, by stating that mining has positive or negative effects, are acknowledging that there is some sort of interaction between mining and other fields of law. This has brought about the debate between FDI and the need to protect the environment. Commenting on the debate, Mabey and McNally advance that the debate has been spurred due to the fact that FDI often goes directly into resource extraction. Although the debate on FDI and its impact on the environment has focused on the micro-level, particularly how environmental regulation affects a firm's decision to locate, less attention has been paid to macro-level issues of how increased economic activity, driven by liberalised investment impacts on the environment of the host country.<sup>20</sup> The work of Mabey and McNally has not explored the macro-level issues relating to how FDI led activities have affected human life. Discussing the relationship between foreign investment and regulation of the environment, Affolder argues that this centres around two main issues: first, the impact of the host country environmental regulations on attracting or deterring foreign investment; and second, assessing whether foreign investment leads to higher or lower environmental standards.<sup>21</sup> It is asserted in this thesis that the relations between foreign investment and environmental protection are

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<sup>17</sup> M Ndulo *Mining Rights in Zambia* (1987) 9, 20.

<sup>18</sup> O Saasa *Zambia's policies towards foreign investment: the case of the mining and non-mining sectors* (1987) 9.

<sup>19</sup> 'Environment and foreign direct investment: policy implications for developing countries' (2013) *Journal of Emerging Issues in Economics, Finance and Banking* 2 76.

<sup>20</sup> N Mabey & R McNally *Foreign direct investment and the environment: from pollution havens to sustainable development* (1999) 15.

<sup>21</sup> N Affolder 'Beyond law as tools: foreign investment projects and the contractualisation of environmental protection' in PM Dupuy & JE Viñuales (eds.) *Harnessing foreign investment to promote environmental protection: incentives and safeguards* (2013) 360.

complex and raise a number of difficult issues. Viñuales warns that, with the increasing reach and sophistication of both international investment law and international environmental law, the possibility that foreign investment protection may encroach on environmental protection and vice versa has started to receive more attention from legal commentators.<sup>22</sup> In consideration of Viñuales's view, the argument put forward is that the two fields are related and this could be because the increase in FDI has correspondingly led to environmental consciousness.

Where the relationship between the two fields is established, the concern is the environmental standard applicable in curtailing FDI polluting activities. Sornarajah avers that environmental standards in many developing countries seem to be relaxed, something which is in sharp contrast to developed countries which place greater emphasis on the effect on the foreign investor's activity on the environment. In his conclusion, he argues that developed countries, where it is shown that the harm to the environment is irreversible or outweighs the benefits of the project, such a project may be cancelled.<sup>23</sup> The limitation with Sornarajah's work lies in the fact that it concentrated on developed states without taking into consideration the existing disparity with developing states in so far as environmental regulation was concerned. The thesis considers this disparity and argues that certain provisions under Zambia's legislation are inherently weak thereby exacerbating pollution of the environment through mining activities. It also shows that, it is a near impossibility for the government to cancel a project based on the harmful effect it is likely or poses on the environment.

The reason for this has been put forward by Sornarajah who concludes that the law on environmental protection expresses a further view that the burgeoning law on human rights and environmental protection also creates instability in an area of law that was designed solely with the single objective of protecting foreign investment.<sup>24</sup> The conclusion of Sornarajah does not consider the effects of FDI activities on the environment. It is argued that, though investment law was solely designed to protect investors, its effects are on the environment and as such, environmental and human rights norms must be accepted as these are intertwined. Frick contends that global best practice with respect to the management, control and reclamation of environmental damage draws on sound Environmental Impact Assessments (EIAs), advanced monitoring procedures and the application of advanced technological

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<sup>22</sup> J Viñuales *Foreign investment and the environment in international law: an ambiguous relationship* (2010) 4.

<sup>23</sup> M Sornarajah *The international law on foreign investment* (3rd edition)(2010) 110–111.

<sup>24</sup> As above, 77.

processes to minimise environmental damage.<sup>25</sup> This view shows a dim consideration of issues by limiting protection of the environment to conducting EIAs and yet protection goes beyond such mechanisms. This explains why Bekhechi and Mercier argue that the EIA mechanisms need to be grounded in well-defined legislation and procedural rules where the rights and obligations of all stakeholders are clearly defined, and its enforcement must be ensured through appropriate implementation and compliance monitoring procedures and other instruments.<sup>26</sup> This thesis shows that, although Zambia's legislation on EIA contains well-defined provisions, the same not properly couched and as such, difficult to enforce. Besides legislation, deliberate policy relating to environmental protection must be put in place. Romson states that environmental policies play an important role and need to develop significantly to be able to address degradation and support sustainable development which could be achieved through effective implementation and enforcement of environmental regulations.<sup>27</sup> Although this argument is plausible, it does not consider the role of the government in ensuring implementation of environmental policies. Thus, the thesis shows that, although Zambia's policy on the environment has been in existence since 2007, it has not been reviewed in recent years and hence is not in tandem with modern practices for control of mining pollution.

At this stage, the concern relates to how pollution emanating from mining activities should be handled. Xu He argues that if foreign companies embrace "best practice", the overall quantity of pollution and level of resource degradation increases with a greater level of investment. In addition to pollution, a significant increase in the scale of investment— in the absence of a broader "sustainable development" framework— is likely to undermine biodiversity and degrade common resources such as rivers and coastlines.<sup>28</sup> The conclusion of He is that greater level of investment increases the level of pollution and in the absence of a sustainable development framework addressing pollution is difficult. It is argued that Zambia's mining legislation is devoid of sustainable development framework even though it is relatively recent.

This implies that in the absence of enforcement, the end result is continued pollution by large scale mining companies. Simutanyi expresses the view that, large-scale mining tends to have several impacts on local communities, including dislocations and displacements, effects on

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<sup>25</sup> C Frick *Direct foreign investment and the environment: African mining sector* (2002) 11.

<sup>26</sup> M Bekhechi & JR Mercier 'The legal and regulatory framework for environmental impact assessments: a study of selected countries in sub-Saharan Africa' *Law, justice and development series* (2002).

<sup>27</sup> A Romson *Environmental policy space and international investment law* (2012) 23.

<sup>28</sup> X He 'Incorporating environmental considerations into investment decision-making: the potential role of strategic environmental assessment in foreign direct investment' (2004) IAS Working Paper 121, 7.

employment, health and safety, a reduction in corporate social responsibility and an increase in environmental degradation. Contestations over access to mineral wealth have implications for human security and how these issues are handled may affect the relationship between local communities and mining companies, on one hand, and the people and their government, on the other.<sup>29</sup> It is argued in the thesis that institutions that are charged with the responsibilities of safeguarding such communities have not done so. In most instances, these institutions have been passive leading mining companies to act with impunity. Mwansa posits that, in order for ZEMA to effectively perform its duty of ensuring environmental protection, it is expected to act independently of government influence notwithstanding the fact that it is funded by the National Treasury.<sup>30</sup> Lindahl observes that existing laws and regulations regarding environmental performance are relatively up to date in Zambia, however, the main problem for the country is that the implementation is not satisfactory. The conclusion made by Lindahl is the lack of coordination between institutions and to a large extent, lack of manpower and technical capacity.<sup>31</sup> It is argued in the thesis that the failure to implement is a multifaceted issue whose source may be the legislation itself or interference by government in the operations of institutions mandated to enforce the law especially where the legislation that establishes ZEMA does not guarantee its independence. Chisanga observes that, despite the issuance of a protection order by ZEMA directing the mining company not to construct the dam, the order was defied and no sanction could be meted out as the government, through the Minister, had ordered construction to proceed. This led to the clearing of 25 hectares of land which included protected forest reserves of Lualaba and Bushingwe areas.<sup>32</sup> This thesis will use this information to justify the argument that the effective functioning of statutory bodies mandated to protect the environment can be hampered by political interference. Nachalwe states that the advent of industrialisation and other related human activities have resulted in pollution and Zambia has not been spared. Development through industries such as mining, fuel refineries and other manufacturing industries have caused adverse environmental effects. Further, the Environmental Pollution and Protection Control Act of 1990 was not effectively implemented in controlling pollution.<sup>33</sup> The concentration of Nachalwe's work was on implementation of the Act of 1990 and hence did not examine the weaknesses that were inherent in the Act thereby contributing to the implementation failure.

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<sup>29</sup> N Simutanyi 'Copper mining in Zambia: the developmental legacy of privatisation' Institute for Security Studies paper no. 165, July 2008, 5.

<sup>30</sup> M Mwansa 'Mining activities and their effects on public health in Zambia: how adequate are the mechanisms for protection?' unpublished Obligatory Essay, University of Zambia, 2013.

<sup>31</sup> J Lindahl 'Environmental impacts of mining in Zambia: towards better environmental management and sustainable exploitation of mineral resources' (2014) *Geological Survey of Sweden 2*.

<sup>32</sup> P Chisanga 'Environmental degradation in the extractive and other industries in Africa' Action aid, 2013.

<sup>33</sup> N Nachalwe 'The Zambian legislation regulating pollution and its effectiveness in pollution control: an analysis' unpublished Obligatory Essay, 2001.

It is clear from literature that despite the recognition that FDI activities in mining negatively affect the environment, the legislation in place is seemingly weak and unenforced. This has sparked questions on the place of environmental law within investment law on one hand, and the place of investment law within the environmental law sphere on the other. Diepeveen et al posit that, although most countries agree that investment laws should leave room for national policymakers to regulate environmental issues, there is still no global understanding of what should be done to align investment protection by maintaining a healthy environment on a global scale.<sup>34</sup> This argument presupposes that investment laws and environmental protection are diametrically opposed. This heightens the debate of how a MNC can be held liable for either human rights breach or environmental pollution. Augenstein advances that the major challenge is that international human rights and environmental law generally do not directly impose obligations on MNCs to protect human rights and the environment. While international human rights and environmental law can require States to regulate corporate activities affecting human rights and the environment and to enforce these regulations in case of corporate violations, they do not directly bind corporate actors.<sup>35</sup> In this thesis, it is averred that, while MNCs may not be bound as stated by Augenstein, it is possible to hold MNCs liable, but only if the human rights, environmental, and FDI frameworks are mutually reinforcing. Thus, the aim will be to demonstrate the possibility of a mutually reinforcing framework.

Brabandere states that the costs associated with environmental protection are clearly a major reason why minimal environmental controls are found in most mining operations on the continent.<sup>36</sup> This view has been partially adopted by Silengo who posits that to curtail the pollution would require large investments of capital, which would reduce the amount of income generated from these economic activities. Mining companies have little incentive to control pollution since it would lower their profitability. The pressure must come from the host government, which often is not in a strong position to require pollution controls. Income generated from mining operations is the largest source of government revenue.<sup>37</sup> It is argued in this thesis that pollution control has not been the government's priority given that doing so

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<sup>34</sup> R Diepeveen, Y Levashova & T Lambooy 'Bridging the gap between international investment law and the environment' *Conference Report* 4-5 November 2013, 147.

<sup>35</sup> D Augenstein 'Study of the legal framework on human rights and the environment applicable to European enterprises operating outside the European Union' University of Edinburgh (2014) 11.

<sup>36</sup> ED Brabandere 'Human rights considerations in international investment arbitration' M Fitzmaurice & P Merkouris (eds.) *The interpretation and application of the European Convention on Human Rights: legal and practical implications* (2012) 117-118.

<sup>37</sup> M Silengo 'An integrated framework for environmental management and protection in Zambia' unpublished PhD Thesis, University of Salford, 1996 177.

might reduce mining operations which in turn would reduce the income generated. This has led Faure and du Plessis to question how an adequate balance can be struck between the need for economic development brought by FDI on the one hand and the necessary environmental protection on the other.<sup>38</sup> This thesis advances that striking a balance requires a wholesome but a multifaceted approach as in most instances, the government places emphasis on economic development at the expense of environmental protection. Osei-Hwedie expresses the view that the Zambian government is faced with a dilemma in terms of the priority accorded to rapid industrial development and Zambia's dependence on the copper industry for her economic livelihood on one hand, and the need for a clean, healthy environment suitable for human habitation and sustainable development, on the other.<sup>39</sup> Agreeing that a balance needs to be created, it is argued in this thesis that the legislation is skewed towards promotion of FDI rather than protection of the environment. Further, attainment of a balance may prove to be difficult where a constitutional right to right to a clean and healthy environment is absent.

Boocock argues that in some instances, governments prioritise environmental protection over economic development. His view is illustrated through the study conducted in South Africa where he concluded that the South African government has on certain occasions refused to grant authorisation to mine in instances where it considered that potential environmental risks outweighed the economic benefits of particular projects.<sup>40</sup> This thesis, using SADC Member States to adopt best practices, argues that it is possible for the Zambian government to attach more importance to environmental protection while at the same time attracting FDI. For this purpose, the thesis suggests principles of best practice that could be adopted under Zambia's framework so as to ensure that mining companies comply with environmental standards. Dugard, expressing a different view, avers that, although much of environmental law is non-justiciable and unenforceable, it is better to have in place standards and policy guidelines to address the problem of environmental damage than for the state to wait until it has have ratified multilateral treaties that translate aspiration into obligation.<sup>41</sup> In this thesis, it is argued that justiciability and enforceability must be a constitutional right. Where this enforcement is only provided in a statute, this raises problems where a human rights issue is raised in an environmental matter.

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<sup>38</sup> M Faure & W du Plessis *Balancing of interests in environmental law in Africa* (2011) xxiii.

<sup>39</sup> BZ Osei-Hwedie 'Environmental protection and economic development in Zambia' (1996) *Journal of Social Development in Africa* 63.

<sup>40</sup> CN Boocock 'Environmental impacts of foreign direct investment in the mining sector in sub-Saharan Africa' OECD global forum on international investment, 2002.

<sup>41</sup> J Dugard *International law: a South African perspective* (3<sup>rd</sup> edition)(2005) 393.

### *Knowledge gap*

Having examined the existing literature, the thesis finds that numerous academic works have been done in the sphere of FDI, mining and environmental protection. However, the primary focus of most of the literature is to demonstrate either the significance of FDI or environmental degradation caused by FDI activities. The other literature focusses on the institutional framework for environmental protection and the legislative mechanisms for pollution control.

In summary, the existing literature has inadequately covered the issues and so, it was imperative that a study of this nature is conducted. Therefore, this thesis adopts a different approach by:

1. Examining the extent to which the law on FDI accommodates environmental protection and human rights, regulates sustainable use of natural resources, and develop new approaches to manage environmental risks and uncertainties.
2. Identifying the legal gaps in the domestic regulatory framework on FDI, environmental protection, and human rights and attempt to fill these by adopting the best practices from other SADC Member States' Mining, and Environmental frameworks.

The thrust of the thesis is to demonstrate that it is possible to harness foreign investment in the mining sector while simultaneously protecting the environment and the rights of those who depend on a clean, safe, and healthy environment.

### **1.7 Significance of the study**

This research is important because mining is not only the mainstay of Zambia's economy but also affects the environment and human rights when mining activities are not properly conducted. Mining involves the extraction of non-renewable natural resources hence if such a sector is not well regulated, it would lead to continued environmental harm and consequentially, poor human health. Therefore, apart from adding academic value to the subject, the research also informs, educates and imparts knowledge. Further, policymakers in government and practitioners in foreign investment and environmental protection may find the key considerations and lessons presented in this thesis useful in monitoring, controlling, and

regulating mining activities conducted by foreign entities. The end result is to create or re-model the current legal framework on foreign investment to make it more responsive to environmental protection and human rights.

### **1.8 Scope of the study**

The study restricts itself to large-scale mining activities undertaken in the Copperbelt and North Western Provinces of Zambia.

### **1.9 Limitations of the study**

Though the study endeavoured to do an intricate investigation, it faced two main limitations: (i) the cost implication of the research and vastness of the mining areas restricted the study to selected mines located on the Copperbelt and North-western Provinces; and (ii) given the sensitivity of the sector and evasiveness of those who hold information, information gathering proved to be a challenge. In some instances, information was not availed despite exhausting numerous channels to have access to the same.

### **1.10 Overview of chapters**

The study has six chapters which are structured as follows:

#### **Chapter 1 General introduction**

Chapter One serves as a background to the entire research and contains the statement of the problem, research objectives, research questions, significance of the study, review of related literature identifying the research gaps, the limits of the study and the research methodology.

#### **Chapter 2 Foreign investment, environment and human rights conceptual framework**

This chapter discusses the relationship between foreign direct investment, environmental protection and human rights, with a particular focus on domestic legal framework. It also attempts to develop a comprehensive theoretical approach which demonstrates the intrinsic connection of the three fields.



### **Chapter 3 Standards on mining and environmental protection**

In this chapter, a two pronged approach is adopted. First, international and regional standards that have been developed as a benchmark for environmental protection with regard to the conduct required in mining activities are identified. Second, the domestic standards are assessed for the purposes of not only establishing the extent to which they comply with set international and regional standards but also how these have protected the environment from the negative effects of mining activities.

### **Chapter 4 Enforcement of environmental laws**

This chapter critically assesses the effectiveness of institutions or bodies in ensuring accountability of the mining companies with respect to the adverse effects of their activities on the environment and human rights.

### **Chapter 5 Mining and environmental frameworks in selected SADC States**

In an attempt to address the gaps identified by the research, Chapter 5 interrogates the mining and environmental legislation of some SADC Member States, namely, Angola, Botswana, Democratic Republic of Congo, Malawi, Mozambique, Namibia, South Africa, Tanzania and Zimbabwe, with a view to ascertaining the best practices from which Zambia can learn and adopt in enhancing the protection of the environment and human beings from the adverse effects of mining activities.

### **Chapter 6 Summary, conclusions and recommendations**

This Chapter reiterates the arguments made in the thesis, interprets the findings made, outlines the conclusions based on these findings and makes recommendations both in terms of policy changes and further research.

## Chapter 2

### Foreign direct investment, environment and human rights conceptual framework

#### 2.1 Introduction

Generally, FDI entails the movement of capital from one state to the other for use of such capital in that other state. As such, a relationship exists between the foreign investor and the host state and the rules that have been formulated aim to protect this relationship. More often than not, the rules are such that they encourage the inflow of investment while at the same time guaranteeing protection once the foreign investor decides to invest. In Zambia, the rules relating to FDI are numerous but chiefly contained in the ZDA Act, which is the principal legislation on investment. This Act is complemented by other legislation, such as the EMA, which ensures that an FDI activity does not negatively affect the environment in which it is undertaken. Beyond the two, there is the Constitution, which is the overarching law in Zambia and contains provisions on FDI, as well as protection of the environment and human rights.

While the benefits of such FDI cannot be underscored, the concern has been whether the FDI rules consider the effect of such activities on the environment and human life. In other words, to what extent does FDI consider environmental and human rights concerns? In providing an answer to this question, there are two aspects that would require consideration. The first is whether there is a relationship that exists between FDI, environmental protection, and human rights. After this has been addressed, the second aspect involves ascertaining the extent to which this is evident under Zambia's domestic legislative framework. The necessity to rationalise the linkage stems from the fact that, FDI activities are carried out in the environment and where such activities adversely affect the environment, this, in turn, violates a person's right to a clean, safe, and healthy environment. Also, there is an increasing significance of the relevance of international investment law within the body of environmental law, to a pace equalling the increase in the importance of environmental law within the body of international investment law.<sup>42</sup>

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<sup>42</sup> R Diepeveen, Y Levashova & T Lambooy 'Bridging the gap between international investment law and the environment' (2014) 30 *Utrecht Journal of International and European Law* 78 148.

Theoretically, it is clear that the three fields have different objectives. In the case of FDI, it attempts to create a better economic status of the host state and positively affects the lives of people. Environmental law ensures that the activities of FDI do not impinge on the environment and where this is so, adequate remedial mechanisms are in place. As for human rights, it ensures that FDI activities do not violate the rights of human beings. In essence, the intersecting field is FDI— both environmental law and human rights law aim to create the soundness of FDI and protection of either persons or the environment. The challenge lies in creating a single theoretical approach that cuts across the three fields.

In view of this, the main aim of chapter two is to establish the existence of a link, or the extent thereof, between foreign direct investment, environmental protection, and human rights in Zambia's domestic framework and thereafter, attempt to develop a theoretical and conceptual framework that encompasses them as one.

## **2.2 Foreign direct investment**

The term 'foreign direct investment' is bereft of one clear and simple definition. It is an arduous task for many scholars that have studied the concept of FDI. In fact, any attempt to define the meaning of FDI has often resulted in inconclusiveness among legal and economic scholars of the discipline. According to Ragazzi 'a direct foreign investment is the amount invested by residents of a country in a foreign enterprise over which they have effective control.'<sup>43</sup> The definition given by Ragazzi is reiterated by Lin who says 'FDI is centred on the extent of the investor's control over the foreign enterprises and the amount of equity the foreign investors has in the business.'<sup>44</sup> From the definition of Ragazzi and Lin, two aspects come out strongly: 'amount invested' and 'control.' This signifies that FDI connotes investing of a certain amount in a business that an investor retains control of. Other scholars have furthered the aspect of 'amount invested' and 'control' adding 'duration' in their definition. For instance, Muhammad and Khattak state that:

Foreign direct investment (FDI) is real investment and can be defined, as medium to long-term investment aimed at obtaining direct managerial controlling power over the use of the capital.<sup>45</sup>

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<sup>43</sup> G Ragazzi 'Theories of the determinants of direct foreign investment' (1973) 20 *International Monetary Fund* 2 471.

<sup>44</sup> X Lin 'An evaluation of the three periods of China's FDI development: 1978-2000' Unpublished PhD Thesis, University of Greenwich, 2007 6.

<sup>45</sup> MA Khan & NR Khattak 'Effects of economic factors on foreign direct investment inflow: evidence from Pakistan (1971-2005)' (2009) 25 *Sarhad Journal of Agriculture* 1 135.

The definition given by Muhammad and Khattak places emphasis on the period of investment. This implies that the concern is not only on control of the investment or use of capital but also how long the investment is. The view expressed by Muhammad and Khattak is supported by Buthe and Milner who argue that 'FDI involves the acquisition or creation of productive capacity, which implies a long-term perspective and involves some assets that cannot be moved without considerable loss.'<sup>46</sup> This description brings in an aspect of assets. It could be inferred that assets are an integral part of FDI and where such are moved, loss is occasioned on the part of the investor. The International Institute for Sustainable Development (IISD) furthers the definition by advancing that:

FDI is defined as an equity interest and other capital that gives the investor a lasting interest and effective voice in the management of the foreign enterprise.<sup>47</sup>

In an attempt to reach a comprehensive definition, the Organisation for Economic Cooperation and Development (OECD) has provided some Guidelines.<sup>48</sup> According to the OECD Guidelines:

Foreign direct investment reflects the objective of establishing a lasting interest by a resident enterprise in one economy (direct investor) in an enterprise (direct investment enterprise) that is resident in an economy other than that of the direct investor. The lasting interest implies the existence of a long-term relationship between the direct investor and the direct investment enterprise and a significant degree of influence on the management of the enterprise. The direct or indirect ownership of 10% or more of the voting power of an enterprise resident in one economy by an investor resident in another economy is evidence of such a relationship.<sup>49</sup>

The description by the OECD draws out two categories of criteria used: first, the time aspect of the investment; and second, the motivation of the investor. In dealing with the first aspect, it has been argued that if foreign investment is categorised as being direct, the investors must have a long-term interest which exerts some high level of influence on managing of the subsidiary located in the host state. On the contrary, if the time horizon is short and investors mainly have a financial interest, such investment is classified as portfolio investment.<sup>50</sup> This entails that there is no definitive period of investment except that which is agreed

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<sup>46</sup> T Buthe & HV Milner 'the politics of foreign direct investment into developing countries: increasing FDI through international trade agreements?' (2008) 52 *American Journal of Political Science* 4 743.

<sup>47</sup> IISD *Investment treaties & why they matter to sustainable development: questions & answers* (2012) 7.

<sup>48</sup> UNCTAD has adopted the definition of the OECD. See: UNCTAD *World Investment Report: transnational corporations, extractive industries and development* (2007) 245.

<sup>49</sup> OECD *Benchmark definition of foreign direct investment* (4<sup>th</sup> edition)(2008) 48 49.

<sup>50</sup> M Stephan & E Pfaffmann *Detecting the pitfalls of data on foreign direct investment: a guide to scope and limits of FDI-data as an indicator of business activities of transnational corporations* (1998) 2.

between the host state and the investor— for mining agreements, the period of investment is between 15 and 20 years.<sup>51</sup> However, this period is quite different from the 10 years granted under the ZDA Act.<sup>52</sup>

It could also be deciphered from the definition of the OECD that, a foreign direct investor must be either resident in the host state, directly or indirectly, or at least possess 10% shareholding or the voting rights of the firm that represents the interest held, if resident in another economy during the period of investment.<sup>53</sup> Since FDI entails making a long-term commitment reflecting a lasting interest of the entity located in the host state, the determination of the investor is anchored on him being able to utilise some level of influence on the running of the entity located in another state.<sup>54</sup> Such an investment would involve not only the initial transaction concerning the host state and the investor but also other subsequent dealings.<sup>55</sup>

Although previously, the International Monetary Fund (IMF) had adopted the definition provided by the OECD<sup>56</sup>, it has since provided its own. The *Balance of Payments and International Investment Position Manual* defines FDI as:

Direct investment is a category of cross-border investment associated with a resident in one economy having control or a significant degree of influence on the management of an enterprise that is resident in another economy. As well as the equity that gives rise to control or influence, direct investment also includes investment associated with that relationship, including investment in indirectly influenced or controlled enterprises, investment in fellow enterprises, debt, and reverse investment.<sup>57</sup>

The definition of direct investment by the IMF appears to be the same as that of the OECD. From the two definitions, the highlight is the relationship between the investor and the host state, including the aspect of control or influence. The term 'control' denotes that there is

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<sup>51</sup> Clause 19.1 of the Development Agreement between the Government and Mopani Copper Mines states: 'The Company may terminate this Agreement at any time after the fifteenth anniversary of the date hereof by giving twelve (12) months written notice to GRZ.' For Konkola Copper Mines, the stability period is 20 years.

<sup>52</sup> Sec. 71, ZDA Act.

<sup>53</sup> In Zambia, while most of the mining companies are owned by subsidiaries, some are not – Mopani Copper Mines is owned by Glencore, Konkola Copper Mines owned by Vedanta, Kansanshi Mining PLC's owned by a First Quantum subsidiary etc. In these mines, the government owns a part, usually no more than 20%, with the other portion owned by the foreign investors.

<sup>54</sup> B Aristidis 'The determinants of FDI in transition countries; incentives and barriers based on a questionnaire research: the case of Bulgaria, 1989–2000' (2003) 90.

<sup>55</sup> UNCTAD *World Investment Report: transnational corporations, extractive industries and development* (2007) 245.

<sup>56</sup> Paragraph 360 of the IMF *Balance of payment manual: conceptual framework* (5th edition) 1993, states that 'The concept of direct investment presented in this Manual is the basis for that adopted in the second edition of the OECD Detailed Benchmark Definition of Foreign Direct Investment.'

<sup>57</sup> IMF *Balance of payments and international investment position manual* (6th edition)(2009) 100.

some presence by the investor in decision-making regarding the management policies and strategy. In *Thunderbird v Mexico*, the tribunal described control as:

...the power to effectively decide and implement the key decisions of the business activity of an enterprise and, under certain circumstances,...can be achieved by the existence of one or more factors such as technology, access to supplies, access to markets, access to capital, know how, and authoritative reputation.<sup>58</sup>

Possession of control or the level of influence may be achieved by the investor's holding of equity in terms of voting rights either directly in the entity, or indirectly by holding some voting rights in another entity that possesses voting rights in that entity.<sup>59</sup> Thus, the relationship between the investor and the host state arises when an investor resident in the capital exporting state making an investment in the capital importing state which investment affords the investor some level of control or influence in the administration of the entity located in the host state.

It is clear from the two definitions that 'lasting interest' entails the creation of manifest 'control or influence' on the administration of the entity.<sup>60</sup> The use of the term 'lasting interest' is used as a way of differentiating FDI from Foreign Portfolio Investment (FPI), with the latter characterised by its short-term and involvement in producing a high turnover of securities.

These definitions put forward seem to reflect the current and future trends in international foreign investment activities, in that, they specifically address the general ambits of what can and eventually will constitute an FDI. Since states reserve for themselves the prerogative of defining and deciding exactly that which constitutes a foreign investment with respect to their economies, the above definitions can only be illustrative and subjected to more specified definitions either within Bilateral Investment Treaties (BITs) or domestic legislation.<sup>61</sup> Unfortunately, Zambia's domestic laws are devoid of the definition of FDI. They do, however, define the term 'foreign investment' as 'investment brought in by an investor from outside Zambia'.<sup>62</sup> This definition is ambiguous as it does not distinguish between the two main types

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<sup>58</sup> *International Thunderbird Gaming Corporation v United Mexican States* (Arbitral Award, 26 January 2006), par. 108.

<sup>59</sup> OECD *Benchmark definition of foreign direct investment* (4th edition)(2008) 101.

<sup>60</sup> C Borrman 'Methodological problems of FDI statistics in accession countries and EU countries' *Hamburgisches Welt-Wirtschafts-Archiv (HWWA) Report* (2003) 10 – 11.

<sup>61</sup> VN Fru *The International law on foreign investments and host economies in sub-Saharan Africa: Cameroon, Nigeria and Kenya* (2010) 14.

<sup>62</sup> Sec. 3, ZDA Act.

of foreign investment— FDI, and FPI.<sup>63</sup> It is argued that the definition under the Act lacks specificity in terms of whether investment that is brought into the country by a foreign investor would include FPI as well as FDI. Thus, it may well be concluded that such a definition embraces both FDI and FPI by virtue of the mention of total or partial control by the owner of the assets. The view expressed is backed by the construction of the definition of ‘foreign investor’ under the Act:

... a person who makes direct investment in the country...in the case of a natural person is not a citizen or permanent resident of Zambia...in the case of a company is incorporated outside Zambia.<sup>64</sup>

The definition of ‘foreign investor’ distinguishes between ‘a natural person’ and ‘corporate person’. In order for a natural person to be classified as a foreign investor, such a person must not be a Zambian or permanently resident in Zambia. The ZDA Act does not define ‘residence’ for purposes of investment. However, it is opined that the determination of residence must be made in line with section 20(2)(c) of the Immigration and Deportation Act.<sup>65</sup> An examination of this section entails that a residence permit may be given to an investor holding a licence. Thus, residence in terms of the ZDA Act refers to a person who is not in possession of an investor's licence and has been staying in Zambia for over ten years. In such an instance, a person is treated the same as a local and not foreign investor. With regard to a company, the test is its place of incorporation— such a company must have been incorporated outside Zambia.<sup>66</sup> Encapsulating both definitions, the OECD guidelines simply defines a ‘foreign investor’ as:

An individual, an incorporated or unincorporated private or public enterprise, a government, a group of related individuals, or a group of related incorporated and/or unincorporated enterprises which have a direct investment enterprise, operating in a country other than the country of residence of the direct investor.<sup>67</sup>

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<sup>63</sup> This refers to investment in securities and is intended for financial gain only and does not create a lasting interest in or effective management control over an enterprise.

<sup>64</sup> Sec. 3, ZDA Act.

<sup>65</sup> According to sec. 20(2)(c), a residence permit can be issued to a person who ‘intends to remain in Zambia for a period in excess of ten years’. Further, sec. 20(2)(e) states that a residence permit can also be issued to a foreigner holding an investor's permit for a period that exceeds three years.

<sup>66</sup> While this may appear clear, a complex situation may arise where a person who is a Zambian or ordinarily resident in Zambia decides to incorporate a company outside Zambia but then applies for a foreign investor's licence. In this situation, the question would be whether it is a natural person or juridical person applying for a licence. If it is a natural person applying for an investor's licence in his personal capacity, then it will not be granted because the person is either a Zambian or ordinarily resident in Zambia. However, if the application is made by a natural person who is either a Zambian or ordinarily resident in Zambia on behalf of the company which he represents, then it should be granted.

<sup>67</sup> This definition classifies who might qualify as a ‘foreign direct investor’ – an individual or group of related individuals; an incorporated or unincorporated entity; a public or private entity; a group of related entities; a

In comparison with the IMF, the latter concerns itself with an enterprise and states thus:

A direct investor is an entity or group of related entities that is able to exercise control or a significant degree of influence over another entity that is resident of a different economy.<sup>68</sup>

Considering the various definitions of FDI discussed above, a more comprehensive definition has been given by UNCTAD. In its World Investment Report of 2012, UNCTAD defines FDI thus:

Foreign direct investment (FDI) is defined as an investment involving a long-term relationship and reflecting a lasting interest and control by a resident entity in one economy (foreign direct investor or parent enterprise) in an enterprise resident in an economy other than that of the foreign direct investor (FDI enterprise or affiliate enterprise or foreign affiliate). FDI implies that the investor exerts a significant degree of influence on the management of the enterprise resident in the other economy. Such investment involves both the initial transaction between the two entities and all subsequent transactions between them and among foreign affiliates, both incorporated and unincorporated. FDI may be undertaken by individuals as well as business entities.<sup>69</sup>

From this definition, it can be deduced that the salient points are: investing, acquiring a firm or its' assets, and controlling or influencing its operations. Despite the clarity of the term 'FDI', McManus has argued that it:

...is a rather inappropriate name for the process by which productive activities in different countries come under the control of a single firm. The essence of this phenomenon is not foreign investment, which is an international transfer of capital, but the international extension of managerial control over certain activities.<sup>70</sup>

Deciphering the argument of McManus, it is advanced that FDI comprises of the direct transfer of capital or indirectly when done through other associated entities by a foreign investor from the capital exporting state to an enterprise located in the host state. Managerial control is also part of FDI.

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government body; an estate, trust or other societal organisation; or any combination of the above. See: IMF *Balance of Payments and International Investment Position Manual* (6<sup>th</sup> edition)(2009) 49.

<sup>68</sup> As above, 101.

<sup>69</sup> UNCTAD *World Investment Report: towards a new generation of investment policies* (2012) 3.

<sup>70</sup> JC McManus 'The theory of the international firm' in G Paquet (ed.) *The multinational firm and the national state* (1972) 66.



Building on the argument of McManus, one would ably conclude that the various definitions given by scholars and institutions on the meaning of FDI are bereft saying what exactly an investment is. Sornarajah contends:

*Foreign investment involves the transfer of tangible or intangible assets from one country to another for the purpose of their use in that country to generate wealth under the total or partial control of the owner of the assets. There can be no doubt that the transfer of physical property such as equipment, or physical property that is bought or constructed such as plantations or manufacturing plants, constitute foreign direct investment.*<sup>71</sup> [Emphasis added]

In Sornarajah view, 'assets' are a key component of the definition of FDI. This view seems to be in consonance with World Trade Organisation's definition which states that FDI happens when an investor from one country, in this instance the home country, procures an asset in another country, which is the host, intending to manage that asset.<sup>72</sup>

At this point, the question that still remains unanswered is what assets are and whether they constitute an investment. An asset is a 'resource with economic value that an individual, corporation or country owns or controls with the expectation that it will provide future benefit.'<sup>73</sup> According to the ZDA Act, an investment is the:

Contribution of capital, in cash or in kind, by an investor to a new business enterprise, to the expansion or rehabilitation of an existing business enterprise or to the purchase of an existing business enterprise from the state.<sup>74</sup>

This definition acknowledges: (i) contribution of capital which can be in monetary form or in kind i.e. provision of management skills, machinery or infrastructure etc.; and, (ii) this could be for purposes of starting or expanding or rehabilitation of a business enterprise. The flaw with this definition seems to be that, the contribution of capital is only for the purpose of starting, expanding, and rehabilitating and not a continuing act. This definition does not expressly include 'assets' like most of the BITs that Zambia has signed. Most of these BITs embrace the traditional *asset-based approach* in their quest to define the term 'investment'. This approach covers 'every kind of asset' or 'any kind of asset'. The accompanying list includes categories of assets: (1) movable and immovable property including any associated property rights– mortgages, liens or pledges; (2) various types of interests in companies, such as shares,

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<sup>71</sup> *The international law on foreign investment* (3rd edition)(2010) 8.

<sup>72</sup> World Trade Organisation *Annual report* (1996) 46.

<sup>73</sup> <http://www.investopedia.com/terms/a/asset.asp#ixzz3p5y6OFrF> (accessed 20 October 2015).

<sup>74</sup> Sec. 3, ZDA.

stock, bonds, debentures or any other form of participation in a company, business enterprise or joint venture; (3) claims to money and claims under a contract having a financial value and loans directly related to a specific investment; (4) intellectual property rights; and (5) business concessions, that is rights conferred by law or under contracts.<sup>75</sup>

Despite the many divergent working definitions of FDI, it appears all definitions are aimed at enunciating the desire by firms that are located within the home state to acquire and manage an enterprise or asset in a host state. In this regard, this thesis defines FDI, as a ***continuous contribution of capital, whether assets or monetary by a person or entity of foreign origin to an entity, in which interest is held, for the sole purpose of making a return within a specified period of time, known as the period of investment.***

### **Regulation of foreign direct investment**

The primary legislation on regulation of FDI in Zambia is the ZDA Act whose objective is to 'foster economic growth and development by promoting trade and investment through an efficient, effective and coordinated private sector led economic development strategy.'<sup>76</sup> The Act establishes the ZDA whose primary function is to support economic development by encouraging investment, efficiency, and attractiveness in business as well as supporting exports emanating from the country.<sup>77</sup>

In order for a foreign investor to be permitted to implement the investment in Zambia, such persons are required to obtain, most importantly, a certificate of registration, and an investor's permit.

#### *Certificate of Registration*

The ZDA Act requires any person who desires to invest in Zambia to apply for a Certificate of Registration. According to section 68(1)(c), an application in writing must be submitted to the Board which shall consider it within a period of thirty days.<sup>78</sup> The consideration of an application is based on certain conditions being met.<sup>79</sup> Once granted, the certificate is valid

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<sup>75</sup> This is evident, inter alia, under the Egypt-Zambia BIT, Finland-Zambia BIT, Germany-Zambia BIT, Luxembourg-Zambia BIT, and the Netherlands-Zambia BIT.

<sup>76</sup> Preamble.

<sup>77</sup> Sec. 5(1).

<sup>78</sup> Sec. 68(2).

<sup>79</sup> Sec. 69(1) requires the Board to have regard to: (a) the need to promote economic development and growth; (b) the extent to which the proposed investment will lead to the creation of employment opportunities and the

for ten years from the date of issue and the Board may, during this period, vary or amend any conditions given where there are changes to the investment or where the holder requests so.<sup>80</sup> Under section 75, the Board may, upon conducting due investigations and upon giving the investor an opportunity to exculpate oneself, suspend or revoke the certificate.<sup>81</sup>

### *Investor Permit*

The Immigration and Deportation Act of 2010 obliges 'any foreigner intending to establish a business or invest in, or who has established or invested in a business in Zambia' to apply to the Director-General of Immigration for an investor's permit.<sup>82</sup> This means that a permit is required where a foreign investor seeks to carry out their investment in Zambia.<sup>83</sup> The conditions upon which such a permit may be granted are three: (i) not be a prohibited immigrant; (ii) proof of investing the prescribed financial or capital contribution in the business; and (iii) must be in possession of a clearance letter from the ZDA.<sup>84</sup> The flaw in this requirement lies in the fact that, it does not include other matters such as human rights observance in carrying out the investment. It only considers the certificate of registration issued by the ZDA to the investor.

### **2.2.1 Theoretical assumptions**

The theoretical views surrounding FDI revolves around two extreme ideas: one idea retains the notion that FDI is entirely relevant to the host country while the other retains the view that, unless a country moves away from dependence on FDI, there would be no development that can be achieved. Between these two extremes, there lies a theory that embraces a middle

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development of human resources; (c) the applicant's pledge for employment creation and training of citizens in Zambia; (d) the degree to which the project is export oriented; (e) the impact the proposed investment is likely to have on the environment in accordance with the EMA; (f) the possibility of the transfer of technology; and (g) any other considerations that the Board considers appropriate.

<sup>80</sup> Secs. 70(2) & 71.

<sup>81</sup> The circumstances when a suspension or revocation may be done are where: (a) the investor obtained it by fraud, negligent misrepresentation or false or misleading statement; (b) assigns, cedes or transfers the certificate to another; (c) failure to implement the investment; (d) breaches terms of the certificate; and (e) conviction of an offence under the ZDA Act or other law.

<sup>82</sup> Sec. 29.

<sup>83</sup> The category of persons required to apply are prescribed in sec. 29(4) which states: "The following shall apply in respect of an investor's permit: a holder of the permit shall not engage in any business other than as is prescribed for in the permit; the spouse and children, over eighteen years, of that foreigner, may be issued with employment permits if they are to be employed in the family business; the holder of the permit may employ such number of qualified expatriate employees as may be authorised by the Director-General of Immigration on condition that the holder employs a prescribed minimum number of citizens; the permit shall indicate the period of time for which it is valid and whether it is subject to renewal for a further indicated period; the permit shall specify the terms and conditions of the permit; and the holder of the permit may enter and re-enter and remain in Zambia until the permit expires in accordance with its terms."— Immigration and Deportation Act, 2010.

<sup>84</sup> Sec. 29(2), Immigration and Deportation Act, 2010.

course. Sornarajah asserts that ‘Lawyers who favour complete protection for foreign investments rely on theories which emphasise the positive effects of foreign investment on economic development.’<sup>85</sup> This assertion was spurred during the peak of globalisation, a period of acceptance of arguments made in support of MNCs’ capital movement, which acceptance was reflected in a number of legal instruments. However, legal scholars expressing a contrary opinion emphasised the harmful nature of FDI on the host country and accordingly, enunciated competing legal principles based on economic theories.

## 1. Classical Theory

In broad terms, classical theorists advance that FDI contributes to the economic development of the host countries through a number of channels– bringing in of foreign capital, technology, and employment creation. A number of other benefits flow from the foreign investors entry and these include infrastructure and upgrading of transport, health or education sectors. The 1992 *World Bank’s Guidelines on the Treatment of Foreign Direct Investment* summarise the idea of the classical theory by recognising that:

a greater flow of foreign direct investment brings substantial benefits to bear on the world economy and on the economies of developing countries in particular, in terms of improving the long term efficiency of the host country through greater competition, transfer of capital, technology and managerial skills and enhancement of market access and in terms of the expansion of international trade.

The classical theory triggers countries, mainly underdeveloped, to market the natural resources that they have so as to woo investors to invest. The underlying belief is that doing so would be beneficial to their economies. According to Gao, the benefits that host countries obtain from FDI include the transfer of capital, transfer of advanced technological equipment and skills.<sup>86</sup> This assertion is supported by Mody who argues that foreign investment confers benefits on the host country in the form of creation of employment, transfer of management skills to the local personnel, and infrastructural development.<sup>87</sup> Balasubramanyam asserts that foreign investment contributes to the improvement of the host country’s balance of payments, tax base expansion, foreign exchange earnings, and integration into the international markets

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<sup>85</sup> M Sornarajah *The international law on foreign investment* (3rd edition) (2010) 47.

<sup>86</sup> T Gao ‘Foreign direct investment and growth under economic integration’ (2005) 67 *Journal of International Economics* 157 – 174.

<sup>87</sup> A Mody ‘Is FDI integrating the world economy?’ (2004) 27 *World Economy* 8 1195 – 1222.

of the economy.<sup>88</sup> These scholars all concentrate on the benefits that FDI confers on the host state and the positive effect it has on the economy.

In Muchlinski's opinion, the desirability of FDI by the host state has been amplified by the phenomenal economic growth of the newly industrialised countries like Hong Kong, Taiwan, Singapore, South Korea and China's impressive economic growth.<sup>89</sup> This implies, in the view of Gorg and Strobl, that FDI benefits are derived through positive spill overs.<sup>90</sup> In this matrix, Greenway views FDI as a source of these spill overs and they provide information relating to new technologies, new markets, new customers and management techniques from which domestic companies benefit.<sup>91</sup> This information spill over occurs through imitation, competition, linkages and/or training which boosts local companies to become more productive.

Borensztein, De Gregorio and Lee argue that for FDI to contribute fully to economic growth in larger measure than domestic investment, human resources have to be available.<sup>92</sup> This assertion views the availability of human resources as an important aspect of FDI. This lies in the fact that FDI's contribution to economic growth is greatly enhanced by its interaction with the level of human capital in the host country. This is so because the application of advanced technology requires qualified labour force. However, this may not be the case in the mining sector which employs more of unskilled or lowly qualified labour to operate.

Nunnenkamp proposes that for the host country to benefit from FDI, its environment must be conducive to overall investment, economic spill overs and income growth, stable socio-political institutions, developed local markets, investment friendly policies and its administrative frameworks.<sup>93</sup> In fostering FDI, the host country must ensure that there are adequate mechanisms that are deliberately designed to attract and protect the foreign investor's investment. In buttressing Nunnenkamp's proposal, Maswood argues that the benefits derived from FDI do, to some extent, depend on the type of FDI made. Furthering this point, he distinguishes between speculative and productive FDI. On speculative FDI, he asserts that this often accompanied by short term capital flows and can undermine national monetary and

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<sup>88</sup> VN Balasubramanyam, M Salisu & D Sapsford 'Foreign direct investment and growth in EP and IS countries' (1996) 106 *The Economic Journal* 434 92 105.

<sup>89</sup> PT Muchlinski *Multinational enterprises and the law* (1995) 91.

<sup>90</sup> H Gorg & E Strobl 'Multinational companies and indigenous development: an empirical analysis' (2002) 46 *European Economic Review* 1305 1322.

<sup>91</sup> D Greenway, N Sousa & K Wakelin 'Do domestic firms learn to export from multinationals?' Leverhulme Center Research Paper No. 37, 2001, University of Nottingham.

<sup>92</sup> E Borensztein, J De Gregorio & JW Lee 'How does foreign direct affect economic growth?' (1998) 45 *Journal of International Economics* 115 135.

<sup>93</sup> P Nunnenkamp 'To what extent can foreign direct investment help achieve international development goals?' (2004) 27 *World Economy* 5 657 677.

economic objectives which are harmful to the economy. Hence, he encourages investment of productive FDI which represents a long term commitment to the host country so as to benefit. It would appear that Zambia has adopted the latter perception in that, long term commitment is encouraged by the government, which accords foreign investors with concession licences of between 15 to 20 years.<sup>94</sup>

It is clear that the classical theory is inclined towards the benefits that FDI confers on the host country. It is focused on the host state creating an enabling environment for the foreign investor. Whereas the host state bears the responsibility of creating an enabling environment for FDI, the theory does not consider in what circumstances the host state can interfere with an FDI in instances where a foreign investor misconducts itself while operating within the host state's jurisdiction. The theory does not also explain why, after such a long period of inward FDI, there is no positive effect on the host state's economy. This is true where, despite the abundance of natural resources, most developing host countries are still struggling economically.

## 2. Dependency Theory

The dependency theory is diametrically opposed to the classical theory. It considers FDI as a tool for imperialist domination that should be completely forbidden as it affords no advantages for host countries. This theory was very dominant in the 1940s resulting in its adoption by most African states. In the case of Zambia, upon attainment of independence, the government decided to nationalise all the investment that belonged to foreign investors arguing that a country cannot be 'fully independent' if its economic sectors were wholly controlled by foreigners.

On this theory, Peet argues that FDI will not bring about meaningful economic development to the host state as the benefits or profits made by a foreign investor are utilised in the country where the company is headquartered.<sup>95</sup> The position taken by Peet could be seen from section 21 of the ZDA Act which allows the foreign investor to repatriate all profits made except that which is due to the relevant authorities. This means that, contrary to the host state's expectation that the profits obtained by the foreign investor would be utilised within the host state, this is not the case as the investor is at liberty to repatriate 100% profits made.

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<sup>94</sup> This is evident from the Mopani Copper Mines and Konkola Copper Mines Development Agreements that were signed with the Government in 2000.

<sup>95</sup> R Peet *Global capitalism: theories of social development* (1991) 43–51.

There is no legal requirement to even indicate where the profits are repatriated to or a cap on the same. Rojas argues that profit repatriation by FDI companies reduces funds available for domestic investment in the less developed countries and as a result, these countries are compelled to seek new forms of foreign financing to cover fiscal deficits.<sup>96</sup> As a consequence, this perpetuates a state of perpetual state of dependency of the host state in the home country of the foreign investor.

Evans expresses the view that the subsidiary company, which represents the holding company, devises its policies in the interests of its parent company and shareholders in the home country.<sup>97</sup> This entails that the subsidiary company, though locally incorporated, only serves the interests of developed countries where they have their headquarters. In the mind of Sornarajah, the host state becomes subservient and economic development, which is its primary need, becomes impossible and unless they break out of the situation, they remain tied to the home country's economies.<sup>98</sup> Though, easy to say, most host state may find it hard to break out of the dependency situation. Perhaps, the panacea under for the dependency theory is to reject foreign investment rather than attract it.

Wilhelm and Witter reiterate that FDIs is exploitative as free trade and foreign investment dealings with industrialised countries are the main causes of underdevelopment and exploitation of developing countries.<sup>99</sup> Furthering this view, it is posited that FDI strangulates such development and perpetuates the domination of the weaker states by keeping them in a position of permanent and constant dependence on the economies of developed states. As a result of this, any prospect of development for the host state is severely restricted because the entire surplus they generate would be externalised to their home countries. This would not only reduce the resources meant for investment but even the internal multiplier effect due to the fact that capital goods would have to be purchased from outside the host state.

Wang argues that increased FDI dependence, principally in non-core nations, only promotes processes of offshoring of resource-degrading and low wage, labour-intensive sectors which stifles successful development.<sup>100</sup> According to this view, the FDI not only

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<sup>96</sup> R Rojas 'International capital: a threat to human dignity and life on planet earth' 2001. See: <http://www.rrojasdatabank.org/globalss.doc> (accessed 24 March 2017).

<sup>97</sup> P Evans 'Dependent development – the alliance of multinational, state and local capital in Brazil' (1979)

<sup>98</sup> M Sornarajah *The international law on foreign investment* (3rd edition)(2010) 53.

<sup>99</sup> SKS Wilhelm & MSD Witter 'Foreign direct investment and its determinants in emerging economies' African Economic Policy Paper No. 9. See: <http://www.eagerproject.com/discussion9.shtml> (accessed 21 March 2017).

<sup>100</sup> Y Wang 'Unraveling the development of underdevelopment: examining the impact of foreign investment on economic growth across income groups, 1997-2011' unpublished Master of Arts, Lehigh University, 2014 7.

perpetuates dependency but also poses negative effects on the host state's economy through resource depletion, payment of low wages, and labour intensive sectors which affect development. This is particularly true to the extent that some of the FDI that Zambia has received has had negative effects. For example, when BINALI Group of Companies acquired Luanshya Copper Mines, they refused to adhere to labour standards on account that they were still servicing loans that they had acquired in order to procure the mine from the government. Another problem that FDI brings is unsafe work environment coupled with the failure to provide safety procedures resulting in death of mine employees.<sup>101</sup>

In Alfaro's view, the objective of FDI is to exploit developing countries and exacerbate their underdevelopment.<sup>102</sup> Barton and Fisher added that FDI is a way for developed countries to gain power in developing countries.<sup>103</sup> The views of these scholars are engrossed in the Marxist view on FDI which in essence, extrapolates that, as long as a country continues to receive FDI, it cannot develop economically.

Despite the near reverence of the dependency theory during the 1960s and 70s, its influence has become limited. This situation is attributed to the numerous countries competing for FDI to stimulate their domestic economies. This has led governments which were initially hostile to foreign investors to now actively seek and compete for FDI.

### 3. Middle Path Theory

The middle path theory presents a move away from philosophical tendencies towards FDI by incorporating opinions from the classical and dependency theorists. Stiglitz argues that between the positions advanced by the classical and dependency theories, the middle path theory takes an accommodating position. It recognises that States and markets cannot do without each other. They complement each by providing a check on and facilitating the functioning of the other.<sup>104</sup>

The theory espouses that the host country must protect FDI to the extent of the inherent benefits and the good corporate behaviour exhibited by the MNC in promoting the social and

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<sup>101</sup> Pengtao Li expresses the view that foreign investors are not the sole culprits behind poor labour conditions in Zambia but also the 'terms of investment, inadequate labour laws and the failure of the Zambian government to implement related laws are also contributing factors.' P Li 'The myth and reality of Chinese investors: a case study of Chinese investment in Zambia's copper industry' (2010) 62 SAIIA Occasional Paper 10.

<sup>102</sup> L Alfaro 'Foreign direct investment and growth: does the sector matter?' Harvard Business School, 2003.

<sup>103</sup> JH Barton & BS Fisher *International trade and investment: regulating international business* (1986) 28.

<sup>104</sup> JE Stiglitz 'The World Bank at the millennium' (1999) 109 *The Economic Journal* 577-597.



economic objectives of the host state. This implies that the host country must pursue policies that are designed to maximise the domestic benefits while minimising the negative effect that FDI may pose. In this way, FDI should only be allowed if it is found that its benefits outweigh the negative effects. Under the ZDA Act, there is section 17 which has been included to maximise benefits to the investor while giving the host state a foothold in the FDI. More specifically, section 17(2) permits the Board to enter into an agreement with an investor on matters relating to investment and development. The contents of such an agreement relate to employment creation, local business development and financial progression of the proposed project.<sup>105</sup>

The theory adopts a cautionary approach by arguing that, though FDI could have detrimental effects in certain instances, if well harnessed, FDI could fuel the host country's economic growth. This requires, however, a blend of regulatory interventions and openness in dealing with FDI. Seid posit that, what is needed, therefore, is a balancing act between those activities that can best be handled by the market and those to be done by the government.<sup>106</sup> According to Sornarajah, while FDI has benefits, the negative effects cannot go unaddressed. He suggests that codes can be designed to curb harmful practices of MNCs.<sup>107</sup>

#### *Consensus on the theories?*

The scholars of the classical theory emphasise the significance of FDI in promoting a host country's economy through numerous ways: employment creation, technology transfer, social development, balance of payments, and creating a health investment competition with local companies. Dependence theory is grounded in the Marxist view which resents FDI. The scholars who support it argue that the benefits of FDI only benefit the country from where the FDI originates and not the host. The other theory, the middle path, adopts both theories and contends that FDI has positives as well as negatives. In order for the host country to benefits from FDI, a balance must be created between the desires of the foreign investors and those of the government.

As observed from the discussion, there is no single theory that can be said to predominate others or singularly gives an explanation of FDI. The theories, developed by scholars, emanate from numerous approaches of varying disciplines. Although FDI is discussed

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<sup>105</sup> Sec. 17(3).

<sup>106</sup> S Seid *Global regulation of foreign direct investment* (2002).

<sup>107</sup> M Sornarajah *The international law on foreign investment* (3rd edition) (2010) 47.

in the legal sense, it has its roots in the field of economics. Even among the scholars of economics, one cannot easily identify a single dominant widely accepted view that is able to explain the form and aspect of FDI. Given the pros and cons of the theories, the thesis adopts the middle path theory, which requires that a balance is created between the FDI received and the need to protect the environment and the rights of those who depend on it for their survival.

### 2.3 Environmental protection

The term 'environment' means to encircle.<sup>108</sup> It is a difficult term to define given that it is a rational concept which can be viewed in both a wide and a narrow sense depending on the discipline and context in which it is used. The wide description includes the natural, spatial and social environments. Such a wide interpretation proves to be unwieldy because it includes virtually everything which influences human existence or quality of life. A narrow interpretation includes the natural environment but excludes the social environment.<sup>109</sup>

The wide description would seem to suit the remark that was made by Einstein who stated that the 'environment is everything that isn't me.'<sup>110</sup> The European Commission states that the environment is a combination of components whose multifaceted interrelationships constitutes the settings, surroundings, and conditions of life of the individual and of society, as they are or as they are felt.<sup>111</sup> Larsson states that the term includes:

all those elements which in their complex inter-relationships form the framework, setting and living conditions for mankind, by their very existence or by virtue of their impact.<sup>112</sup>

By broadly defining the term, an environment can comprise of the cumulative natural, social, and cultural settings that have an effect on the lives of an ordinary society. The United Nations described an 'environment' to capture:

Physical and social factors of the surroundings of human beings and includes land, water, atmosphere, climate, sound, odour, taste, energy, waste management, coastal and marine pollution, the biological

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<sup>108</sup> *Concise Oxford Dictionary* (10th edition) 1999.

<sup>109</sup> M Kidd *Environmental law: a South African guide* (1997) 1.

<sup>110</sup> S Bell & D McGillivray *Environmental law* (7th edition)(2008) 7.

<sup>111</sup> As above, 8.

<sup>112</sup> M Larsson 'Legal definitions of the environment and of environmental damage' (1957-2009) *Stockholm Institute for Scandinavian Law* 157.

factors of animals and plants, as well as cultural values, historical values, historical sites and monuments and aesthetics.<sup>113</sup>

This definition shows that the notion of 'environment' is dynamic and over time, it may change. It also differs one country from another depending on the manner in which it is used. Glazewski concludes that the term 'environment' has no general agreement with respect to its constituents. Thus, seeking an all-embracing notion of the meaning of the term is not acceptable as a basis for establishing its nature and content, if all-encompassing, would make all law environmental law.<sup>114</sup>

The narrow approach restricts the definitional scope. This is the approach adopted under the Environmental Management Act which defines it as:

...the natural or man-made surroundings at any place, comprising air, water, land, natural resources, animals, buildings and other constructions.<sup>115</sup>

This definition is inadequate in scope as it only focusses on the surroundings that are either natural or man-made without reference to a human being. Examining this definition, Sambo observed that:

This definition falls short of including human beings and other organisms within its ambit and this omission raises ethical concerns, namely that this legislation is likely to be interpreted as non-anthropocentric.<sup>116</sup>

The basis for such an observation stems from the fact that environmental considerations constitute a wider ambit of varied but interwoven issues. In this thesis, an 'environment' is defined to mean **'surroundings consisting of land, air and water and is a place of habitat for animals, species, plants, or man who depends on it for their survival.'**

Environmental protection can be described to constitute 'an ensemble of norms, including common or civil law principles, statutes, treaties and administrative regulations designed to ensure or to facilitate the natural resources' rational management of and human

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<sup>113</sup> United Nations Environmental Programme *Training manual on international environmental law* (2006) 15.

<sup>114</sup> J Glazewski *Environmental law in South Africa* (2nd edition)(2005) 9.

<sup>115</sup> Sec. 2.

<sup>116</sup> PT Sambo 'A conceptual analysis of environmental justice approaches: procedural environmental justice in the EIA process in South Africa and Zambia' unpublished PhD Thesis, University of Manchester, 2012 68.

intervention in the administration of resources for sustainable development.<sup>117</sup> The underlying rationale for environmental protection is premised on the relationship between human beings and the planet. This association exists because the environment is the source of energy and materials which man transforms into goods and services to meet his needs, both economic and social. Hence, protecting the environment is essential for the preservation and sustainable use of natural resources which are no longer considered inexhaustible.<sup>118</sup>

The necessity to do so could be exemplified in four ways: providing a biological, physical and chemical system that enables life to exist; providing raw material and energy for economic production and human activity; providing renewable and non-renewable resources; and absorbing waste from economic production and human activity.<sup>119</sup> It may well be stated that, where there is no protection of the environment, this may have an effect on the lives of those that are dependent on it for their survival. This entails that management of the environment must be in a way that leads to its protection.<sup>120</sup>

### **2.3.1 Principles of environmental protection**

Protection of the environment is not novel. Environmental concerns date from the early nineteenth century. At that time, these concerns related to natural resource exploration. In the 1970s, there was a shift and the concern was no longer conservation of flora but addressing issues such as oil pollution and the effects on the atmosphere of nuclear tests. The Stockholm Conference of 1972 presented a turning point in the field of international environmental law. The Conference led to a declaration of principles, later known as, the Stockholm Declaration. According to Principle 1:

Man has the fundamental right to freedom, equity and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being and he bears a solemn responsibility to protect and improve the environment for present and future generations.

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<sup>117</sup> OC Odidi 'Reflection on teaching and research on environmental law in African universities' (1988) 18 *Journal of Eastern African Research Development* 132 as quoted by F Mudenda 'General principles of environmental law' a paper presented at LAZ seminar, Livingstone, 2006 2.

<sup>118</sup> S Bell & D McGillivray *Environmental law* (7th edition)(2008) 42-43.

<sup>119</sup> SK Pandey 'Public interest litigation: instrument of environmental protection: an appraisal' (2006) *Journal of Environmental Research and Development* 100.

<sup>120</sup> Environmental management refers those mechanisms, normally legislative, developed and designed to ensure environmental protection. See: S Burchi 'Balancing development and environmental conservation and protection of water resource base: the "greening" of water laws' (2007) 6.

The wording of Principle 1 suggests that environmental rights have their origins from the broader right to life. Although it may be plausible to argue so, Principle 1 does not strictly declare a discrete and cohesive right to a healthy environment. Instead, the principle may be more specifically interpreted to connote that a healthy environment is necessary to enjoy other basic human rights.<sup>121</sup>

The Stockholm principles have provided a platform upon which other principles in environmental law have developed and these include: polluter pays principle; prevention principle; precautionary principle; participatory principle; intergenerational equity; and the principle of sustainable development.<sup>122</sup>

### 1. Sustainable development

The term 'sustainable development' entails that development must meet the requirements and desires of the current and future generations.<sup>123</sup> Under this principle, it is accepted that the general pace and manner of economic development may be incompatible with sustainability, however, development should neither be abandoned nor subordinated to environmental protection. Therefore, the two must instead be merged as one so as to achieve sustainable development.

The principle, as cited in the Report of the Brundtland Commission on Environment and Development, was described as:

Development that meets the needs of the present without compromising the ability of future generations to meet their own needs.<sup>124</sup>

The Brundtland Commission appointed in 1983, by the General Assembly, was mandated to reconcile or balance the relationship between environmental protection and the need for economic growth; to influence policy shift in the area of environment and development by suggesting other forms of international cooperation; and to enhance the level of commitment and understanding of persons, organisations, industries, and the government.

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<sup>121</sup> S Atapattu 'The right to a healthy life or the right to die polluted?: The emergence of a human right to a healthy environment under international law' (2002) 16 *Tulane Environmental Law Journal* 74.

<sup>122</sup> Under the EMA, section 6 lists down the principles that shall be applicable in governing environmental management. Most of these principles have been subsumed under those that have been proclaimed by the Stockholm Declaration.

<sup>123</sup> Section 2, EMA.

<sup>124</sup> Joint Report OHCHR and UNEP *Human rights and the environment* (2012) 11.

The main conclusion of the Report placed emphasis on adopting an integrated approach to policies relating to development, and which should culminate in sustainable economic development if environmentally sound.

Sustainable development, as a principle, was adopted under Principle 4 of the Rio Declaration which provides that in 'order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.' This principle was adopted in the **Case Concerning the Gabčíkovo – Nagymaros Project** where it was observed that:

...throughout the ages, mankind has for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risk for mankind- for present and future generations- of pursuit of such interventions at an unconsidered and unabated pace, new norms have been developed, set forth in a great number of instruments during the last two decades this need to reconcile economic development with the protection of the environment as aptly expressed in the concept of sustainable development....the court must hold the balance even between the environmental considerations and developmental considerations raised by the respective parties. The principle that enables the court to do so is the principle of sustainable development.<sup>125</sup>

Deciphering this case, it is opined that, sustainable development cannot be achieved if the protection of the environment is considered separate from the process of development. It is thus the court' duty to balance environmental protection and the need for economic development.

## 2. Precautionary principle

The precautionary principle emphasises anticipation and avoidance of environmental harm before it occurs. This is imperative in lowering the overall costs of mitigating or adapting to environmental damage. Since the 1980s when the principle was developed, other environmental treaties had already adopted it, for instance, the Bamako Convention which obliges State Parties to take up a 'precautionary approach to pollution' by 'preventing the release into the environment of substances which may cause harm to humans or the environment without waiting for scientific proof regarding such harm.'<sup>126</sup> The principle has also

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<sup>125</sup> *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* I.C.J. Reports 1997.

<sup>126</sup> Article 3(f).

been recognised in article 15 of the Rio Declaration of 1992 and article 3(3) of the United Nations Framework Convention on Climate Change.

The formulation of this principle links preventive and precautionary approaches in two ways: firstly, damage does not have to be serious or irreversible; and secondly, it reduces the level at which scientific evidence obtained might necessitate action. This dissociation between scientific certainty and political decision-making characteristics the precautionary approach. By stating that the absence of scientific certainty is not an excuse to postpone decisions on an environmental matter, the precautionary principle is creating a link between the acceptance of science and its simultaneous negation as a decision-making factor.<sup>127</sup> Consequentially, this principle is often associated with the notion that: (1) scientific uncertainty is not a reason for failing to take action where there is an environmental concern; (2) there should be affirmative action taken with regards to a specific environmental concern; (3) the burden of proving the non-existence of environmental damage lies with those conducting the activity; and (4) the State has the right to restrict imports where there is less than the required standard of full scientific certainty of harm caused by the environment.<sup>128</sup>

The EMA has adopted the precautionary principle in section 43(2) which allows the Minister to make regulations 'in the absence of absolute or conclusive scientific proof of the degree of toxicity or the hazard posed by any substance, so long as the regulations refer to the precautionary principle as the rationale for doing so.' This provision permits the Minister to make regulations where there is no definite scientific evidence of the toxicity levels or harm that the substance poses. The condition precedent is that the regulations must make reference to the principle as the basis for doing so.

### 3. Prevention principle

This principle, closely related to the precautionary principle, states that environmental protection is well attained by preventing environmental damage rather than endeavouring to compensate for such damage after it has occurred. The principle is underscored in several international treaties, most notably, the Stockholm Declaration which states in Principle 6 thus:

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<sup>127</sup> UD Ikoni 'The Application of the Precautionary Principle in the Proof of Environmental Offences under the Nigerian Law: Challenges and Prospects' 7 *Journal of Environmental Research and Development* 4 1738.

<sup>128</sup> D Shelton and A Kiss *Judicial handbook on Environmental Law* (2005) 21.

The discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted in order to ensure that serious or irreversible damage is not inflicted upon ecosystems.

It is almost always less costly to prevent environmental damage in the first instance than to allow the damage and face the environmental costs later. Therefore, preventive mechanisms, such as monitoring, notification, and exchange of information concerning environmental risk must be put in place. This principle clearly affects foreign investment negatively because most forms of foreign investment are bound to have a negative consequence on the environment and if this principle was actively relied upon by governments of capital importing states, then the levels of FDI would drop drastically.

#### 4. Polluter must pay principle

The Polluter Pays Principle (PPP) had been originally enunciated as an economic principle during the 1970s by the OECD to stop domestic public authorities from subsidising private firms' costs associated with pollution control.<sup>129</sup> The principle arose due to the conflict concerning the desirability for the attraction of foreign investment and the need for stronger protection of the environment. The notion was that, if markets were opened to foreign investment, it would lead to undesirable investment and production that do not permit absorption of environmental costs.<sup>130</sup> Thus, internalising these costs would mean, moving the costs brought by remedying the environmental damage from society to the person causing the damage.

The PPP requires the individual or entity liable for pollution or any other environmental harm to bear the restoration and clean-up cost of the affected area to its natural or acceptable standards.<sup>131</sup> In this way, 'internalising the externality' is achieved by making the firm/consumer pay the total social cost, rather than just the private cost. The modern-day PPP was first incorporated in the Stockholm Declaration of 1972 in which Principle 21 which allows States to exploit their own resources in accordance with their own environmental policies and bear the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States. After the Stockholm Declaration, the PPP has been incorporated in other international instruments, most notably, Rio Declaration. In Zambia, the

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<sup>129</sup> As above.

<sup>130</sup> JM Wagner 'International Investment, Expropriation and Environmental Protection' (1999) 29 *Golden Gate University Law Review* 3 470.

<sup>131</sup> Section 2, EMA.



MMDA has incorporated the PPP in section 87 which holds the holder of a mining licence 'strictly liable for any harm or damage caused by mining operations or mineral processing operations and shall compensate any person to whom the harm or damage is caused.'

#### 5. Participatory principle

The participatory principle requires dissemination of environmental information to the public. This allows the public to take part in the making of decisions relating to projects that have effects on the environment. The principle is enunciated in section 91(1) of the EMA which grants the public a right to be informed by the public authorities of any decisions that may affect the environment and an opportunity is given to them to participate in such decisions. According to section 91(2), the right includes participation in formulating policies, plans and programmes, strategies, and the making of legislation and regulations applicable to the conservation of the environment.

#### 6. Intergenerational equity

The principle of intergenerational equity obliges states to consider the long-term effects caused by human activities. The rationale is that present-day decisions may restrict future uses of natural resources and may force upon future generations considerable clean-up costs. The principle does not assume that future generations will be able to develop the necessary technology for this purpose for some of the damage caused may even be irreversible.

The appreciation of this principle is seen under the Stockholm, Rio Declaration, and some Constitutions. The principle, although not explained by the Rio or Stockholm Declarations, has been interpreted by the courts of law. For instance, in the *Juan Antonio Oposa and Others v the Honourable Fulgencio S. Factoran*, the petitioners brought an action on their own behalf and that of the yet unborn generations contending that the natural forest cover of their country was depreciating rapidly, and if care was not taken, there would be no forest left. They also contended that actions of the respondent amounted to a misuse of the natural resources which was also a property of succeeding generations. It was observed by the Philippines Supreme Court thus:

This case, however, has a special and novel element. [The petitioning] minors assert that they represent their generation as well as generations yet unborn. We find no difficulty in ruling that they can, for themselves, for others of their generation and for the succeeding generations, file a class suit. Their

personality to sue in behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned. Such a right, as hereinafter expounded, considers the "rhythm and harmony of nature." Nature means the created world in its entirety. Such rhythm and harmony indispensably include, inter alia, the judicious disposition, utilisation, management, renewal and conservation of the country's forest, mineral, land, waters, fisheries, wildlife, off-shore areas and other natural resources to the end that their exploration, development, and utilisation be equitably accessible to the present as well as future generations. Needless to say, every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology. Put a little differently, the minors' assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come.<sup>132</sup>

Ultimately, the Philippines Supreme Court held, inter alia, that the petitioners had a right to bring an action on behalf of the generations yet unborn and that every generation has an obligation to preserve nature for the next generation's full enjoyment.

#### 7. Principle of Common but Differentiated Responsibilities

This principle evolved from the general application of the principle of equity to the realisation that developing countries have peculiar needs which ought to be considered in the development, application, and construction of rules of international environmental law.<sup>133</sup> It appreciates the fact that different States have different environmental concerns, needs, and responsibilities from others. In this regard, the Rio Declaration' Principle 7 provides thus:

States shall co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of their different contributions to global environmental degradation, States have common but different responsibilities. The developed countries acknowledge the responsibility that they bare in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

This principle has two components: first, pertains to the common responsibility that States have with respect to environmental protection; and second, concerns the different circumstances of each State which must be taken into account. It is based on the recognition that developing nations and developed nations often have very different priorities in terms of environmental problems. The environmental problems of developing nations are often directly

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<sup>132</sup> G.R. No. 101083 30 July 1993, 7-8.

<sup>133</sup> P Sands *Principles of International Environmental Law* 2nd edition (2003) 286.

related to poverty, whilst environmental problems in developed nations are related to excessive industrialisation and high consumption lifestyles.

a) *Common Responsibility*

Common responsibility explains mutual responsibilities that States have concerning the protection of the environment, having due regard to nature, physical location, and historical meaning that is related to it.<sup>134</sup> Although natural resources can belong to one State, or can be shared, or can be one of common legal interest, or does not belong to any State, common responsibility only applies where the natural resource is under the sole jurisdiction of a single State.

b) *Differentiated Responsibility*

The differentiated responsibility of States regarding the protection of the environment is translated into environmental standards that have been shaped by numerous factors, including peculiar circumstances, developing countries' economic future, and the historical contribution to the environmental harm that has been caused.<sup>135</sup> The international community, in the Rio Declaration, acknowledged that 'environmental standards, management objectives, and priorities should reflect the environmental and developmental context to which they apply' and that 'special situation of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special priority.'<sup>136</sup>

## 8. "No Harm" Rule

The "No Harm" rule regulates State behaviour in respect of transboundary pollution. It is the most fundamental rule of international environmental law which is contained in the Rio Declaration (Principle), and Stockholm Declaration (Principle 21). Principle 2 provides:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

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<sup>134</sup> As above.

<sup>135</sup> As above.

<sup>136</sup> As above.

While principle 21 states:

States have the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

An interpretation of the two principles entails striking a careful balance between the territorial sovereignty of a state on one hand and a wider responsibility to the international community, on the other. Although the principle is not binding, it is an accepted principle of a customary rule of international law.

### **2.3.2 Theoretical underpinnings**

The concern for protection of the environment is as old as humankind. In recent times, this concern has heightened due to the manner in which the environment is utilised which has a bearing on the quality of human life. What is undoubtedly clear is that FDI in mining poses negative effects on the environment. Hassaballa argues that this happens when developed countries direct their polluting FDI outflows to developing countries where there are loose environmental laws, causing more pollution in developing countries. On the other hand, he also argues that FDI may have positive effects on welfare through the transfer of environmentally friendly techniques of production to developing countries with FDI flows from developed countries.<sup>137</sup> Regardless of either view, the interaction between FDI and the environment cannot be ignored. Theoretically, two main views typify the relationship between FDI and the environment: first, the Pollution Haven Hypothesis (PHH); second, the Race to the Bottom (RTB), and third, Race to the Top (RTT).

#### **1. Pollution Haven Hypothesis**

The PHH refers to the probability that FDI is drawn to countries where the environmental standards are weak. The general understanding of this theory is that any country with less strict environmental standards than one's own country is guilty of providing a pollution haven. According to Neumayer, such a description, however, would be misleading because countries cannot, in general, be expected to have the same environmental standards all over the world

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<sup>137</sup> H Hassaballa 'Environment and foreign direct investment: policy implications for developing countries' (2013) *Journal of Emerging Issues in Economics, Finance and Banking* 2 76.

regardless of whether they want to attract FDI.<sup>138</sup> Although primarily the PHH enunciates that FDI is attracted to countries with lax environmental regulations, it does advocate for stronger environmental regulations. Xing argues that the PHH has three justifications: (a) production costs are driven up by requiring certain equipment; (b) decrease in waste disposal capacity; and (c) prohibit certain factor inputs or outputs.<sup>139</sup> In all these instances, production costs are increased and it becomes imperative that the firm relocates its facilities to a country with lower costs of production. It is posited that the PHH purely focusses on the cost effectiveness of environmental regulations on polluting industries.

Arising from the aforesaid, PHH brings out three dimensions to the PHH: first, the relocation of high polluting industries from developed countries with strict environmental policies to developing countries where comparable policies are not in existence or are lax or not enforced. The second dimension concerns the dumping of hazardous waste generated from developed countries in developing countries; and third, is the unrestricted extraction of non-renewable natural resources in developing countries by MNCs.<sup>140</sup> Aliyu argues that:

A possible asymmetry exists between foreign capital and local environmental standards. When firms avoid environmental regulations by relocation it could trigger competition for lax environmental policy in order to gain comparative advantage in “dirty” goods production. The power of foreign firms, especially, and the desperate attempt to woo and tame foreign capital by poor countries might sometimes force these countries to lower the country-specific regulation.<sup>141</sup>

The view expressed by Aliyu posits that FDI and environmental standards are diametrically opposed. This means that, where the threshold for environmental standards is high, companies are more likely to avoid investing in such a country and instead go to one whose environmental regulations are lax. The notion of such an action stems from the fact that companies want to gain a comparative advantage, even at the expense of polluting the environment. This compromises the host state, which is desperate for FDI, to lower its environmental standards in an effort to attract more FDI to its jurisdiction. Eskeland and Harrison define PHH as follows:

The pollution haven hypothesis is, perhaps, best seen as a corollary to the theory of comparative advantage: as pollution control costs begin to matter for some industries in some countries, other

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<sup>138</sup> E Neumayer ‘Pollution havens: an analysis of policy options for dealing with an elusive phenomenon’ (2001) *10 Journal of Environment and Development* 2 147.

<sup>139</sup> Y Xing ‘Do lax environmental regulations attract foreign investment?’ 2000, 1.

<sup>140</sup> MA Aliyu ‘Foreign direct investment and the environment: pollution haven hypothesis revisited’ 8th annual conference on global economic analysis, Lübeck, Germany, June 9-11, 2005 2.

<sup>141</sup> As above.

countries should gain comparative advantage in those industries, if pollution control costs are lower there (for whatever reason).<sup>142</sup>

From the above description, it is apparent that this theory provides for comparative advantage enjoyed by a developer owing to less stringent environmental protection regimes that a country has put in place in the regulation of the environmental pollution.

The views expressed by Eskeland, Harrison and Aliyu explain why some scholars maintain that extractive industries prefer areas of low environmental standards. Mabey and McNally opine that, in the mining sector, the overriding decision where to locate is based on access to the resource in question. However, once this is determined, companies may thereafter consider and seek out investment incentives— such as lower environmental standards.<sup>143</sup> The rationale for doing so emanates from nature, demand for, and intense competition for basic extractive resources which allows companies to considerably benefit from the poor or lax environmental standards.

Zhang posits that the most contentious argument centres on whether differences between countries with respect to environmental regulations turn less developed states into ‘pollution havens’.<sup>144</sup> This view creates a presumption of the existence of environmental regulation-induced production cost variances that boost the firm’s desire to transfer its production facility.

In contrast to the PHH, Mabey and McNally, argue that another view— the “pollution halos” exists. This view postulates that foreign companies with better management practices pull environmental standards upwards. The motivation to do so is premised on: shareholder and consumer pressure from home countries; the need to harmonise quality standards inside global production chains; economies of scale from having global environmental standards; and that environmental performance is a source of competitive advantage in some companies.<sup>145</sup> In the mining sector, this may not be the case as mining companies rely on the environmental regulations that exist in the host state. Even though mining companies may have guidelines that require them to apply a higher standard where domestic regulations are lax or

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<sup>142</sup> GS Eskeland & AE Harrison ‘Moving to greener pastures? Multinationals and the pollution haven hypothesis’ (1997) World Bank Paper 1744, 4.

<sup>143</sup> N Mabey & R McNally ‘Foreign direct investment and the environment: from pollution havens to sustainable development’ WWF–UK Report, 1999, 40.

<sup>144</sup> J Zhang ‘Foreign direct investment, governance, and the environment in China: regional dimensions’ unpublished PhD Thesis, University of Birmingham, 2008 12.

<sup>145</sup> N Mabey & R McNally ‘Foreign direct investment and the environment: from pollution havens to sustainable development’ WWF–UK Report, 1999, 32.

lower, they may not be willing to do so as such guidelines are not enforceable or legally binding on them.

## 2. Race to the Bottom

The formulation of the RTB was primarily done to create local competition for investment and employment within federal states. Medalla and Lazaro argue that the RTB devolved environmental responsibilities thereby giving each state the liberty to set their own environmental standards in consonance with their priorities.<sup>146</sup> Where such standards are set high, this inevitably imposes high costs of production on polluting industries which, in order for them to remain competitive, relocate to countries which have relaxed their environmental standards. Kaplan asserts that the low levels of environmental standards in developing countries may be an attempt to attract FDI resulting in fierce competition among countries which undercut themselves in their environmental standards.<sup>147</sup> This implies that such countries, in order to attract FDI, deliberately lower their environmental standards thereby wooing polluting FDI to their territory.

Although generally, RTB is associated with relaxing of environmental standards by the host country, this is not always the case. OECD contends that, while low-cost operation could be an objective of FDI flow abroad, foreign companies generally seek consistent environmental regulation rather than lax environmental policy. In such instances, they are also likely to make new investment that protects and improve the environment provided a similar standard is enforced on their competitors.<sup>148</sup> The basis for this contention is premised on the reasoning that removing the cost advantage has the effect of disadvantaging the industries competitively at the international level.

Copeland and Taylor offer a contrary view by reiterating that, effects of pollution on FDI movement does not depend on stringency of policy.<sup>149</sup> This means that having a stringent policy does not curtail the effects of pollution unless if such policy is potent or can be enforced. Thus, the country may, as opposed to relaxing its environmental standards, not enforce the environmental regulations. Wagner and Timmins argue that FDI is attracted by the failure of the relevant authorities to enforce environmental regulations and this is because the FDI is

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<sup>146</sup> EM Medalla & DC Lazaro *Does trade lead to a race to the bottom in environmental standards?: another look at the issues* (2005) 4.

<sup>147</sup> M Kaplan 'Pollution haven hypothesis - how does foreign direct investment react to heterogeneous environmental regulation across countries? A critical examination of empirical surveys referee report' 8.

<sup>148</sup> OECD *Globalisation and environment: preliminary perspectives* (1997).

<sup>149</sup> BR Copeland & MS Taylor *Trade and the environment: theory and evidence* (2003).

located in regions with the highest rate of return and as lower regulatory standards ensure higher returns to capital.<sup>150</sup> Supporting this argument, Wheeler says that, local governments ignore environmental regulations to promote investment and economic growth, allowing businesses to minimise costs by polluting with impunity.<sup>151</sup> This occurs where the relevant authority, despite having the statutory authority to act in instances of violation of environmental regulations, decides not to act against an erring firm.

Xing argues that, although lax environmental regulation can attract FDI, its determination may not be easily ascertainable. In his view, 'while environmental pollution and movements of capital and "dirty" goods could be observed, lax environmental problem may be difficult to determine.'<sup>152</sup>

### 3. Race to the Top

The RTT is diametrically opposed to the PHH and RTB theories. Gray contends that having more robust environmental policies improves competitiveness in a market place by promoting efficiency and innovation, which in turn attracts foreign investors.<sup>153</sup> His reasoning focusses on the performance of an investor from a view point of the environment once the investment is brought into the host state. This implies that more robust environmental policies epitomise a comparative advantage for countries. According to Pazienza, over time, the process becomes characterised by the positive effects of technological advancement which in turn promotes efficiency, innovation, and competitiveness thereby improving the whole market place.<sup>154</sup>

Birdsall and Wheeler argue that stricter environmental regulations can encourage enterprises to carry out technical innovations and introduce cleaner energy and/or environmentally friendly technology and this would not only affect the relocation of enterprises with FDIs but also make the local environment better.<sup>155</sup> Eskland and Harrison add that spill over of cleaner technology and industrial upgrading requiring high standards of

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<sup>150</sup> UJ Wagner & CD Timmins 'Agglomeration effects in foreign direct investment and the pollution haven hypothesis' (2009) 43 *Environmental Resource Economics* 231-256.

<sup>151</sup> D Wheeler 'Racing to the bottom? Foreign investment and air quality in developing countries' World Bank Development Research Group, 2000, 2. Paper available at <http://infohouse.p2ric.org/ref/22/21758.pdf> (accessed 31 March 2017).

<sup>152</sup> Y Xing & CD Kolstad 'Do lax environmental regulations attract foreign investment?' (2002) 21 *Environmental and Resource Economics* 1 22.

<sup>153</sup> KR Gray 'Foreign direct investment and environmental impacts: is the debate over?' (2002) 11 *RECIEL* 3 310.

<sup>154</sup> P Pazienza *Relationship between FDI and the natural environment: facts, evidence and prospects* spring (2014) 38.

<sup>155</sup> N Birdwell & D Wheeler 'Trade policy and industrial pollution in Latin America: where are the pollutions havens?' (1993) 2 *Journal Environmental Development* 137 149.



environmental protection is attainable where regulations are stringent.<sup>156</sup> In support of these arguments, Mihci et al. state that stringent environmental regulations push companies to innovate and create new technologies that are environmentally friendly and later become net exporters of these new technologies.<sup>157</sup> This reasoning is flawed in the sense that, although stringent environmental regulations may increase compliance costs, the benefits incurred from innovation through the use of environmentally friendly techniques can offset the cost of compliance. This occurs due to the fact that net compliance cost may decrease with stringency and may even change into benefit.

The expectation is that foreign companies have cleaner technologies and as such, their environmental performance is better— where there is a higher concentration of industries, foreign companies are more likely to meet environmental costs associated with their activities due to their ability to control the market. Further, by adhering to a collective approach, these companies will have greater impetus to establish common codes of conduct and adopt better environmental practices.<sup>158</sup> In practice, this may however not be attainable. The adoption of codes of conduct or better environmental practices has not always been in a firm's corporate nature. In most instances, such codes are adopted due to the requirements imposed on them by funders or entities from whom they obtain funds for their operations. In other words, the weakness of the theory stems from the fact that, in decision making, there are other factors that come into play— market and industrial forces, formal and informal regulatory forces, and ownership —leading to competitive advantage with regards to the positive implications of the interface between FDI and the environment.

#### *Consensus between the PHH, RTB, and RTT theories?*

The reasoning for the PHH or RTB is that strict environmental standards in some countries drive up costs of production and as such, highly polluting companies relocate to other countries with lower environmental regulations. The purpose for doing so is to take advantage of less stringent environmental regulations in that other country. The consequence being that, the other country may 'race to the bottom'— undervalue its environmental damage in order to attract

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<sup>156</sup> GS Eskland & AE Harrison 'Moving to greener pastures? Multinationals and the pollution haven hypothesis' (2003) 70 *Journal Development Economy* 1–23.

<sup>157</sup> H Mihci, S Cagatay & O Koska 'The impact of environmental stringency on the foreign direct investment of the OECD countries' (2005) 7 *Journal of Environmental Assessment Policy and Management* 679 704.

<sup>158</sup> As above.

more FDI.<sup>159</sup> The RTT is contrary to both the PHH and RTB in that it asserts that stringent environmental regulations do attract FDI.

The law regulating the environment or FDI does not contain explicit or implied provisions relating to either the PHH, RTB or indeed the RTT. It is devoid of such. However, in most of the investment treaties that Zambia has signed or is a party to, there is a requirement that, in achieving the treaty obligations, the country must not lower its domestic environmental standards. The challenge may not be lowering of standards but either lack of enforcement or inherently weak regulations. These treaty obligations do not even spell out the environmental standards in the first place. Although impliedly the host state is expected to raise its environmental standards, these may only act to its own detriment.

It is clear from literature that no single comprehensive theory explains the notion of environmental protection in relation to mining activities. However, the consensus for these theories lies in their concern with environmental regulations of the host state. Whichever the case, the end result lies between excessive levels of pollution and environmental degradation.

## 2.4 Human rights

The expression 'human rights' is a recent terminology which emerged after the Second World War. The establishment of the United Nations in 1945 coupled with the adoption of the Universal Declaration of Human Rights (UDHR) in 1948 replaced the phrase 'natural rights' with 'human rights'.<sup>160</sup>

The term 'human rights' consist of two distinct terms 'human' and 'rights'. A 'human' can be said to be a Homo sapiens species that is to say, a man, woman or child or in simple terms, a person. The word 'right' is unclear and multifaceted and its interpretation does, to a large extent, depend on the context in which it is used. Generally, a 'right' can be said to be that which is 'morally or socially correct or acceptable' or 'agreeing with the facts or truth' or 'accurate or correct' or 'speaking, acting, or judging in a way that agrees with the facts or truth'.<sup>161</sup> The Stanford Encyclopaedia of Philosophy defines it as 'entitlements (not) to perform

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<sup>159</sup> J Zhang 'Environmental regulations and foreign direct investment' (2006) 1. Available at: <https://www.nottingham.ac.uk/gep/documents/conferences/2006/postgradconf2006/jingzhang-postgradconf2006.pdf> (accessed 30 March 2017).

<sup>160</sup> It has been argued that the phrase 'natural rights' had fell into disfavour due to the controversy that surrounded the concept of natural law. See: <https://brightkite.com/essay-on/the-foundation-developing-and-significance-of-human-rights> (accessed 11 July 2017).

<sup>161</sup> <http://www.merriam-webster.com/dictionary/right> (accessed 10 May 2016).

certain actions'.<sup>162</sup> This definition dominates modern understandings of what actions are permissible. As a moral concept, it provides a logical transition from the principles guiding relationships between persons.<sup>163</sup> Thus, accepting a set of *rights* means the approval of a distribution of freedom and authority, as well as to authorise what may, must, or must not be done. Its sanction is independent and done without requiring anyone's permission.

In respect of the term 'human rights', these can be said to be basic entitlements consisting of rights and freedoms that are possessed by every human being by reason of them being human. They are freedoms established by custom or international instruments for the purpose of protecting the interests of human beings as well as regulating the conduct of governments. According to Duhaime Law Dictionary, a human right is:

An individual's statutory right to equal treatment and free from discrimination prohibited by statute and which, generally, provides a civil remedy to provide compensation or to punish such discrimination when it is reported.<sup>164</sup>

This definition is restrictive as it views a human right in terms of equal treatment and freedom from discrimination. Cranston argues that a human right is:

A universal moral right, something which all men everywhere at all times ought to have, something which no one may be deprived without a grave affront to justice, something which is owing to every human being simply because he is human.<sup>165</sup>

Cranston's definition classifies a human right as a moral right. A moral right offers a 'checklist' of the characteristics that an individual must possess in order to enjoy that right. This means that being human alone cannot suffice. This explains why Cranston uses the words 'ought to have' and 'something which no one may be deprived.' In Phillippe Cullet's view:

...all human rights represent universal claims necessary to grant every human being a decent life that are part of the core moral codes common to all societies.<sup>166</sup>

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<sup>162</sup> <http://plato.stanford.edu/entries/rights/> (accessed 10 May 2016).

<sup>163</sup> This would mean that, a 'right' is a moral principle defining and sanctioning a man's freedom of action in a social context. See: [http://aynrandlexicon.com/lexicon/individual\\_rights.html](http://aynrandlexicon.com/lexicon/individual_rights.html) (accessed 10 May 2016).

<sup>164</sup> <http://www.duhaime.org/LegalDictionary/H/HumanRight.aspx> (accessed 10 May 2016).

<sup>165</sup> M Cranston *Human rights today* (1962) 40.

<sup>166</sup> P Cullet 'Definition of an environmental right in a human rights context' (1995) 13 *Netherlands Quarterly of Human Rights* 26.

The view expounded by Cullet furthers Cranston's definition— it is not only being human that makes a right complete. A human being should be able to claim the right in order to live a decent life. The United Nations states that:

Human rights are universal legal guarantees protecting individuals and groups against actions and omissions that interfere with fundamental freedoms, entitlements and human dignity.<sup>167</sup>

This definition regards human rights as legal guarantees— they offer legal protection to individuals against those that interfere with their freedom, entitlement, and dignity. In other words, human rights cloth individuals with certain freedoms, entitlements, and dignity which must be protected by the law. Where this is not so, an individual or group can take action against such an action or omission.

The definitions cited above all bring in three aspects: first, the universality of human rights as legal guarantees— these rights are generally agreed upon and are possessed by everyone; second, have a moral basis —they exist regardless of whether or not they are recognised; and third, the basic intent is to ensure dignity in their protection of individuals and groups. It is stated here that human rights and the protection thereof, outline the minimum standards that must be adhered to by those in authority. They prescribe the manner in which those in authority treat their people. The standards also limit the exercise of governmental power while obliging it to put in place a foundation that enables its people to exercise their rights through the application of affirmative measures.<sup>168</sup>

#### **2.4.1 Characteristics of human rights**

There are three primary characteristics that set apart human rights from other references to “rights”— inherence and inalienability, universality, and indivisibility, interdependence and interrelation.

##### **1. Inherence and inalienability**

Human rights are considered as ‘inherent’ as they flow from nature and are acquired at birth. The Vienna Declaration states that ‘human rights and fundamental freedoms are the birth right

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<sup>167</sup> <http://www.ohchr.org/Documents/Publications/FAQen.pdf> (accessed 10 May 2016).

<sup>168</sup> Austrian Development Agency *Human rights manual guidelines for implementing a human rights based approach in ADC* (2010) 6.

of all human beings; their protection and promotion is the first responsibility of governments.<sup>169</sup> Inherence of human rights entails that they are not created by law and as such, exist independently of it. The law only recognises their existence and facilitates their enforcement.

The term inalienability implies that something 'cannot be bought, sold, or transferred from one individual to another.'<sup>170</sup> These rights do not have to be given, bought, earned or inherited. They belong to people simply because they are human. This means that a person does not have to do anything to prove that he or she is entitled to human rights. The only qualification needed is that one is a human being. Inalienability also entails that, once a right has accrued, it cannot be taken away except in certain circumstances permissible at law. Similarly, a person cannot renounce these rights by himself.

## 2. Universality

Human rights are said to be universal due to their acceptability in more one jurisdiction. The acceptability of these rights form the foundation of international human rights law. Universality, as a characteristic of human rights, was first underscored in the UDHR in 1948. Today, numerous conventions, declarations, and resolutions on international human rights have reiterated the principle. For instance, the Vienna World Conference on Human Rights of 1993, has recognised the duty that states have to promote and protect all human rights and fundamental freedoms, regardless of their political, economic and cultural systems. The Vienna Declaration states:

The World Conference on Human Rights reaffirms the solemn commitment of all States to fulfil their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law. The universal nature of these rights and freedoms is beyond question.<sup>171</sup>

This affirmation confirms that States are obliged to ensure fulfilment of all human rights contained, not only in the Charter of the United Nations but also 'other instruments relating to human rights, and international law.' This essentially means that human rights are not limited to

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<sup>169</sup> Article 1, Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, 23 June 1993.

<sup>170</sup> <http://legal-dictionary.thefreedictionary.com/Inalienable+rights> (accessed 11 July 2017).

<sup>171</sup> Section 1 Paragraph 1 of the *Vienna Declaration and Programme of Action*.

the Charter of the United Nations or instruments made pursuant to it, but also other instruments. These instruments may relate to human rights or international law.

### 3. Indivisibility, interdependence and interrelation

Human rights are said to be indivisible, interdependent and interrelated. This means that their protection depends on effective promotion as well as protection of other rights for example, the right to life depends, among others, on the right to food, health and a clean and healthy environment. The United Nations Office of the High Commissioner for Human Rights observes:

All rights are indivisible, whether they are civil and political rights, such as the right to life, equality before the law and freedom of expression; economic, social and cultural rights, such as the right to work, social security and education or collective rights such as the right to development and self-determination are undividable, interrelated and interdependent. The improvement of one right facilitates the advancement of the others. Likewise the deprivation of one right adversely affects the others.<sup>172</sup>

The Vienna Declaration regards all human rights as interdependent and interrelated and as such, they should be treated in a fair and equal manner placing the same emphasis, regardless of their category. It is the duty of the State, regardless of its political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms. However, in doing so, it must consider the significance of national and regional particularities such as historical, cultural and religious background.<sup>173</sup> Suffice to state that human beings have numerous needs which must be met at the same time. It is thus imperative to ensure to attain a minimum standard so as to avoid or prevent violation of another. There are no human rights which are more superior to others.

### 4. Equal and non-discriminatory

Non-discrimination applies to all human rights recognised under international human rights law. As a principle, human rights apply equally and on the basis of non-discrimination. This implies that, human rights are all at the same footing and apply to every person regardless of their race, creed, sex or religious belief. Under the UDHR, article 1 declares that 'All human beings are born free and equal in dignity and rights.'

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<sup>172</sup> <http://www.ohchr.org/EN/Issues/Pages/WhatAreHumanRights.aspx> (accessed 30 September 2015).

<sup>173</sup> Sec. I Par. 5.

## 5. Both rights and obligations

Human rights contain both rights and obligations. Under international law, States assume obligations and duties to respect, protect and to fulfil human rights. The obligation to respect means that States are to refrain from interfering with the enjoyment of human rights. The obligation to protect requires States to protect individuals from abuse of their human rights. The obligation to fulfil compels States to positive action to facilitate the enjoyment of basic human rights. The obligations also extend to individuals who are also required to respect other person's human rights.

### 2.4.2 Classification of human rights

The classification of human rights has been variant and with emphasis on whether such rights are fundamental or non-fundamental, violable or non-violable, collective or individual, justiciable or non-justiciable, and procedural or those that are substantive.<sup>174</sup> Despite these variations, at international level, human rights are often divided into different categories, sometimes referred to as 'generations'. The categorisation of human rights reflects their chronological recognition in their historical evolution. The categorisation should not be seen as depicting the level of their significance or their hierarchy but rather as they appeared in international human rights documents. In principal, human rights are categorised into three groups: first, civil and political rights; second, economic, social and cultural rights; and third, group rights.<sup>175</sup>

#### 1. Civil and Political Rights

These rights are regarded as part of the first generation because they were generally the first to be recognised as rights of the individual. As a category of human rights, these place emphasis on the freedom of the individual and oblige the State to abstain from interfering in the life of the individual. In that sense, these rights impose a "negative" obligation on the State. These rights do, however, place a duty on the State to protect these rights. The duty requires, on the one hand, a functioning judicial mechanism and on the other, establishment of laws aimed at protecting a particular right. Where legislative measures are not enough, the

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<sup>174</sup> JC Mubangizi 'Towards a new approach to the classification of human rights with specific reference to the African context' (2004) 4 *African Human Rights Law Journal* 95.

<sup>175</sup> 'Classification of Human Rights' 3. Available at: <http://tandis.odhr.pl/documents/hre-compendium/en/CD%20SEC%203/HRE%20Package%20for%20Schools%20Tajikistan/HRE%20Package%20Extbook%20Tajikistan%20ENG.pdf> (accessed 20 March 2015).

State is required to take actual steps of enforcement to prevent the violations of those rights or, if a violation nevertheless occurred, to punish its perpetrators. In other words, although the government has a duty in ensuring fulfilment of these rights, it has to take active steps to ensure that the obligation is complied with by all authorities. Examples of such include: the rights to life; liberty and security of person; freedom from torture and slavery; political participation; freedom of opinion, expression, thought, conscience and religion; and freedom of association and assembly.

## 2. Economic, Social and Cultural Rights

These are rights whose realisation is aimed at bringing about social justice and equity. The degree of realisation of these rights does, to a large extent, depend on the financial resources of a country. The realisation of these rights is aimed at bringing about social justice and equity. They are said to require a State's "positive action", meaning that, the State should take deliberate or active steps to bring about conditions in which every person adequately enjoys his or her economic, social and cultural rights i.e. the State has a duty of performance. These rights reflect the ideas of assigning conditions of living to a person in the sphere of labour, employment, welfare, and social security even the environment.

## 3. Collective or group Rights

Collective or group rights, also called the right of solidarity, reflect the idea of interdependence of individual and the community. These rights include: the right to peace, development, clean environment, or self-determination. They are held by a group as a group rather than by its members severally. The "group" in "group right" describes the nature of the right-holder; it does not describe the mere fact that the right is confined to the members of a group rather than possessed by all members of a society or by humanity at large.

Much of the controversy that surrounds group rights focuses on whether groups can hold rights and, if they can, on the conditions that a group must satisfy if it is to be a right-holder.<sup>176</sup> Proponents of these rights conceive right-holding groups as moral entities in their own right, so that, as a right-holder, a group has a being and status analogous to those of an individual person. Others conceive group rights as rights that are shared in and held jointly by

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<sup>176</sup> <https://plato.stanford.edu/entries/rights-group/> (accessed 9 December 2016).



the group's members.<sup>177</sup> Still others are merely concerned about the threats that such rights pose for individuals and their rights.<sup>178</sup> These views demonstrate that these rights are very complex and vague making their enforcement, and even simple recognition, very difficult.

### 2.4.3 Human rights approaches

The theoretical foundation for human rights consists of theories or philosophies that have developed a general understanding of human rights or indeed how they are used. The theories are informed by numerous academic fields which include: law, anthropology, sociology, and philosophy. These fields provide frameworks that underscore human rights rather than discussions of the concrete norms. Thus, while some may be supportive, others may offer critical aspects. The 'supportive theories' give a foundation and legitimation to rights and in a way, predate human rights as codified and enshrined in conventions.<sup>179</sup> There are also others that encompass the historical origin of human rights and focus on how they are applied. The common feature of these theories, whether supportive or critical, relates to their ability to deepen the understanding of human rights from both the normative and also the critical platforms by use of varying theoretical horizons.

#### 1. Natural law

This theory is founded on the assertion that nature has endowed man with such rights by virtue of being a human being. It entails that, our nature possesses something that justifies that a human being has special rights that can be claimed. Paine describes natural law as that 'which appertain to man in right of his existence. Of this kind are all the intellectual rights, or rights of the mind, and also all those rights of acting as an individual for his own comfort and happiness, which are not injurious to the natural rights of others.'<sup>180</sup> In Paine's view, the rationale for such a law is to create a comfortable and happy environment for man to enjoy. In other words, natural law constitutes conditions that are inherent in man's existence which condition enable man to be comfortable and happy. From Paine's argument, it is clear that natural rights focus on man. Tonnies posits thus:

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<sup>177</sup> As above.

<sup>178</sup> As above.

<sup>179</sup> A Valen-Sendstad 'Theories of human rights in relation to understandings of human rights education: the relevance to diversity' unpublished PhD Thesis, University of Birmingham, 2010 1.

<sup>180</sup> T Paine *The rights of man* (1985) 68.

The universal term 'man' already conceals the assertion that all people have an essential quality in common, and it is the same quality, which is considered as dominant over all other heterogeneous qualities that the statement appears to be justified that people are 'equal' despite their apparent diversity.<sup>181</sup>

The assertion of Tonnies underscores the quality that man possesses and its superiority over other creatures. The challenge posed by this view lies in the determination of which quality man has but not other creatures. Addressing this issue is not an easy task as the answer may be based either on religious or scientific beliefs. According to Walter, he asserts that 'the question of human nature is transdisciplinary. Psychologists, sociologists, neuroscientists, philosophers and many more work on mapping human nature.'<sup>182</sup>

Philosophers, who dominate the scientific debate, question which quality every human being has in common. Kant believes that the quality common in man is 'rationality' as man is 'the only rational creature on earth.'<sup>183</sup> Rorty posits that 'Traditionally, the name of the shared human attribute that supposedly 'grounds' morality is 'rationality'.<sup>184</sup> The gist of the scholars' view on natural law lies in the understanding that man is capable of reason and this is what makes him a human being.

## 2. Historical rights

The historical rights theory has its roots in history and customs. It argues that rights are a product of history and originate in its customs which are passed from one generation to another. It views custom as fundamental to the growth and development of man simply because they are maintained by a long unbroken custom and the generations have habitually followed them.

The proponents of the historical theory postulate that these rights are as a result of historical evolution of customs. The thrust of this view lies in the fact that, while rights are recognised as those created by law, in ancient times, rights were based on customs and usage. They are considered fundamental to man because they are maintained by a long unbroken custom which successive generations habitually follows. Such rights have, with the passage of

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<sup>181</sup> S Tonnies *Der westliche Universalismus: die denkwelt der menschenrechte* (2001) 39.

<sup>182</sup> L Walter 'Theories of universal human rights and the individual's perspective' 25 *Politikon: IAPSS Political Science Journal* 124.

<sup>183</sup> I Kant 'Idea for a universal history from a cosmopolitan point of view' (1963) 13. Translated by LW Beck, RE Anchor & EL Fackenheim *On History* Indianapolis.

<sup>184</sup> R Rorty 'Human rights, rationality, and sentimentality' in R Rorty (ed.) *Truth and Progress* (1998) 171.

time, evolved and became the basis of law. Burke asserts that whereas the Glorious Revolution of England was based on the customary rights of the people, it was not so for the French Revolution which was based on the abstract rights of man.<sup>185</sup> The point Burke was putting across was that the French Revolution resulted from conditions that prevailed in that country. The Glorious Revolution merely affirmed the historic liberties and heritage of the English since the times of the Anglo-Saxons.

A view has been expressed to effect that, historical rights should be accorded on the basis of their contribution to social utility. According to Ritchie, utility varies historically in that, what was useful or necessary at one time may not be so at another. Thus, any satisfactory theory of rights has to be historically conditioned.<sup>186</sup>

While it is correct that law can have a historical origin, it is not, however, all rights that are a product of history. In fact, certain rights are created by laws that a country enacts, some of which do not have history as a source of their origin. In relation to this, Hegel is at pains to distinguish the historical or legal approach to "positive law" (Gesetz) and the philosophical approach to the Idea of a right (Recht). In his view, the former involves a mere description and compilation of laws as legal facts while the latter probes into the inner meaning and necessary determinations of law or right.<sup>187</sup> It is asserted that the justification of something does not lie in finding its inherent rationality, its origins or longstanding features but rather of studying it in a conceptual manner.

### 3. Social rights theories

The social rights theory states that rights are a creation of society, law, customs and traditions and as such, yield to what is socially useful or socially desirable. Hence, what is socially useful should have for its test the greatest happiness of the greatest number which is the measure of utility. However, utility should be determined by considerations of reason and experience. Therefore, one's rights are built upon one's contribution to the well-being of society and utility is the measuring rod of a particular right. Fabre states that people have social rights to minimum income, housing, education and health care and these rights are positive rights which come from the State.<sup>188</sup> This implies that, where the State has not afforded a person such rights, there can be no claim arising for their enforcement. Pogge has taken a related but

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<sup>185</sup> E Burke *Reflections on the Revolution in France* (1986).

<sup>186</sup> WJ Mander *British idealism: A History* (2011) 260.

<sup>187</sup> <http://www.iep.utm.edu/hegelsoc/> (accessed 11 April 2017).

<sup>188</sup> C Fabre 'Constitutionalising social rights' (1998) 6 *Journal of Political Philosophy* 263.

slightly different approach and emphasises Article 28 of the UDHR which guarantees everyone the right 'to a social and international order'. In his view, Article 28 lays down a norm that places negative duties on States and individuals not to be complicit in a manner that unfairly disadvantages poor countries and their people.<sup>189</sup> It is clear from this view that the emphasis regarding social rights lies in their respect and not necessarily a claim for their redress in the event of failure on the part of the State.

Hodgson points out that the lack of access to educational opportunities typically limits (both absolutely and comparatively) people's abilities to participate fully and effectively in the political and economic life of their country.<sup>190</sup> The view taken by Hodgson imply that education is a right that must be respected and once this is done, it enables people's full participation in their country's governance.

Marx, writing on the importance of the political economy on society, focused on the "material conditions" of life.<sup>191</sup> In his view, there are social rights that accrue to people, which rights are material for the fulfilment of their rights. Despite taking this view, the fundamental element of social rights lies in their realisation i.e. where the State has not provided for them, they cannot be realised as they are not inherent to man.

#### 4. Legal rights theory

This theory asserts that rights are created and maintained by the State and so, the state is the only source of the right. Beyond the State, an individual has no rights at all and can never claim rights against the state. The theory dispels the naturalists' view by arguing that rights are not natural to man.

These rights exist under the rules of legal systems and raises a number of philosophical issues: first, whether legal rights are conceptually related to other types of rights such as moral rights; second, the analysis of the concept of a legal right; third, the entities that could be legal right-holders; fourth, whether there any kinds of rights which are exclusive to certain legal systems as opposed to morality; and finally, what rights legal systems ought to create or recognise.

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<sup>189</sup> <https://plato.stanford.edu/entries/rights-human/#SocRig> (accessed 11 April 2017).

<sup>190</sup> As above.

<sup>191</sup> A Callinicos *Social theory: a historical introduction* (1999) 4.

Plato remarks that 'indiscriminate equality for all amounts to inequality and both fill a state with quarrels between its citizens.'<sup>192</sup> He argues that a complex equality aimed at conferring praise and other benefits to those who deserve them is as strict as justice requires.

Hohfeld explaining legal relations and rights came up with different domains on legal doctrine. This has been endorsed by other legal scholars. For instance, Kramer argues that legal rights are claims while Waldron adds that legal rights capture the concept of individual rights used in political morality. In Simmonds's view, legal rights consist of four concepts: claim, liberty, power and immunity. In support of Simmonds's view, Coleman posits that these rights are established by any combination of the concepts. This position has been endorsed by Hart who asserts that legal rights signify an individual's power of control, hence a bilateral liberty or power are only suitable combinations of Hohfeldian instances. In buttressing Hart's view, Wellman posits that it is only the suitable combinations of Hohfeldian instances that could constitute a real right.<sup>193</sup>

The views of these scholars have not been free from opposition by others. Bentham argues that only institutional rights, such as legal rights, were real and concluded that rights were really secondary to obligations. In his own view:

The law, when it imposes on one part a duty of extra-regarding kind, does thereby confer upon some other party rights to services: a right to services to be rendered by the party on whom the duty is imposed..... Every primordial law that is efficient is a command: every legal command imposes a duty: every legal command by imposing a duty on one party, if the duty is not only of the self-regarding kind, confers rights to service upon another.<sup>194</sup>

The point raised by Bentham is that the law imposes a duty on the rights holder and thus, the holding of such a right entails that the holder is subject to the command of the rights giver. This means that where a person holds such rights, they can only act within the confines of that law that grants the right. In sharp contrast to this view, Kant brings in the will theory in which he defines the rights as powers that a person has over another person to the extent of his conduct. He postulates:

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<sup>192</sup> PZ Eleutheriades *Legal rights* (2008) 2.

<sup>193</sup> As above.

<sup>194</sup> J Bentham *Of laws in general* (1970) 57–58.

My possession of another's choice, in the sense of my capacity to determine it by my own choice to a certain deed in accordance with laws of freedom...is a right (of which I can have several against the same person or against others).<sup>195</sup>

In Kant's view, the possession of a right does not entail that the rights holder is deprived of making their own choices regarding how they are to enjoy their right. The law, though it prescribes the right, should allow the exercise of free will.

Jones, in deciphering legal rights, distinguishes between claim rights and liberty rights. He argues that a claim right is a right one holds against another person(s) who owe a corresponding duty to the right holder. On liberty rights, these are rights which exist in the absence of any duties not to perform some desired activity and thus consist of those actions one is not prohibited from performing.<sup>196</sup> This view goes beyond Bentham and Kant's. While Bentham emphasises the duty of the rights holder, Kant argues the free will to exercise the right. This theory can be criticised on the basis that it does not identify the character of the State and neither does it provide a basis to know what right ought to be ensured.

#### *Common aspects of human rights theories*

The approaches that underlie the basis for human rights have one thing in common– they are all based on dignity and wellbeing of humanity. They are inspired by a desire to protect and foster some quality of life, that is to say, because a person is alive, he or she should live a life that is filled with dignity. Haller observes:

Human rights are negatively oriented towards the real conditions. If human rights theories are proposed and philosophically backed, the reason for its proposal is always an unsatisfactory reality, a painful experience of an affront to human dignity.<sup>197</sup>

As rightly observed by Haller, the basis for theories or philosophical underpinnings of human rights is protection of human dignity. Wholesomely, this entails that, the notion of human rights concerns itself with the preservation of life. However, this should not lead to a conclusion that the differences between the numerous theories on human rights are simply of emphasis. It may well be argued that the 'distinctive focus of each theory results in significant variations in

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<sup>195</sup> I Kant *Practical philosophy* (1999) 421.

<sup>196</sup> <http://www.iep.utm.edu/hum-rts/#H2> (accessed 11 April 2017).

<sup>197</sup> G Haller *Menschenrechte ohne demokratie? der weg der versöhnung von freiheit und gleichheit* (2013) 29.

their lists of specific human rights or the kind of activities human may indulge in.<sup>198</sup> In the end, the basis for human rights may well depend upon what one wishes to protect.

## 2.5 Environmental rights

Human beings depend on the environment for their livelihood. The culture of man is intensely entrenched in the belief that the spiritual realm exists in nature and as such, it is imperative that nature is respected. This means that man's livelihood and culture is connected to having a sound environment. Where the environment is disturbed, the connection is broken thus negatively affecting man's enjoyment of the environment and the right to do so.

Human rights, as discussed in §2.4 above, are universal, bear a moral basis, and whose basic intent is to ensure the dignity of all human beings. To fully enjoy these rights, it is imperative that the environment is safe and healthy. Likewise, to have a safe and healthy environment, it is critical that human rights are protected. In recent times, there has been a debate on whether a healthy environment meets these requirements and if so, qualifies as a human right. According to Hayward, 'as a moral proposition, the claim that all human beings have the fundamental right to an environment adequate for their health and well-being is . . . unimpeachable.'<sup>199</sup> Shue asserts that 'unpolluted air, unpolluted water, adequate food' are among the basic human rights.<sup>200</sup> Birnie and Boyle posit that constitutional recognition of the right to a healthy environment 'would recognize the vital character of the environment as a basic condition of life, indispensable to the promotion of human dignity and welfare, and to the fulfilment of other rights.'<sup>201</sup>

It is clear from the assertion of these scholars that there is a correlation between environmental protection and human rights in that, both fields strive to produce better conditions of life on earth— while environmental law seeks to protect nature for itself and man, human rights allow individuals and groups to claim their rights. Toepfer contends:

The fundamental right to life is threatened by soil degradation and deforestation and by exposures to toxic chemicals, hazardous wastes and contaminated drinking water...Environmental conditions clearly

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<sup>198</sup> A Heard 'Human rights: chimeras in sheep's clothing' 1997. Available at: <http://www.sfu.ca/~aheard/intro.html> (accessed 14 February 2017).

<sup>199</sup> T Hayward 'Constitutional environmental rights: a case for political analysis' (2000) 48 *Political Studies* 3 568.

<sup>200</sup> H Shue *Basic rights: subsistence, affluence, and U.S. foreign policy* (2nd edition)(1996) 23.

<sup>201</sup> P Birnie & A Boyle *International law and the environment* (2nd edition)(2002) 255.

help to determine the extent to which people enjoy their basic rights to life, health, adequate food and housing, and traditional livelihood and culture.<sup>202</sup>

As observed by Toepfer, the degrading, polluting, or contamination of water, air, and land affects the right to life. It is argued that the enjoyment of universally accepted human rights hinges on sound environment thus forming a fundamental part of modern human rights dogma. Thus, where these mediums are polluted or contaminated, it is impossible for man to enjoy their use. Judge Weeramantry warns that 'damage to the environment can impair and undermine all the human rights.'<sup>203</sup> It may well be said that the operation of the environment serves as a precondition for human rights fulfilment.

Although it is clear that human rights and environmental protection are connected, there is no prescribed level below which the threshold of the environment quality must decrease to before a violation of human rights can be said to have occurred. This presents a dilemma regarding the content, nature, and the scope of the environmental right or right to a clean and healthy environment. Boyd asserts that:

What is not clear with respect to substantive environmental rights is precisely what level of environmental quality is to be protected. This will depend, in part, on the specific language of the right, as enacted in a constitution and/or legislation. It will also depend on the economic, ecological, social, and political circumstances of a particular nation. The content of an environmental right will evolve over time, and just as other human rights vary in content from nation to nation, so will environmental rights.<sup>204</sup>

The assertion of Boyd questions the level of protection of the environmental quality. Unlike other traditional human rights which are easily ascertainable, the environmental right may pose a challenge to its determination may well depend on the couching of the right and the prevailing economic, social, ecological, and political circumstances. Alfredsson and Ovsiook opines:

...to successfully anchor the human rights dimension in environmental work, it is not enough to establish an interrelationship between the two. One must also specify the contents of existing and emerging standards, examine the sources and acceptance of the relevant rules, point at the exact beneficiaries of

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<sup>202</sup> A Statement made at the 57th session of the Commission on Human Rights, 2001.

<sup>203</sup> *Case Concerning the Gabikovo-Nagymaros Project* [1997] I.C.J. Rep. 7, 91–92.

<sup>204</sup> DR Boyd 'The environmental rights revolution: constitutions, human rights, and the environment' unpublished PhD Thesis, University of British Columbia, 2010 40.



these rules, and make realistic suggestions on implementation methods, including the problem of transboundary transgression.<sup>205</sup>

The view expressed by Alfredsson and Ovsioek not only calls for specifying the content of the right, but also, examining the standards, sources, and acceptance of rules. The need for standards goes to the root of enforcement of the right. This explains the necessity of an environmental dimension in human rights debates.<sup>206</sup> However, the concerns raised, on the one hand, is the practical effects of acknowledging the relationship existing between the fields of human rights and environmental protection. Sands asserts that addressing this particular concern requires an assessment of a distinction that has been made between civil and political rights on the one hand, and economic and social rights on the other.<sup>207</sup> Economic and social rights define basic rights that a person is entitled to and such an entitlement includes the threshold below which environmental set standards must fall if they are to be lawful. Although the existence of these rights is not generally accepted, human rights bodies have tended to determine the upholding of environmental standards and assessing whether such a level is satisfactory.<sup>208</sup> It is only when there is a violation of these rights that the connection to environmental degradation is made.

The other concern raised is that environmental rights do not fit properly into one of the 'generations' of human rights. This assertion views environmental rights from three dimensions: first, current civil and political rights provide a basis for giving affected individuals access to information on environmental processes and judicial remedies and as such, these rights are procedural as they enhance openness, participation, and accountability.<sup>209</sup> This view is anthropocentric to the extent that it focusses on the detrimental effect on human beings, and not on the environment itself.

The second view considers a safe, clean, sound, or healthy environment as economic or social right which is equivalent to rights enshrined in the International Covenant on Economic Social and Cultural Rights. The argument put forward is that applicable environmental rights make reference to rights that already exist in the field of international human rights law. A healthy environment is essential for a person to enjoy their right to life, for, without an

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<sup>205</sup> G Alfredsson & A Ovsioek 'Human rights and the environment' (1991) 60 *Nordic Journal of International Law* 22.

<sup>206</sup> P Cullet 'Definition of an environmental right in a human rights context' (1995) 13 *Netherlands Quarterly of Human Rights* 25.

<sup>207</sup> P Sands, J Peel, A Fabra & R Mackenzie *Principles of international environmental law* (3rd edition)(2012) 779.

<sup>208</sup> As above, 780.

<sup>209</sup> CI Bruch, W Coker & CV Arsdale *Breathing life into fundamental principles: implementing constitutional environmental protection in Africa* (2001) 5.

environment that is healthy, life cannot be possibly enjoyed. This means that utilising the prevailing human rights to pursue environmental rights protection could be more appropriate as opposed to depending on procedural environmental rights only. Birnie argues that even if procedural or participatory rights are fully realised, it is entirely possible that a participatory and accountable polity may opt for short-term influence rather than long-term environmental protection.<sup>210</sup> The basis for this assertion is that procedures alone cannot guarantee environmental protection.

The third view regards environmental soundness as a shared or solidarity right that allows society to decide the manner in which their environment and its natural resources are to be conserved.<sup>211</sup> This is the most controversial with some human rights scholars arguing that the right to a sound environment devalues the concept of human rights.<sup>212</sup> The argument is that environmental rights require global participation in order to be enforced successfully. This view labels these rights as 'solidarity rights' given their ability to represent a broader society of actors and requires collective cooperation to achieve a liveable world.<sup>213</sup> The point being made is that environmental quality is seen to be a collective right that gives society a right to protect and manage their environment and natural resources.

It is asserted from the discussion above that, regardless of the numerous views and assertions made by scholars, human rights and the environment are connected. The field of human rights remains essential for protecting the environment. The arguments on recognition of a specific environmental right are founded on the essential human needs— an environment favourable to human life and health. Given this clarity, the question requiring an answer is the extent to which this exists and in addressing this issue, analysis will be done from an international, regional, and then domestic perspective.

### **2.5.1 International level**

Internationally, concerns about human rights and the environment have generated a number of legal instruments, specialised organs, and agencies whose role is to redress the issues that have arisen in the two areas. The interaction of the two fields has been apparent since the Stockholm Conference of 1972 where the participants declared:

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<sup>210</sup> As above.

<sup>211</sup> P Birnie, A Boyle & C Redgwell *International law and the environment* (3rd edition)(2009) 272.

<sup>212</sup> As above.

<sup>213</sup> JC Gellers 'Constitutional environmental rights: a quantitative analysis of intra-regional influences' (2012) 4.

Man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. . . . Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights - even the right to life itself.<sup>214</sup>

The declaration observed that man is at the centre of the environment. Whether the environment was made by man or nature, it is essential to man's wellbeing as it facilitates the enjoyment of basic rights including the right to life. The declaration connected a sound or healthy environment to the right to life. In other words, a healthy environment was viewed as a precondition to the enjoyment of the right to life.

Although 1972 seems to be a milestone year for this discourse, it is not the first time such an issue was raised.<sup>215</sup> The significance of the Conference lies in the fact that it was the first time recognition of the right to a clean and healthy environment was made. The declaration has laid a foundation for the development of numerous instruments on human rights that have recognised and incorporated the need to protect the environment. Conventions such as the UDHR, and the Convention on the Rights of the Child (CRC), have attempted to thread in environmental issues in the human rights discourse.

## 1. Universal Declaration on Human Rights

The UDHR places emphasis on human dignity as a basis to the enjoyment of human rights.<sup>216</sup> Although it does not have a specific provision on the right to a sound or healthy environment, it is argued that pollution of the environment caused by one person, lowers the human dignity of another. The basis for this argument stems from the fact that human dignity is at the centre of human rights. This means that every human being is born dignified and as such, the conscience and reason bestowed on a person should not make one act to the detriment of the other, who is equally born with dignity and rights.

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<sup>214</sup> Stockholm Declaration of the United Nations Conference on the Human Environment, 16 June 1972, U.N. Doc. A/.CONF.48/14/Rev.1 at 3 (1973).

<sup>215</sup> In 1962 Rachel Carson lamented: 'If the Bill of Rights contains no guarantees that a citizen shall be secure against lethal poisons distributed either by private individuals or by public officials, it is surely only because our forefathers, despite their considerable wisdom and foresight, could conceive of no such problem.' See: R Carson *Silent springs* (1962) 12-13.

<sup>216</sup> Article 10 provides: 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.'

## 2. Convention on the Rights of the Child

The CRC was adopted in 1989. The motivation for its adoption was partly to address the need for safe drinking water and the threats posed by pollution. The Convention embodies the right to a clean environment in article 24(1):

States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health.

This provision makes reference to 'the highest attainable standard of health'. This notion considers a child's biological, social, cultural and economic conditions, and the State resource availability, supplemented by resources made available by other sources.<sup>217</sup> The State Parties are required:

To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution.<sup>218</sup>

Clean drinking water and sanitation are essential to life and as such, States are required to regulate and monitor the impact that business activities have on the environment. Where this is not done, the result would be detrimental to the children's right to health and access to sanitation, and safe drinking water. Therefore, the relevance of the environment goes beyond environmental pollution hence the environmental interventions taken should, inter alia, address climatic change, as this is a threat to children's health and exacerbates health disparities.<sup>219</sup>

### 2.5.2 Regional level

At a regional level, instruments such as: European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR), Inter-American Convention on Human Rights

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<sup>217</sup> Committee on the Rights of the Child *General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health* (art. 24), paragraph 48.

<sup>218</sup> Article 24(c), CRC.

<sup>219</sup> Committee on the Rights of the Child *General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health* (art. 24), paragraph 50.

(IACHR), and the African Charter on Human and People's Rights (ACHPR) contain provisions that recognise the environmental dimension in human rights.

The ECHR, though it does not enshrine any specific right to a healthy environment, the Court has had to address issues concerning the environment under the Convention. In **Lopez Ostra v Spain**<sup>220</sup>, the applicant complained against a waste treatment facility situated within 12 meters of her home. She argued that the facility released smokes, noise and smell that caused the living conditions of family unbearable causing them severe health problems. She contended there was a connection between the illness suffered and the emissions released. Further, she claimed violation of her right to privacy and family security as laid down under article 8 of the ECHR.<sup>221</sup> In interpreting article 8, the Court expressed the view that:

...severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health.<sup>222</sup>

The Court's reasoning was premised on the fact that environmental pollution hinders individuals from enjoying their rights. Where the environment is polluted, it affects an individual's right and it is the responsibility of the State to ensure protection of human rights from the effects of environmental degradation.

The IACHR is anchored on the underlying principle that respect for the dignity of a person enhances protection of a right to life and preservation of that person's physical well-being. The Convention puts a responsibility on the States to guarantee protection of indigenous peoples and the minorities without discrimination.<sup>223</sup> This has considerably contributed to the recognition of indigenous people's rights to protect their environment. In 1988, the Additional Protocol to the Convention in the Area of Economic, Social and Cultural Rights was signed in San Salvador (Protocol of San Salvador) and coming into effect in 2008. Article 11 of the Protocol guarantees everyone 'the right to live in a healthy environment and to have access to basic public services' and obliges state parties to 'promote the protection, preservation, and

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<sup>220</sup> Judgment of December 9, 1994, Case No. 41/1993/436/515.

<sup>221</sup> Article 8 provides: '(a) Everyone has the right to respect for his private and family life, his home and his correspondence: (b) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

<sup>222</sup> Judgment of December 9, 1994, Case No. 41/1993/436/515, paragraph 51.

<sup>223</sup> Article 24.

improvement of the environment.<sup>1</sup> The Protocol goes further to spell out means of protection to ensure compliance with article 19.

The ACHPR recognises the interaction between the environment and human rights in Articles 16(1) and 24. Article 16(1) guarantees every individual ‘the right to enjoy the best attainable state of physical and mental health’ while Article 24 affords ‘the right to a general satisfactory environment favourable to their development’ for all peoples. The plausible meaning of the two Articles would be that, every individual has a right to health and the State has the responsibility to guarantee the attainment of the right. Further, this right may not be enjoyed where the environment is not satisfactory thereby impeding their development. Ouguergouz asserts:

For a great many African peoples, these various aspects of the problem of the natural environment are of vital importance. For them as others, a ‘general satisfactory environment favourable to the development’ also means a quality environment: in other words, relatively unpolluted air and water, the protection of the flora and fauna which are particularly important as they sometimes form an integral part of the traditional way – food and medicine for example – of certain African people.<sup>224</sup>

Whereas it is novel idea to include the right in the Charter, the reasoning supporting its addition and its connection to development by the African experts, is devoid of originality as it did not emanate from the continent’ historical traditions and values– environmental protection was a fundamental part of cultural, social, and religious life of the Africans.<sup>225</sup>

In 2001, the Commission had an opportunity to interpret the meaning of articles 16 and 24 in ***Social and Economic Rights Action Centre (SERAC) and another v Nigeria***. In interpreting both articles, the Commission observed:

The right to a general satisfactory environment, as guaranteed under article 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.<sup>226</sup>

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<sup>224</sup> F Ouguergouz *African Charter on Human and People’s Rights: a comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 364.

<sup>225</sup> EP Amechi ‘Enhancing environmental protection and socio-economic development in Africa: a fresh look at the right to a general satisfactory environment under the African Charter on Human and People’s Rights’ (2009) 5 *Law, Environment and Development Journal* 62.

<sup>226</sup> As above, par. 52.

It is clear from this observation that Article 24 requires every state to take reasonable steps to ensure that the environment is not polluted. Further, the State must uphold conservation and ensure use of natural resources in a sustainable manner. On Article 16, the Commission said:

The right to enjoy the best attainable state of physical and mental health enunciated in article 16(1) of the African Charter and the right to a generally satisfactory environment favourable to development (article [24]) already noted, obligate governments to desist from directly threatening the health and environment of their citizens.<sup>227</sup>

The conclusion of the Commission was that compliance of the Government to the tenets of Articles 16 and 24 included, at the very least, permitting independent scientific monitoring of environments that were threatened, requesting of environmental and social studies before the development took place, undertaking the necessary monitoring and affording the communities affected information, and affording the communities a chance to take part in environmental decisions that affected them.<sup>228</sup> Despite such a conclusion being made, the Commission did not establish an independent right to an environment that is healthy within the meaning of Article 24. The Article, though it connects a human beings' right to development, it does not include any independently distinct measure relating to environmental quality.

In its decision, the Commission discussed the need to prevent pollution and promote conservation. These activities remain closely linked to the quality of human living conditions, rather than the wellbeing of the environment in its own right. As Lewis espouses:

The *Ogoniland* decision is the first and only case in which the African Commission has found a violation of article 24. It is significant in advancing the integration of environmental and human rights concerns, and in articulating the duties of governments in relation to the environment, particularly with respect to the activities of multinational corporations.<sup>229</sup>

It is asserted that the ACHPR recognises the right to a healthy environment and hence offers a basis to integrate protecting the environment, economic development, and human rights securing. The *Ogoniland* decision, despite its contribution to developing a substantive right to a clean environment, is limited in that: first, Article 24 was interpreted in relation to the interference with the rights of a particular community with emphasis on link between the

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<sup>227</sup> As above.

<sup>228</sup> As above, par. 53.

<sup>229</sup> BM Lewis 'The human right to a good environment in international law and the implications of climate change' unpublished PhD Thesis, Monash University, 2014 75-76.

environment and other rights. The Commission did not consider whether a finding relating to the adverse effect on human beings could be established without a breach of Article 24. Second, the obligations enumerated by the Commission were not substantive but procedural in nature. In the premises, it remains the responsibility of the Commission to creatively interpret article 24 so as to mirror the right to an environment that is clean and healthy.

### 2.5.3 Domestic legislation

Besides instruments developed at international and regional levels, legislation enacted at domestic level has attempted to address the human rights and environment interface. Whereas the Constitution has made lurid references on environmental matters, the EMA has provided for an explicit 'right to a clean, safe, and healthy environment' and the remedies thereof.

#### 1. Constitution

The Constitution is the supreme law and 'if any other law is inconsistent with it, that other law shall, to the extent of the inconsistency, be void.'<sup>230</sup> The State is required under the Constitution to put in place mechanisms aimed at reducing waste, promoting relevant environment management systems and tools, and ensuring that environmental standards that are enforced in Zambia essentially benefit the citizens.<sup>231</sup> The Constitution has put in place certain principles that must govern the development and administration of the environment and its natural resources.<sup>232</sup> It is clear from the constitutional provisions that, though the Constitution recognises the significance of a sound environment, it does not contain an explicit provision relating to the right to a safe, clean, and healthy environment.

There was a gleam of hope under the proposed Bill of Rights which guaranteed every person the right to clean and safe water.<sup>233</sup> Article 44 guaranteed every person 'the right to a safe, clean and healthy environment.' Despite its lucidity, the flaws in the provision were threefold: first, it did not define nor describe what the right was thereby raising questions such as: what is a safe, clean and healthy environment? What are its constituent elements? What is the threshold below which an act must fall before it can be said that the right has been

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<sup>230</sup> Article 1(1).

<sup>231</sup> Article 257(b)(c)(f).

<sup>232</sup> Article 255.

<sup>233</sup> The proposed Bill of Rights, as drafted by the Technical Committee, was subjected to a vote in a Referendum held on 11 August 2016. The law requires that for an amendment to be made to the Bill of Rights, 50% (3 764 046) of the eligible voters (7 528 091) must vote "Yes". However, the threshold was not met, therefore it failed. See: [https://www.elections.org.zm/results/2016\\_referendum](https://www.elections.org.zm/results/2016_referendum) (accessed 22 August 2016).



violated? These questions cannot be addressed by the vague phrasing of the right.<sup>234</sup> The second flaw related to the nature of this right. The right lacked specificity and in the absence of jurisprudence developed on the subject, it is possible that it would cover more than the legislators would have envisioned thereby making the right too broad. The third flaw was the absence of an enforcement mechanism thereby making the realisation of the right a near impossibility. Article 45 of the proposed Bill of Rights provided:

- (1) The State shall take reasonable measures for the progressive realisation of economic, social, cultural and environmental rights.
- (2) Where a claim is made against the State on the realisation of an economic, social, cultural or environmental right, it is the responsibility of the State to show that the resources are not available.
- (3) The Constitutional Court shall not interfere with a decision by the State concerning the allocation of available resources for the progressive realisation of economic, social, cultural and environmental rights.

Clearly, article 45(1) required the State to ‘take reasonable measures’ for the progressive realisation of environmental rights. What amounted to reasonable measures was not elaborated and it would be erroneous to assume that this provision included virtually anything that would be considered ‘a measure’. Article 45(1) was narrow as it did not explicitly state the nature of measures to be undertaken by the State, that is to say, such measures must be outlined in a piece of legislation. The inherent weakness of article 45(1) was embedded in its failure to place an obligation on the State to enact appropriate legislation, as a measure, for better protection of the right. In this manner, ‘reasonable measures’ purportedly exclude legislative measures thereby leading to an assumption that legislation on environment, in the form of the EMA, is adequate needing only ‘reasonable measures’, however, this is not so.

Under article 45(2), where the full enjoyment of the right had not been fully realised, the State bore the responsibility of showing that the resources were not available. The Constitutional Court was ousted by article 45(3) from interfering with the State’s decision concerning allocation of available resources. Such exclusion limits the full realisation of the right – it means that any ‘justification’ of the State’s failure to provide resources should be accepted by the Court.

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<sup>234</sup> This presupposes that the EMA should prescribe what the right entails, however, it does not do so in sec. 4.

## 2. Environmental Management Act

The EMA is the main legislation on environmental issues and where any other Act is inconsistent with it, such shall not prevail.<sup>235</sup> Section 4(1) permits every person to 'enjoy the right to a clean, safe and healthy environment.' According to section 4(2), the right shall 'include the right of access to the various elements of the environment for recreational, education, health, spiritual, cultural and economic purposes.' In construing this provision, it is clear that the constituent elements of the right are not exhaustive hence the use of the term 'shall include'. The right is restricted to a person's right of access to recreational, health, spiritual, cultural and economic facilities, however, the right has not been defined nor explained. In the Ugandan case of *Uganda Electricity Transmission Co. Ltd v De Samaline Incorporation Ltd* the right was defined as follows:

I must begin by stating that the right to a clean and healthy environment must not only be regarded as a purely medical matter. It should be regarded as a holistic social-cultural phenomenon because it is concerned with physical and mental well-being of human beings...a clean and healthy environment is measured in both ethical and medical context. It is about linkages in human well-being. These may include social injustice, poverty, diminishing self-esteem. And poor access to health services. That right is not restricted to a clinical model.<sup>236</sup>

The interpretation by the court is broad and encompasses all aspects of the human being. It is asserted that the right is anthropocentric and contain, not only the substantive content but also the characteristics of civil and political rights which require a government to progressively realise its fulfilment. The entitlement to this right is however individualistic as it does not place matching duties on the holders of the right to preserve and safeguard the environment for its worth. It is argued that this right is inherently connected to the realisation of the other fundamental rights.

It is concluded that the EMA, though primarily concerned with environmental protection, has embraced human rights and created the right to a clean, safe, and healthy environment as stated in section 4. It may well be posited that the Act contains a provision on environmental rights. The concern, however, is whether such a right is capable of being enforced at law considering that there is no corresponding right under the Constitution. It is argued that a

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<sup>235</sup> This is in line with sec. 3 which provides: 'Subject to the Constitution, where there is any inconsistency between the provisions of this Act and the provisions of any other written law relating to environmental protection and management, which is not a specific subjected related to law on a particular environmental element, the provisions of this Act shall prevail to the extent of the inconsistency.'

<sup>236</sup> Misc. Cause No. 181 of 2004, High Court of Uganda

human right, by nature, attracts a constitutional remedy. The EMA is a statute and hence can only provide a civil remedy in accordance with section 4(4) – (1) prevention or discontinuance of any activity that harms the environment; (2) compelling public officer to act; (3) environmental audit or monitoring; (4) measures for environmental protection; (5) restoration; and (6) compensation. These remedies are civil in nature and only applicable where there is a violation of one's right by another person. They do not apply to either a local authority or a government for its failure to ensure that the right to a clean and healthy environment is attained.

## **2.6 Integrated theoretical approach**

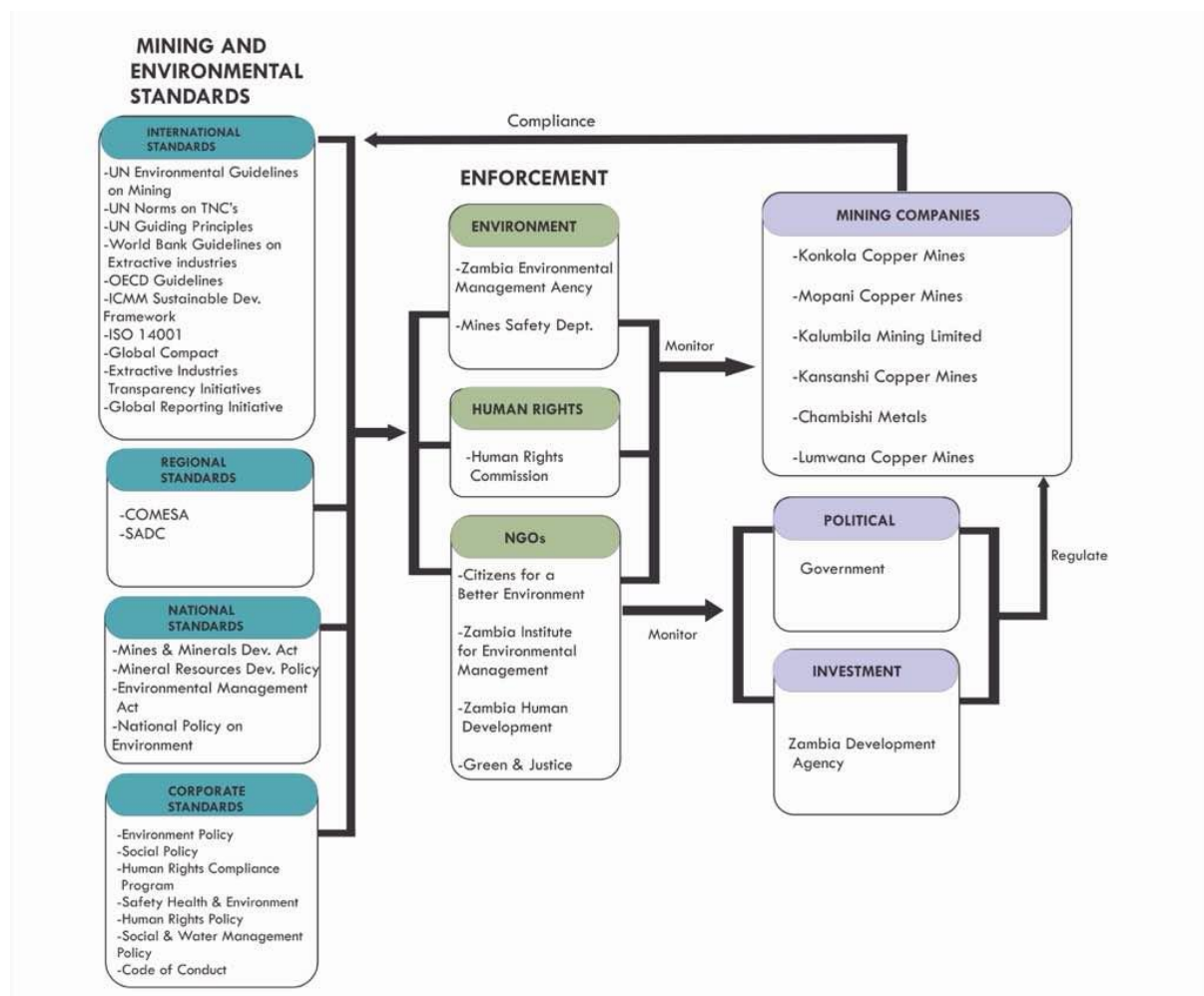
The thesis studied the theories relating to FDI, environmental protection, and human rights. It has been found that there is no single theory that singularly explains the notion of FDI. Similarly, no single comprehensive theory explains the view of environmental protection in relation to mining activities. In spite of this lacuna, in the case of FDI, the thesis adopts the middle path theory which calls for the creation of a balance between the FDI received and other aspects, in this case, protection of the environment. It is clear from literature that, whichever theory of environmental protection is adopted, the end result lies between excessive levels of pollution and environmental degradation. This means that, though the middle path theory is the most ideal, pollution is always bound to happen during mining activities. The approaches that underlie the basis for human rights emphasise dignity and wellbeing of humanity i.e. where the environment is degraded, man's dignity is affected, including the right to enjoy a clean, safe, and healthy environment. This implies that human rights are violated constantly.

It is argued in this thesis that there is no common approach to the three fields except the objective that they intend to serve— to enhance the welfare of mankind or his livelihood. Thus, it is an arduous undertaking to create a theoretical approach or framework that encompasses the three fields in a singular approach. Notwithstanding this fact, the thesis proposes what it refers to as the 'pragmatic dynamism' approach. It is the author's view that implementation of FDI projects must be coupled with deliberate proactive measures by the State to conserve the environment. This approach differs from approaches discussed under §2.2.1 as it emphasises creation of a balance between desirability for FDI, environmental protection and human rights. In this manner, the costs and benefits of an FDI to the country must be weighed and the extent to which it would affect the environment assessed. If the effect on the environment is greater or irreparable, the FDI should be rejected. This approach does not

emphasise acceptance of any form of FDI even when such is environmentally undesirable. It therefore requires that handling of issues relating to FDI and its effect on the environment is based on practical issues rather than principles or theories.

## 2.7 Conceptual framework

As discussed in §2.6, the research is guided by the ‘pragmatic dynamism’ approach and whose conceptual framework is summarised below:



The conceptual framework depicts four main pillars of the study: first, mining and environmental standards; second, enforcement agencies; third, mining companies; and fourth, political aspect.

The first pillar constitutes the international, regional, domestic, and corporate standards that have been developed to regulate mining activities and the need for protection of the environment.

The second pillar comprises institutions that have been established to ensure that mining companies comply with environmental regulations e.g. ZEMA and MSD. The Human Rights Commission is included as it is constitutionally mandated to ensure the protection of human rights from violation which could also emanate from polluting mining activities. The NGOs put mining companies in check through lobbying, community sensitisation, and public interest litigation.

The third pillar encompasses the main large scale mining companies who are required to comply with the set standards.

The fourth pillar represents the two entities– government and the ZDA. The government formulates policies and enacts legislation which are aimed at controlling mining activities in Zambia. The ZDA is bestowed with the responsibility of ensuring that it sets requirements for acceptance of investment into Zambia.

These pillars present a cohesive framework in that standards have been developed to ensure compliance by mining companies. In order to attain this, institutions have been established to monitor mining companies whose activities are polluting in nature as well as enforce environmental regulations. The government has an overarching responsibility to ensure that appropriate environmental protection laws and policies that regulate mining activities are in place. It also bears the responsibility of not shielding mining companies when their activities are questioned. This means that the four pillars are intertwined and should be mutually reinforcing. Where one of the institutions or body is not performing its role, this would lead to an imbalance and ultimately, continued pollution. Thus, a balance is required in order for FDI, environmental protection and human rights to be mutually reinforcing.

## **2.8 Foreign direct investment, mining and environmental rights**

Foreign Direct Investment has been flowing into Zambia in significant amounts. However, in 2016, the UNCTAD noted that there was a decline in FDI flows by 48% to \$1.7 billion. The reasons for such a decline were said to be: electricity shortages and uncertainties related to

the mining tax regime; low copper prices, collapse of the national currency and surging inflation all affected reinvested earnings.<sup>237</sup>

Mining in Zambia is the main contributor to the country's quest for economic and social development. It averages a share of 9.1% of the economy while contributing 70.3% to foreign exchange earnings and 8.5% to formal employment.<sup>238</sup> To harness the sector's contribution to the country's GDP, the government is determined to continuously facilitate the opening of new mines, support the development of small-scale mines, and place emphasis on value addition in the development of the sector.<sup>239</sup>

It is clear from the strategic focus that the policy of government, with regard to the mining sector, is to increase mineral exploration. This strategic focus is realised under the MRDP, whose objective, *inter alia*, is to 'attract and encourage local and foreign private sector participation in the exploration for and commercial exploitation of Zambia's mineral resources'.<sup>240</sup> Thus, in order to achieve the objectives of the MRDP, it is imperative that government creates an enabling environment that attracts investment and innovation while at the same time ensuring the country obtains benefits from the sector.<sup>241</sup> The enabling environment in place is one that offers incentives to investors in order to encourage them to make meaningful investment in the sector.<sup>242</sup> Given such an enabling environment, it is estimated that over \$5 billion of FDI has been injected in the mining industry between the period 1996 and 2015.

Since gaining her independence, copper production has been predominantly relied on by the country to meet its social and economic needs. Despite the price fluctuations of the mineral, the period 2000 and 2015 has seen an increase of 184.2% in production, a trend that is projected to continue given the discovery and extract of other minerals besides copper.<sup>243</sup> This period was also characterised by the expansion of existing mines and opening

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<sup>237</sup> World Investment Report 'Investor nationality: policy challenges' (2016) 41.

<sup>238</sup> <http://dfat.gov.au/about-us/publications/Documents/africa-appr-2012-13.pdf> (accessed 2 April 2015).

<sup>239</sup> As above.

<sup>240</sup> Y Sun 'Africa in China's foreign policy' John L. Thornton China Centre and the Africa Growth Initiative at Brookings (2014) 6.

<sup>241</sup> M Ndulo 'Legal and regulatory frameworks for resource exploration and extraction – global experience' African Development Bank high-level policy seminar on 'optimizing the benefits of coal & gas in Mozambique' 27–28 February 2013, Maputo, Mozambique, 2.

<sup>242</sup> Currently, the government offers incentives such as carry-over of losses for a period of 10 years, 0% taxation of dividends, 25% capital allowance claim back, and 10% payment of property transfer tax in the event of transfer of mine assets to another investor. Further, for those companies that are publicly traded on the stock exchange, there is a reduction of 30% corporate tax from 35%.

<sup>243</sup> Oxfam 'Implications of the extractive industry activities on human rights: the case of Zambia's mining sector' (2016) 3.

of new mines— Lumwana Copper Mines, Kansanshi Copper Mines, Mulaishi Copper Mine, and Munali Hills Nickel Mines.<sup>244</sup> Currently, some large scale mines have been opened in Luapula and Southern Province.

Mining by its nature, cannot be carried out without defacing the environment or pose a threat to it. The United Nations Special Rapporteur on Human Rights Obligations Related to Environmentally Sound Management and Disposal of Hazardous Substances and Wastes, observes:

Mining for the extraction of resources generally falls within two categories of activities: excavation and beneficiation. Each of these activities generates its own waste stream and management issues. Excavation techniques entail surface, underground and solution mining. Underground (or sub-surface) mining involves the construction of tunnels or shafts to reach buried ore deposits and can extend several miles underground. Solution mining (or in situ, leaching or recovery) involves the injection of a liquid (for example, water, sulphuric acid, nitric acid, hydrogen peroxide or carbonates) leaching solution into porous rock through a borehole to dissolve the desired resource.<sup>245</sup>

The observation acknowledges that mining activities, in whatever form, pose a threat to the environment. While such effect may be on the surface, others may be beneath the surface. The effect of mining activities on the environment is worse where large scale mining is involved given its size of production. Silengo asserts:

The immense scale of the mining industry has contributed to considerable environmental pollution, including the formation of waste rock and tailings dumps, silt and effluent discharge into the Kafue river system. These effluents contain a large range of metallic and other chemical substances, including cyanide, as solid or dissolved pollutants. Suspended solids will settle and may undergo chemical change in anaerobic sediments. These polluting substances may be released when the sediments are disturbed.<sup>246</sup>

Silengo, while acknowledging the threat to the environment that any form of mining activity may pose, emphasis is placed on large scale mining. This view is correct in the sense that, large scale mining discharges more environmentally unfriendly substance which in turn adversely affect the environment. The use of chemicals in the production or extraction of minerals affects the environment where such are discharged.

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<sup>244</sup> Ministry of Mines and Mineral Development *Mineral Resources Development Policy* (2013) 1.

<sup>245</sup> United Nations Human Rights Council, 21st Session, A/HRC/21/48, 2 July 2012, at 5.

<sup>246</sup> M Silengo 'An integrated framework for environmental management and protection in Zambia' unpublished PhD Thesis, University of Salford, 1996 174.

The MMDA, while providing for numerous issues on mining and the licensing thereof, places emphasis on sustainable mining practices. The Mineral Resources Policy of 2013, which forms the basis of the MMDA, acknowledges that exploration and mining activities have negative effects on the safety, health and environment of communities in which such activities are conducted.<sup>247</sup> In view of this acknowledgement, the development of the Policy was for the purpose of achieving:

...a socially and internationally acceptable balance between mining and the bio-physical environment and to ensure that acceptable standards of health, safety and environmental protection are observed by all participants in the mining sector.<sup>248</sup>

The Policy not only creates a balance between mining and protection of the environment but also establishes a connection between the two. This means that mining activities are to be managed with a view to reducing the adverse effects on the environment and human beings whose livelihood depends on a clean, safe and healthy environment. In other words, mining activities must respect every person's right to an environment that is clean, safe and healthy. Without this, human beings would not be able to live at a level proportionate to the basic standards of human life. Although what amounts to a 'clean, safe and healthy environment' has not been clarified nor defined under the EMA, the courts have ensured that a company's mining activities do not affect a person's enjoyment of an unpolluted environment. In *James Nyasulu and 2000 others v Konkola Copper Mines, Environmental Council of Zambia and Chingola Municipal Council*, Musonda J, finding Konkola Copper Mines liable, affirmed thus:

There was gross recklessness, whether human beings died or not. They deprived the community in Chingola the right to life, which is fundamental right in our Constitution. They disregarded environmental legislation at a time...Such disregard for human life was received by this court with a sense of outrage.<sup>249</sup>

The affirmation by the court was to the effect that mining activities do affect human rights— where the environment is degraded by mining activities, this, in turn, affects the right to life of any person. In essence, the argument that is put forward is that protection of the environment is inseparable from human rights, particularly the right to life. This view is supported by scholars like Cullet who underscores thus:

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<sup>247</sup> Ministry of Mines and Minerals Development *Mineral Resources Development Policy* (2013) 8.

<sup>248</sup> As above, 6.

<sup>249</sup> *James Nyasulu & 2000 others v Konkola Copper Mines, Environmental Council of Zambia & Chingola Municipal Council* [2007] HP 1286 at J20.



It is by now clear that environmental protection is intrinsically related to a number of other human rights and comes out as both a precondition and an outcome of the enjoyment of many rights. A right to environment should nevertheless not be classified as a synthesis right, because it embodies specific characteristics that can be distinguished from other rights, and does not constitute a 'shell-right' aimed at enhancing the realisation of the other ones.<sup>250</sup>

Cullet's view interweaves environmental protection and human rights as a basis for enjoyment of other rights— a right to a clean, safe and healthy environment. It is asserted that where mining activities pose a negative threat to the environment, this, in turn, violates a person's human rights.

The relationship between FDI and environmental rights has not been plain sailing. While FDI primarily focusses on protection of interests of the foreign investor, environmental rights are concerned with granting a man the right to enjoy a sound environment— one that is free from abuse by man's activities and permits man to seek a remedy where such rights are violated. Jorge Viñuales asserts that the two fields have traditionally evolved as separate specialised fields of international law. However, given the fact that FDI impinges on protection of the environment, there is a growing belief of the two fields interacting.<sup>251</sup> The interaction between the two fields has been spurred by the increase in FDI and environmental consciousness which has resulted in threading environmental norms in FDI.<sup>252</sup>

The interaction between the two fields has attracted debates from human rights and environmental scholars. For human rights scholars, they insist on the need to clarify the 'rights to the environment' while environmental scholars emphasise clarifying and honouring the ecosystem but limited to a person's human rights with the aim of defining responsibilities to care for the environment and not the rights.<sup>253</sup> The concern from the perspective of FDI is that enhancing environmental rights protection creates instability in an area of law that was initially designed solely with one aim— protection of FDI.<sup>254</sup> Asteriti states:

The right of states to adopt and enforce environmental legislation and their duty to guarantee a certain level of protection to foreign investors and their investments are likely to come into conflict, for example,

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<sup>250</sup> P Cullet 'Definition of an environmental right in a human rights context' (1995) 13 *Netherlands Quarterly of Human Rights* 27.

<sup>251</sup> JE Viñuales *Foreign investment and the environment in international law: an ambiguous relationship* (2010) 4.

<sup>252</sup> <http://www.oecd.org/investment/globalforum/40311090.pdf> (accessed 27 September 2013).

<sup>253</sup> L Zarsky (ed.) 'Introduction: conflicts, ethics and globalisation' *human rights and the environment: conflicts and norms in a globalising world* (2002) 1.

<sup>254</sup> M Sornarajah *The International law on foreign investment* (3rd edition)(2010) 77.

if the regulation impacts on the profitability or the legal status of the investment. If from the vantage point of the investment lawyer the problem is the intrusion of environmental obligations in the system of protection for the investor and its investment, from the point of view of the government lawyer or the legislator, the problem lies in dealing with the environmental externalities of investors' activities.<sup>255</sup>

Asteriti's observation is well founded as it highlights the potential tension created between FDI and environmental protection. The tension is created by the fact that, while a state may desire FDI, it has an overarching duty to ensure that such FDI does not impinge on the soundness of the environment. This entails that the state has to create a balance between accepting FDI and protection of the environment from activities of the FDI. In creating a balance between the two fields, the question about the place of environmental rights within FDI becomes as important as the question about the place FDI has within environmental rights.

Although domestic policies should leave room for government to regulate environmental issues, there is still no global consensus about what should be done to align investment protection with maintaining a healthy environment on a global scale. This may be because the two fields touch upon the delicate issue of government's decision-making level at which decisions concerning the environment are to be taken.<sup>256</sup>

The domestic framework for FDI primarily constitutes the Constitution; ZDA Act; and MMDA. These pieces of legislation show an interface between FDI and environmental rights albeit in a 'loose' manner signifying that the balance is far from being achieved.

#### 1. Constitution, 2016 (Amendment Act No. 2)

The Constitution acknowledges the significance of FDI and its promotion to Zambia's economy. Article 10 obliges the government to create an economic environment that encourages local and foreign investment. It also commits itself to protecting and guaranteeing such investment through agreements with investors and other countries. It is clear from this provision that promotion and protection of FDI is of concern to the government.

With respect to environmental rights and the protection thereof, this can be seen where: (a) there is realisation of an individual's right to a clean, safe and healthy environment; and (b) there is explicit provision of an exception to article 10. An assessment of the

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<sup>255</sup> A Asteriti 'Greening investment law' unpublished PhD Thesis, University of Glasgow, 2011 30.

<sup>256</sup> P Sands, J Peel, A Fabra & R Mackenzie *Principles of international environmental law* (3rd edition)(2012) 887.

Constitution reveals that the principle of sustainable development has been embraced. The Constitution requires a citizen to conserve the environment and utilise natural resources in a manner that upholds a clean and healthy environment.<sup>257</sup> The local government system is obligated to promote a clean, safe and healthy environment.<sup>258</sup> Further, every person has a responsibility to co-operate with State organs or institutions to maintain a clean, safe and healthy environment.<sup>259</sup> In article 257(f), the State has committed itself to ensure enforcement of environmental standards for the essential benefit of the citizens.

These constitutional provisions are merely concerned with rights and obligations of citizens and local authorities. The flaws lie in their failure to create a relationship between FDI and environmental rights. This is exacerbated by the absence of an obligation on the part of the government to ensure that a clean, safe, and healthy environment will be maintained. It is posited that there should be a provision which gives a corresponding responsibility to the government inserted in the Constitution. In the manner in which it is presently couched, FDI promotion and protection is more pronounced than protection of individual's right to a clean, safe, and healthy environment.

## 2. Zambia Development Agency Act, 2006

The ZDA Act is the primary legislation on investment— local and FDI. The Act mandates the Board to take into account the environment before granting a certificate of registration. Section 69(e) provides:

The Board shall, in considering an application for a certificate of registration...for purposes of determining entitlement to an incentive...have regard to *the impact the proposed investment is likely to have on the environment* and, where necessary, the measures proposed to deal with an adverse environmental impact in accordance with the Environmental Management Act, 2011.<sup>260</sup> [Emphasis mine]

In this provision, the use of the words 'proposed investment is likely to have on the environment' does not relate to the impact that may arise later. This is fortified by the fact that, whereas environmental issues are considered at the beginning, the breach of environmental regulation does not have any effect on the certificate granted— section 75(1)

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<sup>257</sup> Article 43(1).

<sup>258</sup> Article 151(2)(f).

<sup>259</sup> Article 256(a).

<sup>260</sup> As amended by Act 15 of 2012.

allows the Board to suspend or revoke a certificate of registration, it does not, however, list failure to adhere to section 69(e) as a ground for revoking or suspending such a certificate.

Under section 17(3), the Board is permitted to enter into an IPPA whose provisions include a detailed schedule for undertaking to complete the necessary EIA required by ZEMA. Like section 69(1)(e), this provision is equally inadequate as it focusses on meeting the requirements for EIA at the point of commencement of the project by an investor and not the whole project. Therefore, breach by the investor does not lead to withdrawal or suspension of the certificate.

It is argued that the requirement for environmental consideration is merely for purposes of obtaining a certificate of registration which is mandatory for all investors. The Act, for the most part, concerns itself with promotion and protection of an investor and their property. There is no mention of protection of human rights or environmental rights under the Act neither is there reference to the same. It is posited that the Act should have made reference to such rights or referred to the EMA or Constitution in terms of enforcing the right in instances where an FDI project infringed upon the environment.

### 3. Mines and Minerals Development Act, 2015

The MMDA has been enacted, *inter alia*, to 'provide for safety, health and environmental protection in mining operations.'<sup>261</sup> It is asserted that the Act places concern on safety, health and environmental protection. This is seen in provisions that require the Committee to take into consideration whether a mining activity would present a negative socio-economic effect to the health of human life.<sup>262</sup> Where a mining licence is granted, the renewal is subject to conditions relating to protection of human health.<sup>263</sup>

The Act recognises that mineral resources are a non-renewable resource and hence, requires their sustainable use.<sup>264</sup> Despite this requirement, the Act does not provide mining mechanisms and strategies that must be utilised in order to ensure that mining companies consider sustainability principles in carrying out their activities.<sup>265</sup> Although the Act requires

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<sup>261</sup> Preamble, MMDA.

<sup>262</sup> Sec. 80(1)(b).

<sup>263</sup> Sec. 81(1)(b).

<sup>264</sup> Sec. 4(a), MMDA.

<sup>265</sup> The conditions of the mining licence, which are specified in the Third Schedule of SI No. 7 of 2016, contain certain obligations relating to environmental protection such as preparation of an Environmental Management Plan (EMP), however, this is merely procedural and not premised on sustainability principles.

that wasteful mining practices are avoided, it does not define the same.<sup>266</sup> This assertion is buttressed by the fact that section 84 merely vests the Director of Mines or Mines Safety with the authority to take certain actions where it is considered that a mining license holder is using wasteful mining practices. It is however not clear on the criteria to be used in determining whether a mining activity amounts to wasteful practice or not.

In section 36(1)(c), the Act authorises the Director of Mines or Mines Safety to compel the holder to suspend or curtail production or close the mine or a section thereof where there is uncontrollable pollution. This provision is not clear as it does not exemplify what would amount to 'controlled' or indeed 'uncontrolled pollution'. Although section 111(2)(b) provides sanctions for breach of environmental obligations, no limits have been prescribed in relation to what would be 'environmental damage'.<sup>267</sup>

The Act permits carrying out of mining activities as well as control of pollution of the environment arising from mining activities. Although the Act contains provisions on environmental and human life protection, the same is inherently weak and inadequate to guarantee a clean, safe, and healthy environment. It is concluded that, though a relationship between FDI and environmental rights is created, the protection of the right is not adequate from the provisions of the Act.

## **2.9 Conclusion**

The main objective of the chapter was to establish the existence of a link, or the extent thereof, between FDI, environmental protection, and human rights in Zambia's domestic framework. The other objective was to develop a theoretical framework that encapsulates them as one.

The thesis has found that FDI, particularly in the mining sector, is a desirable tool that is used by states to foster the growth of their economies. The challenge lies in the fact that mining activities cannot be conducted without them having an adverse effect on the environment. In instances where the environment is polluted or degraded, this affects the lives or livelihood of people that depend on a clean, safe, and healthy environment. Thus, FDI, environmental protection, and human rights are intrinsically connected.

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<sup>266</sup> Sec. 4(d), MMDA.

<sup>267</sup> Sec. 111(2)(b) provides that: 'A person who causes environmental damage contrary to the Act or any other written law commits an offence and is liable, upon conviction, to a fine not exceeding one million penalty units or to imprisonment for a term not exceeding ten years, or to both.'

The thesis also found that the MMDA and ZDA Acts contain provisions on environmental protection. Similarly, under the Constitution, while protection of the environment is recognised and emphasised, the right to a clean, safe and healthy environment is not enshrined. On the corollary, the right is however created by the EMA under its section 4. It is asserted that, notwithstanding the absence of such a right under the Bill of Rights, there are provisions for the protection of the environment generally.

In an attempt to develop a singular comprehensive theoretical framework, it was found that none which ties FDI, environmental protection, and human rights exist. It can only be concluded that what is clear is the interconnectedness of the three fields whose objectives are interwoven— improvement of the welfare and livelihood of mankind on earth. Notwithstanding this lacuna, the thesis has advanced its own approach the, 'pragmatic dynamism', which postulates that FDI, environmental protection, and human rights can and should coexist.

## Chapter 3

### Standards for mining and protection of the environment

#### 3.1 Introduction

Mining law has developed in line with mining activities being carried out. It cannot, however, be said to have existed until the industry itself came into being. Hence, knowledge of the origins of mining as a business is necessary for a clear comprehension of the fundamental peculiarities of mining law.<sup>268</sup> The global community has been dependent on the products of mining for hundreds of years. The use of unprocessed metals has been reported as far back as 500 BC. With the passing time, technology for mining and mineral processing has gradually improved leading to the production of commodities that have added value to man's survival and livelihood.

In Zambia, mining has played a significant part in the country's quest for economic development. The statistics reveal that the mining sector constitutes 70% of the country's Gross Domestic Products. Its total contribution to revenue is about 32% with 60% of this figure representing the contribution of employer's Pay As You Earn.<sup>269</sup> In terms of employment creation in the mining sector, the number of employees has steadily risen from 28 050 in 2000 to 65 311 in 2008. In 2009, due to the economic downturn in the global economy, this figure slightly dropped to 46 246. This later increased to 53 577 in 2010 following the rebound in metal prices on the world market which led to increased mining activities. In 2015, the employment in the mining industry was estimated to be around 80 000.<sup>270</sup> It may well be posited that the contribution of the mining sector to the economic development of the country cannot be underrated. This also explains government promotional efforts in the sector which have seen an estimated \$5 billion worth of FDI being injected into it between 1996 and 2011.<sup>271</sup>

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<sup>268</sup> TF Van Wagenen *International mining law* (1918) 1.

<sup>269</sup> Informal discussion with ActionAid Zambia, Thursday, 23 July 2015.

<sup>270</sup> Honourable Maxwell Mwale, Minister of Mines and Minerals Development, Ministerial Statement, 5th Session of the 10th Assembly of Parliament, 24 March 2011.

<sup>271</sup> Government of the Republic of Zambia *Mineral Resources Development Policy* (2013) 7. This has also led to the expansion of existing mines and the opening of new mines— Lumwana Copper Mines, Kansanshi Copper Mines, Mulaishi Copper Mine, and Munali Hills Nickel Mines. From 2011, some large scale mines have been opened in Luapula Province, for example, Kabasa Mine. Some of the mining companies that have been granted large scale mining licences are: Genesis, Cruix Resources, Anvil Mining, and Tranter.

Although mining presents undoubted benefits to the country, it is impossible that mining activities can be carried out without affecting the environment. In the past, the concentration of the mines was in the Copperbelt province, however, recent times have seen the emergence of mineral exploration and extraction in North-Western and Southern provinces. The emergence of new mines, coupled with the mining activities of old mines results in pollution of the environmental media— air pollution, soil contamination, water pollution and siltation, geotechnical issues, and land degradation. The question is not so much about why this is so but on whether there are standards that are aimed at ensuring that mining activities are conducted in a manner that is sustainable. Suffice to say, standards have been created at international and domestic levels. Besides these, corporations have also been expected to adopt either code of conducts or policies that evidence their commitment to the protection of the environment from their mining activities.

In view of the aforementioned, with a view to assessing to what extent the environment is protected from the effects of mining activities under the domestic framework, the objective of Chapter 3 is to interrogate the international and regional standards that have been developed as a benchmark for environmental protection.

### **3.2 International mining standards**

It is generally agreed that there is no universally accepted standard that relates to mining and protection of the environment, even though the latter still remains a global issue. However, at an international level, there have been developed standards that mining companies have to comply with in their extractive activities. In a nutshell, these instruments acknowledge that mineral resources are not only the greatest gift to mankind, but are also a source of wealth for any nation and as such, they must be extracted with a consciousness of sustainability. These standards, mostly established by international bodies, place emphasis on sustainability, that is to say, protection of the environment which may be defaced by mining practices. Thus, it is expected that adherence to such standards by mining companies would further greater environmental protection from adverse effects of mining activities.

#### **3.2.1 United Nations Environmental Guidelines for Mining Operations**

The United Nations Environmental Guidelines for Mining Operations (UNEGMO) originated from the adoption of Agenda 21 by the United Nations Conference on Environment and



Development (UNCED). Agenda 21 stressed the necessity for guidelines targeted at environmental protection and sustainable development of natural resources.<sup>272</sup> In 1997, UN General Assembly reviewed and appraised the implementation of the Agenda. At this session, Member States underscored the importance of implementing the Agenda in an all-inclusive manner.<sup>273</sup> In the years that followed, Member States requested the UN to issue a direction on environmental management in the mining sector. This led to the development of the first Environmental Guidelines for Mining Operations in 1994. These guidelines, which have constantly been updated, provide essential principles to be embraced by the mining sector. The Guidelines were also useful in the conclusion of the 1991 Berlin Round Table on Mining, which has come to be known as the "Berlin Guidelines".

#### Fundamental principles for the mining sector

The Guidelines address, inter alia, regulatory frameworks; environmental audits and monitoring; environmental impact assessments; environmental management systems; and enforcement thereof as applicable to the entire facets of mining operations, particularly: operation of mines; rehabilitation of mine site; and small scale mining. These are not a standard manual, but rather should be adopted and modified depending on country's specific needs. The Guidelines outlines fifteen underlying principles that applicable to the mining sector. These principles, derived from the Berlin Guidelines, require governments and mining companies to: prioritise environmental management; recognise socio-economic impact assessments and social planning in mining operations; establish environmental accountability; encourage employees to recognize their responsibility for environmental management; ensure community participation in the environmental and social aspects of all phases of mining activities; adopt best practices to minimize environmental degradation; adopt environmentally sound technologies in all phases of mining activities; seek to provide additional funds to improve environmental performance; adopt risk analysis and management in mining activities; reinforce the infrastructure, information systems service, training and skills in environmental management; avoid the use of such environmental regulations that act as unnecessary barriers to investment; recognize the linkages between ecology, socio-cultural conditions and human health and safety, the local community and the natural environment; evaluate and adopt environmental tax incentive policies; and encourage long-term mining investment by having clear environmental standards with stable and predictable environmental criteria and procedures.

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<sup>272</sup> United Nations *Berlin II Guidelines for mining and sustainable development* (2002) 1.

<sup>273</sup> As above.

In essence, these principles acknowledge that the nature of mining activities involves extraction of natural resources from the ground which must be done in a sustainable manner. Though mining activities may be for short-term land use, the effects may, however, be long term. Thus, in light of recent technological developments, there is need to mitigate the effects that mining activities can pose on the environment.<sup>274</sup> If the effects are not mitigated, it would mean that such a project has not been properly managed. Thus, the Guidelines were developed for this purpose— to put an ‘obligation’ on governments and mining companies to adhere to the principles set forth.

### Regulatory framework

National governments are required to create a well-designed legislative framework, which includes both physical and social aspects of the environment, for the mining industry. From the perspective of the regulator, a definite and enforceable framework is necessary to control mining company’s activities. On the part of the industry, it is necessary that there is a stable and transparent regulatory system.<sup>275</sup> There are two forms of the regulatory framework that are emphasised: (a) mining legislation; and (b) environmental legislation.

With regard to mining legislation, environmental control is usually the first step. Thus, mining legislation must incorporate structures of safety and operations, limited exposure to hazardous chemicals, dangers of explosives; retention and treatment methods of wastewater, proper management of contamination whether runoff or groundwater, control of soil and re-vegetation process, waste disposal, repossession and rebuilding of places and areas that have been disturbed, and removal of used machinery and structures.<sup>276</sup>

Environmental laws are aimed at addressing a host of ecological, conservational, pollution, and health issues. Hence, the application is much wider than just mining. Specific to mining, environmental legislation should cover EIA, or other environmental planning, grant of permits, and control of land, water, or air pollution.<sup>277</sup> It is also expected that the environmental laws place emphasis on the criteria and standards for environmental quality which are not found in legislation but regulations.

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<sup>274</sup> As above, 5.

<sup>275</sup> As above, 7.

<sup>276</sup> As above, 8.

<sup>277</sup> As above, 9.

## Implementation

The Guidelines also stress the need for implementation on the part of the government. To this effect, the Guidelines recognise the possibility that the relationship between the regulator on the one hand, and the operator on the other can move from collaborative to confrontational. Where a public body which acts as a regulator, applies greater control, it must also accept a responsibility of a higher level. If this is not done, it may impede the constant improvement on the operator's part. To avert this, it calls for the need to have a more balanced physically and socially environmental management approach.<sup>278</sup>

## Financial surety

Environmental management, more often than not, places the responsibility on the government to deal with the cost of dealing with environmental issues generated by the abandonment of a mine. To prevent this problem, it is required by the Guidelines that, financial surety be guaranteed prior to the project's approval. This guarantees environmental performance and covers the technical as well as the financial failure by the mine operators to attain their full responsibilities at the point of closure.<sup>279</sup> It also allows the governments to avoid costs associated with cleaning up of closed or abandoned mines. According to the Guidelines, consideration should be given to: (a) the required standard of rehabilitation; (b) the required standard of certainty; and (c) one-off rehabilitation as opposed to long-term care.

## Enforcement

While establishing regulatory frameworks is laudable, this would be useless in the absence of an enforcement mechanism. The Guidelines require that new approaches to enforcement be tried and carried out.<sup>280</sup> It does not however set an enforcement mechanism and this reveals its weakness.

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<sup>278</sup> As above, 11.

<sup>279</sup> As above, 15.

<sup>280</sup> As above, 17.

### **3.2.2 United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights**

The global society, concerned about human rights violations, is considering how international law can be used to regulate transnational corporations in the absence of effective state regulation. The first attempt in international law to concretise international law principles governing MNCs was the *United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*.<sup>281</sup> The Norms, although they did not make explicit guidelines on mining and the environment, set an expected conduct of MNCs regardless of the industry in which they operate. They recognised that human rights and environmental law, traditionally envisaged as two distinct fields, are intertwined. The perception arose because protection of the environment could be promoted by setting it in the framework of human rights.<sup>282</sup>

In essence, these Norms attempted to place on corporations the same human rights as States have agreed to abide by under treaties ratified by them ‘to promote, secure the fulfilment of, respect, ensure respect of and protect human rights’.<sup>283</sup> However, these Norms suffered from several defects, including an overcomplicated attempt to identify a closed list of internationally recognised rights that would apply directly to corporations. As a result, it was also felt that the Norms were aspirational in that they identified ideals of TNC behaviour rather than the minimum standards of acceptable international conduct.<sup>284</sup>

### **3.2.3 United Nations Guiding Principles on Business and Human Rights**

Following the rejection of the Norms by the international community, the UN Secretary-General, in 2005, appointed a Special Representative, Professor John Ruggie, whose mandate was:

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<sup>281</sup> UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003). Approved 13 August 2003, UN Sub-Commission on Promotion and Protection of Human Rights resolution 2003/16, UN Doc.E/CN.4/Sub.2/2003/L.11 at 52 (2003) 0.

<sup>282</sup> P Pathak ‘Human rights approach to environmental protection’ (2014) 7 *OIDA International Journal of Sustainable Development* 18.

<sup>283</sup> J Ruggie ‘Guiding principles on business and human rights: implementing the United Nations “Protect, Respect and Remedy” Framework’ A/HRC/17/31.

<sup>284</sup> It was argued that the Norms were parallel to the UDHR in articulating ideal human rights standards. Denis Arnold contended that requiring TNCs to contribute to “the highest attainable standard” implied that TNCs must promote a range of social goods which most States have a difficulty providing for their citizens. Further, the Norms could not provide specific guidance about what constitutes such complex ends as “mental health” and “education.” He reiterated that it was imprecise insofar as the vast range of claims or duties that might fall under the umbrella of bioethics was left unspecified— DG Arnold ‘Transnational corporations and the duty to respect basic human rights’ (2010) 20 *Business Ethics Quarterly* 3 6–7.

1. To identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights;
2. To elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation;
3. To research and clarify the implications for transnational corporations and other business enterprises of concepts such as “complicity” and “sphere of influence”;
4. To develop materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises;
5. To compile a compendium of best practices of States and transnational corporations and other business enterprises.<sup>285</sup>

On 18 June 2008, Ruggie presented the findings to the Human Rights Council which were unanimously ‘accepted’. The findings proposed a Framework that incorporated “protect, respect, remedy’ principles. This prompted the Human Rights Council, through a resolution, to renew the Special Representative’s mandate for a further period of 3 years– until June 2011 –requesting the Special Representative to operationalise the Framework.<sup>286</sup> On 16 June

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<sup>285</sup> <http://www.ohchr.org/EN/Issues/Business/Pages/SRSGTransCorplIndex.aspx> (accessed 25 September 2017).

<sup>286</sup> The resolution A/HRC/RES/8/7 requested the Special Representative to: (a) provide views and recommendations on ways to strengthen the fulfillment of the duty of the State to protect all human rights from abuses by transnational corporations and other business enterprises; (b) elaborate further on the scope and content of the corporate responsibility to respect all human rights and to provide concrete guidance to business and other stakeholders; (c) explore options and make recommendations, at the national, regional and international levels, for enhancing access to effective remedies available to those whose human rights are impacted by corporate activities; (d) integrate a gender perspective throughout his work and to give special attention to persons belonging to vulnerable groups, in particular children; (e) liaise closely with the efforts of the human rights working group of the Global Compact in order to identify, exchange and promote best practices and lessons learned on the issue of transnational corporations and other business enterprises; (f) work in close coordination with United Nations and other relevant international bodies, offices, departments and specialized agencies, and in particular with other special procedures of the Council; (g) continue to consult on the issues covered by the mandate on an ongoing basis with all stakeholders, including States, national human rights institutions, international and regional organizations, transnational corporations and other business enterprises, and civil society, including academics, employers’ organizations, workers’ organizations, indigenous and other affected communities and non-governmental organizations, including through joint meetings; and (h) report annually to the Council and the General Assembly. See: <http://www.ohchr.org/EN/Issues/Business/Pages/SRSGTransCorplIndex.aspx> (accessed 25 September 2017).

2011, the Human Rights Council unanimously endorsed the Guiding Principles on Business and Human Rights for implementing the UN “Protect, Respect and Remedy” Framework. The endorsement provided, for the first time, a global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity. These principles enunciated under the Framework have been categorised in line with the three pillars: (1) duty of the State to protect human rights; (2) Corporation's obligation to respect human rights; and (3) Access to remedies.

### 1. Duty to Protect

The State has an obligation to respect, protect and fulfil the rights of individuals– (1) an obligation to protect an individual' right against abuse by a third party; and (2) to encourage respect of human rights by corporations. To this end, regulatory measures that strengthen governance of human rights and business including enforcement mechanisms must be encouraged by the State.

Where a State fails to protect the human rights of individuals against abuse by corporations, this amounts to an abrogation of its obligation to protect. John Ruggie reiterates:

States are required to act with due diligence to protect against corporate-related rights abuse affecting individuals within their territory or jurisdiction. This is a duty of conduct rather than the result. It involves taking steps to prevent, investigate, redress and punish abuse.<sup>287</sup>

Thus, a State violates human rights when it permits private individual or corporations to act freely. If an act infringes on human rights and this is initially attributable to the State, it is internationally liable for its failure to prevent the violation. The duty of the State is to take appropriate steps that are aimed at preventing the violation of human rights and carrying out serious investigations where there are reports of violations committed within its territory.<sup>288</sup>

### 2. Duty to Respect

The duty to respect human rights rests with the corporation. This implies that corporations are obliged to exercise due diligence so as to prevent them from violating human rights resulting

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<sup>287</sup> J Ruggie 'Business and fundamental rights: the state duty to protect and domestic legal reform' South African Institute for Advanced Constitutional, Public, Human Rights and International Law Johannesburg, 3 November 2008.

<sup>288</sup> V Rodriquez *Annual report of the Inter-American Court of Human Rights* (1988), par. 166, 172, 174 and 175.

from negative effects of their activities.<sup>289</sup> Corporations are responsible for any violation of human rights either within their own establishment or those that arise from their business relationships.<sup>290</sup> This responsibility applies fully and equally to all businesses. Thus, they are required to draw up a policy that embeds a commitment for the respect of human rights and this should be made publicly available.<sup>291</sup>

The Framework distinguishes the responsibility of corporations from the duty placed on States as follows: 'To respect rights essentially means not to infringe on the rights of others—put simply to do no harm'.<sup>292</sup> Thus, it introduces a 'due diligence' approach that requires corporations to see to it that their activities do not lead to any adverse human rights effects.<sup>293</sup> This approach has two key stages: first, responsibility to become aware and knowledgeable about a business' conduct; and second, responsibility to act on such information and do something in terms of prevention and remediation.<sup>294</sup> Due diligence is to be initiated in a new project and should include an assessment of the potential and actual impacts on human rights.<sup>295</sup>

### 3. Duty to Remedy

Where a corporation realises that its activities have led to or contributed to the adverse effects, it is obliged to cooperate in the remediation of the effects and through legitimate processes.<sup>296</sup> In this regard, the States are to take appropriate steps that ensure that such abuses, as they occur within their jurisdiction, are afforded access to effective remedies.<sup>297</sup> Except the State takes such steps to redress abuses by the corporation, its corresponding duty to protect can be said to be redundant.

#### Effectiveness of the Framework

The Framework has expounded an integrated approach to governance that recognises the distinct characteristics, rights and duties of state and non-state actors. It seeks internal

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<sup>289</sup> Principle 11, Ruggie Framework.

<sup>290</sup> Principle 13(b).

<sup>291</sup> Principle 16.

<sup>292</sup> Paragraph 24.

<sup>293</sup> D Schoemaker 'Raising the bar on human rights: what the Ruggie principles mean for responsible investors' (2011) 8.

<sup>294</sup> R Mares 'A gap in the corporate responsibility to respect human rights' (2010) 36 *Monash University Law Review* 3 36.

<sup>295</sup> Principle 17.

<sup>296</sup> Principle 22.

<sup>297</sup> Principle 25.

harmonisation within the domestic legal set up of States while acknowledging the reality of non-state governance systems centred on the regulatory community of economic actors. In this manner, it is not tied to the state or its legal systems but rather grounded in social legitimacy that embraces disciplinary and culturally techniques.<sup>298</sup> Notwithstanding the expansion of investor protection provisions, the Framework has little regard to the duties of States to protect its citizens. Ruggie argues that this has 'skewed the balance between the two' and consequently made it difficult for host states to 'strengthen domestic social and environmental standards, including those related to human rights, without fear of foreign challenge, which can take place under binding international arbitration.'<sup>299</sup> This would imply that a balance is difficult to attain in that, while the state may seek to strengthen environmental and human rights standards, the investor may well argue that such would infringe on the investment. This situation limits the state's duty to protect human rights from abuses by mining companies that operate at a transnational level. As Deva notes 'States are unwilling or unable to act robustly against corporate actors that disregard their human rights responsibilities.'<sup>300</sup> This unwillingness arises due to the apprehension that taking a hard line against TNCs that abuse human rights might impair their competitiveness to attract FDI brought by such corporations.

In reality, the State has given preferential treatment to investors to the disadvantage of the citizen. Consequentially, even in light of unhealthy working conditions in certain mines, hardly any action has been taken by the relevant authority to remedy the violation.<sup>301</sup> It is opined that, despite setting guidelines, international law on human rights and environment does not generally impose responsibilities on TNCs to safeguard the environment and human rights in the process of conducting their activities. While both fields of law require regulation by the State of a corporation' activities, enforcement of such regulations in the event of corporate violations is not easy as these regulations do not bind corporate actors directly thus making enforcement a daunting task for the State.

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<sup>298</sup> LC Backer 'On the evolution of the United Nations 'protect-respect-remedy' project: the state, the corporation and human rights in a global governance context' (2010) 9 *Santa Clara Journal of International Law* 2 141.

<sup>299</sup> J Ruggie 'Guiding principles on business and human rights: implementing the United Nations "protect, respect and remedy" framework' (2011) 29.

<sup>300</sup> S Deva 'Guiding principles on business and human rights: implications for companies' (2012) 9 *European Company Law* 2 103.

<sup>301</sup> For instance, there were reports in 2015 that workers at Kagem Mine on the Copperbelt were working without any safety gear.



### **3.2.4 World Bank Guidelines On Extractive Industries**

The World Bank has developed guidelines that are aimed at guiding the operations of extractive industries. These guidelines, modelled on sustainable development policies, focus on the management of environmental and social concerns, as well as extractive industries' transparency in its interaction with the host governments. The guidelines are a prescription for extractive industries whose activities are supported by the World Bank with the requirement that such industries should abide by them, more specifically, the International Finance Corporation (IFC) Guidelines; and Equator Principles (EPs).

#### **1. International Finance Corporation Guidelines**

The IFC Guidelines provide guidance on avoiding or minimising impacts caused by the implementation of projects on human health and the environment. It also promotes sustainable use of natural resources and to the reduction of project-related greenhouse gases (GHG) emissions. The Guidelines require clients to take into consideration the potential effect of their activities on ambient conditions and avoid or minimise such effects. Clients are also encouraged to consider, when developing and implementing projects, the potential effects of their activities on climate change and put in place cost-effective measures aimed at reducing emissions. These measures may include: alternative project locations, adoption of renewable or low carbon energy sources, sustainable agricultural, forestry and livestock management practices, the reduction of fugitive emissions and the reduction of gas flaring.

During the project life-cycle, the client must consider ambient conditions and apply technically and financially feasible resource efficiency and pollution prevention principles and techniques that are best suited to avoid or minimise adverse impacts on human health and the environment. The principles and techniques applied should be consistent with good international industry practice (GIIP). According to Guidance 34, the client must avoid, minimise, or control the release of pollutants whether in the air, water, and land.

The IFC Guidelines are applicable only to clients of the World Bank- entities that obtain loans, financial assistance or guarantees from the Bank. This means that, where an entity seeks to obtain a loan or assistance, such Guidelines would be prescribed. However, where there is a breach of the Guidelines, there is no sanction. It is asserted that the

Guidelines focus on avoiding or minimising of environmental impacts of a project supported by the World Bank.

## 2. Equator Principles

The EPs are a voluntary set of standards for determining, assessing and managing social and environmental risk in project financing. They are considered the financial industry 'gold standard' for sustainable project finance. The adoption of the EPs is aimed at guaranteeing that Projects financed and advised on are implemented in a socially responsible manner that reflects proper management of the environment. The reasoning is drawn from the recognition of the prominence of climate change, human rights, biodiversity, and other negative effects caused by projects. It is believed that their adoption and observance offers substantial advantages to the project funder, client, and local stakeholders.<sup>302</sup>

The current principles, Equator Principles III, adopted in June 2013, establishes a set of ten principles that must be adhered to by a client: (a) review and classification of the environmental and social risk of the project; (b) conducting an Assessment that addresses the specific environmental and social risks and their mitigation; (c) compliance with applicable environmental and social standards; (d) utilisation of an environmental and social management system; (e) effective stakeholder engagement (affected communities) on an ongoing basis; (f) maintaining of a grievance mechanism; (g) conducting of due diligence and assessment of compliance; (h) compliance to environmental laws and regulations of the host country; (i) mechanism for independent monitoring and reporting; and (j) report and ensure that environmental information is accessible and obtainable online.<sup>303</sup>

These principles, drawn by the World Bank, are based on the IFC Performance Standards on Social and Environmental Sustainability, and the World Bank Group Environmental, Health and Safety Guidelines. The two form a cornerstone upon which the EPs are drawn in that, the Equator Principles Financial Institutions (EPFIs) obligate themselves to ensure that loans or any financial assistance are given only to projects whose borrower is able to observe the policies and procedures set for implementing EPs. The principles provide a baseline for establishing policies, practices, and procedures. Financial institutions can embrace and apply the Principles willingly and independently. They are not legally binding neither are

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<sup>302</sup> Preamble to Equator Principles.

<sup>303</sup> Equator Principles III (June 2013) 5-15.

they enforceable. Their aim is basically to provide a baseline and framework for developing individual, internal environmental and social policies, procedures and practise.<sup>304</sup>

### 3.2.5 Organisation for Economic Cooperation and Development Guidelines

The Organisation for Economic Cooperation and Development (OECD) is an economic organisation with a membership of 30 countries. Its Guidelines contain a set of standards that are aimed at governing Multinational Enterprises (MNEs) and other businesses that operate within or outside their countries. The Guidelines are voluntary in nature and are meant to apply to both domestic and overseas activities. The nature of the principles and standards is in consonance with globally accepted standards. The Guidelines were first adopted in 1976 by the Council of the OECD. In 2011, at the 50<sup>th</sup> Anniversary Ministerial Meeting, the Guidelines were updated for the fifth time bringing in some new changes which include among others – a new human rights chapter, environment, clearer and reinforced procedural guidance, and a proactive implementation agenda.<sup>305</sup>

Chapter VI of the Guidelines encourages MNEs to increase environmental performance by enhancing their own environmental management and strategically planning for how to address environmental effects. Specifically, MNEs are obliged to conduct their activities in a manner that does not negatively affect the environment. Thus, MNEs are required, *inter alia* to: establish and maintain a system of environmental management; not postpone measures for addressing or reducing environmental harm caused on the basis that they lack full scientific certainty; maintain a plan for preventing, averting, and handling serious environmental harm; and contribute to sustainability through adequate public policy.<sup>306</sup>

The Guidelines basic foundation is hinged on the requirement that enterprises must act proactively to avoid environmental damages resulting from their activities.<sup>307</sup> It may be stated that the Guidelines are meant to recommend how a precautionary approach could be utilised and not to give an interpretation to any existing instrument or create novel commitments or precedents a government' part.<sup>308</sup> Unfortunately, despite these the obligations placed on the MNEs, the Guidelines have not addressed pollution control, compliance monitoring and liability issues. The Guidelines appear to be focused only on prevention of harm. Further, besides the

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<sup>304</sup> As above, 11.

<sup>305</sup> OECD *Guidelines for multinational enterprises* (2011) 4.

<sup>306</sup> As above, paragraph 4, 5 & 8.

<sup>307</sup> As above, commentary 69.

<sup>308</sup> As above, commentary 70.

Guidelines being 'voluntary', no mechanism for enforcing these have been provided. The only expectation is that governments that are OECD members encourage their corporations operating within their territories to follow the Guidelines as a code of conduct. In this regard, every member is obliged to establish a National Contact Point— a government office —so as to facilitate application of the Guidelines.<sup>309</sup> In the event of a violation of any part of the Guidelines, a party so affected can file a complaint with the National Contact Points. Despite putting in place a mechanism of filing in of a complaint, no enforcement can be done even by the National Contact Points.

### **3.2.6 International Council on Mining and Metals Sustainable Development Framework**

The International Council on Mining and Metals (ICMM), established in May 2001, is a body that brings together 23 mining and metal companies with a mandate to promote sustainable policies and practices in the mining and mineral production.<sup>310</sup> Specifically, the purpose of the ICMM is threefold: first, catalyse industry performance; second, monitor long term strategic developments and emerging issues in the international realm; and third, catalyse change for sector wide action through the undertaking of partnerships for action and engage in dialogue initiatives on mining and biodiversity. Thus, its main objective is to assist the mining sector in aligning their economic, social and environmental goals so as to maximise their contribution to meeting the challenges of sustainable development. Pursuant to this objective, the ICMM aims to promote global best practice performance standards. This has been done through the development of a Sustainable Development Framework (SDF) which enunciate principles on performance.

#### **Sustainable Development Framework**

The Sustainable Development Framework, 29 May 2003, has ten (10) principles relating to performance obligations which all make a valuable contribution to sustainable development.

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<sup>309</sup> Part II of OECD Guidelines of 2011 on 'Implementation Procedures of the OECD Guidelines for Multinational Enterprises' provides: 'Adhering countries shall set up National Contact Points to further the effectiveness of the Guidelines by undertaking promotional activities, handling enquiries and contributing to the resolution of issues that arise relating to the implementation of the Guidelines in specific instances, taking account of the attached procedural guidance.'

<sup>310</sup> International Council on Mining and Metals 'The mining and metals industries: progress in contributing to sustainable development' ICMM Working Paper, 27 February 2002, 7. The 23 members are: African Rainbow Minerals; Anglo American; Anglo Gold Ashanti; Antofagasta Minerals; Areva Mines SA; Barrick; BHP Billiton; Codelco; Freeport-McMoRan; Glencore; Goldcorp; Gold Fields; Hydro; JX Nippon; Lonmin; Mitsubishi Materials; MMG; Newmont; Polyus Gold; Rio Tinto; South32; Sumitomo Metal Mining; and Teck. See: <http://www.icmm.com/en-gb/members/member-companies> (accessed 12 December 2016).

The principles besides enhancing shareholder value, also, include a commitment to measure corporate performance using the principles.

### 1. Ethical business practices and corporate governance

The corporations are obliged to develop and implement company statements of ethical business principles and practices that management commits itself to enforce. The policies and practices to be implemented must be those that aim to prevent bribery and corruption. Where implemented, they should comply with or exceed the minimum requirements of the laws and regulations of the host-country. In their operations, corporations must work with governments, industry and other stakeholders to achieve appropriate and effective public policy, laws, regulations and procedures that facilitate the mining, minerals, and metals sector's contribution to sustainable development within that country's sustainable development strategies.

### 2. Integrating sustainable development in corporate decision-making

The principles on sustainable development principles must be integrated into company policies and practices. This means that the planning, designing, operation and close of operations must be done in a manner that enhances sustainable development. Good practice and innovative measures that improve the social, environmental and economic performance, must be implemented by the corporation. This must be done in consonance with enhancing shareholder value. Training on sustainable development must be conducted to ensure adequate competency at all levels among employees and those of contractors.

### 3. Human rights respect

Fundamental human rights must be respected by the corporation. It is the responsibility of the corporation to ensure that there are fair remuneration and work conditions for all employees. The labour utilised must not be forced, compulsory or that which employs children— child labour. Where there are issues of mutual consent, employees must be engaged. The policies and practices to be implemented must be designed in a manner that eliminates harassment and unfair discrimination. The corporation must respect the culture and heritage of local communities, including indigenous peoples. Its employees must be trained and provided with guidance on cultural and human rights. Involuntary resettlement must be minimised and where

it is unavoidable, fair compensation relating to the adverse effects caused by the community must be paid.

#### 4. Risk management strategies

The corporation must consult with interested and affected parties in the identification, assessment and management of all significant social, health, safety, environmental and economic impacts associated with its activities. In this regard, there must be regular review and updating of risk management systems and where parties are to be affected, these must be informed of the measures that will be undertaken to manage the potential risks effectively.

#### 5. Health and safety performance

The corporations must implement a management system focused on continual improvement of all aspects of operations that could have a significant impact on the health and safety of its employees, contractors engaged, and the communities where its operations are conducted. Thus, practical and reasonable measures to eliminate workplace fatalities, injuries and diseases must be taken. Also, all employees including employees of contractors must be provided with health and safety training. Further, regular health surveillance, risk-based monitoring of employees, rehabilitation and reintegration of employees into operations following illness or injury must be implemented.

#### 6. Continued environmental performance

Environmental effects where positive and negative, direct and indirect, must be assessed from exploration stage through to closure of the mine. Thus, an environmental management system that focuses on continued improvement must be implemented. The aim of such a system is to review, prevent, mitigate or ameliorate adverse environmental effects of mining activities. Where land has been disturbed, such must be rehabilitated. Waste generated from mining operations must be safely stored and disposed of.

#### 7. Conservation of biodiversity

There must be respect for areas that are designated as protected. The corporation must disseminate scientific data on and promote practices and experiences in biodiversity

assessment and management. Its policies must also support the development and implementation of scientifically sound, inclusive and transparent procedures for integrated approaches to land use planning, biodiversity, conservation and mining.

#### 8. Facilitate and encourage responsible product design

There must be prior understanding of the mineral or metal properties, their life cycle, and effects on human health and the environment. In achieving this, the corporation must conduct or support research and innovation that promotes the use of products and technologies that are safe and efficient in their use of energy, natural resources and other materials. It must also develop and promote the concept of integrated materials management throughout the metals and minerals value chain. Further, it must support the development of scientifically sound policies, regulations, product standards and material choice decisions that encourage the safe use of mineral and metal products.

#### 9. Contribution to community development

The corporations must engage with likely affected parties and respond to issues and conflicts concerning the management of social impacts. It must ensure that appropriate systems are in place for ongoing interaction with affected parties. These systems are to ensure that equitable and cultural means are utilised in by the corporation in dealing with minorities and other marginalised groups. The important aspect is a contribution to community development from project development to closure. Thus, partnerships with governments and non-governmental organisations must be encouraged to ensure that programmes (such as community health, education, local business development) are well designed and effectively delivered.

#### 10. Verified reporting

The corporation must report on its economic, social and environmental performance and how these contribute to sustainable development. In this vein, they must provide timely, accurate and relevant information. Open consultation with relevant stakeholders must be carried out.

## Effectiveness of the SDF

The SDF is significant in terms of its contribution to the sustainable development process. In the longer term, the engagement process has helped stimulate ongoing dialogue on sustainable development issues.<sup>311</sup> The process requires companies to publicly commit the activities of their in pursuance to sustainable development agenda. In doing so, the expectation is that such companies would not renege from commitments that it has already made. Put simply, the framework would, in turn, induce compliance. However, the enforcement thereof is what is lacking.

### **3.2.7 International Organisation for Standardisation's ISO 14001**

The International Organisation for Standardisation (ISO) is a non-governmental entity that develops worldwide standards to facilitate the international exchange of goods. The ISO's precise responsibility is to ensure global coordination and unification of industrial standards. In furtherance of its objective, a series of voluntary environmental management standards for corporations has been created. The ISO 14001 are a Global Environmental Management Initiative that provides for a corporate self-assessment checklist. The main objective of the ISO 14001 is to assist businesses to accomplish environmental, health and safety excellence. The Standards do not include specific environmental regulations for corporate compliance but instead contains general procedures for developing management systems that address the environmental impacts of corporate activities, including pollution, and thus can be adapted to different types of organisations. These Standards require certain aspects to be well addressed such as:

1. Establishment of appropriate environmental policy

The Standard requires a corporation to establish an appropriate environmental policy. Such a policy, once established, must be documented, communicated to employees, and made publicly available. It should include an undertaking to continue to improve prevention of pollution, compliance with regulations, and a framework with set objectives.

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<sup>311</sup> N McNamara 'The environmental regulation of mining: an international comparison' unpublished PhD Dissertation, University of Southern Queensland 2009, 52.



## 2. Planning and identification of environmental aspects

The planning phase must cover identification of the organisation's activities regarding environmental aspects, including– policies, access to legal options, objectives and targets, and programmes established for the realisation of objectives and targets set.

## 3. Environmental management system

It is required that an organisation implements and operates an Environmental Management System (EMS). An EMS is a system that 'helps organisations identify, manage, monitor and control their environmental issues in a "holistic" manner.'<sup>312</sup> It includes the definitions, communication of roles and responsibilities, delivery of suitable training, sufficient internal and external communication guarantees, documented control processes, and emergency response measures.

## 4. Regular monitoring and measurement

There must be put in place processes aimed at monitoring the environment regularly and measuring the operations and activities of entities. Processes for handling issues of non-conformity, maintenance of records, the auditing process must be present. It is posited that the EMS is basically a mechanism that has been set up to monitor and deal with pollution.

## 5. Periodic management reviews

It is mandatory that periodic management reviews of the overall EMS are conducted. This ensures determination of suitability, adequacy, and effectiveness in line with the changing environmental circumstances. To be able to be in constant touch with environmental needs, there must be a constant update of policies and standards so to keep track with the changing circumstances. Further, the ISO 14001 requires that any organisation engaged in mining must determine whether it is compliant to the environmental need. For ISO 14001 certification to be given, there should be established an environmental policy on pollution prevention by the organisation's top-level management.

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<sup>312</sup> International Standardisation Organisation 'Introduction to ISO 14001' (2015) 3.

## Effectiveness of the ISO 14001

The ISO 14001 has been developed as an effective tool for proactive organisations to improve their environmental performance and in the process, meet the legislative requirements while reassuring stakeholders and regulators.<sup>313</sup> Its weakness lies in its generic and voluntary nature. The fact that it is generic, entails that an organisation can implement it in a manner it sees fit. In this way, an organisation can implement an EMS without necessarily altering its organisational culture. This makes an EMS as a substitute for human action and not a tool that could be used. The voluntary nature of the ISO 14001 creates an impression that, once an organisation adopts it, it would automatically improve its environmental system, even in the absence of commitment from the organisations' top management.

### 3.2.8 Global Compact

The Global Compact is an initiative that has been embraced by many TNCs, including the mining companies. It is a voluntary initiative of the UN which was launched on 26 July 2000. The idea behind the Compact rest on the fact that the value system of a company is a formidable basis for corporate sustainability. This implies that the company, in conducting its activities, must meet the minimum fundamental responsibilities in the spheres of human rights, labour, environment and anti-corruption.<sup>314</sup> Thus, the Compact encapsulates ten principles that have been developed for incorporation by companies in the strategies, policies and procedures, and establishing a culture of integrity. These principles have been derived from the Universal Declaration for Human Rights, International Labour Organisation Declaration on Fundamental Principles and Rights at Work, Rio Declaration, and United Nations Convention against Corruption.

#### 1. Human rights

Human rights is the first area of concern identified by the Compact. It has two fundamental principles: the first requires businesses to support and respect the protection of internationally recognised human rights. Respect entails that businesses should refrain from infringing on human rights and where their activities impacts negatively on human rights, such must be addressed. While States have an overarching obligation to protect, respect and fulfil human

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<sup>313</sup> M Sambasivan and NY Fei 'Evaluation of critical success factors of implementation of ISO 14001 using analytic hierarchy process (AHP): a case study from Malaysia' (2008) *16 Journal of Cleaner Production* 1424-1433.

<sup>314</sup> <https://www.unglobalcompact.org/what-is-gc/mission/principles> (accessed 13 December 2016).

rights, other organisations, institutions, businesses and individuals have important complementary roles to play in respecting and supporting human rights. The underlying expectation is that respecting and supporting human rights strengthens the relationship between the business and its stakeholders.

In determining the scope of their responsibility, businesses must: (i) consider the country and local context in which it is operating for any human rights challenges that context might pose; (ii) consider whether the company is violating human rights through its own activities within that context; and (iii) consider whether its relationship with other stakeholders poses a risk on the company in terms of implicating it in human rights abuse. The company must, in fulfilling its responsibility, develop a policy as a public commitment to fulfil its duty to respect human rights. This arises from the belief that organisations can make a positive contribution to the attainment of human rights. In the workplace, organisations are expected to: provide safe and healthy working conditions; guarantee freedom of association; ensure non-discrimination in personnel practices; not use forced labour or child labour, directly or indirectly; provide access to basic health, education and housing for workers and their families; and accommodate religious practices of all employees. Regarding the community, the organisation must: prevent forced displacement of individuals, groups or communities; protect the economic livelihood of local communities; and provide decent work, produce quality goods or services that improve lives.

The second principle requires businesses to ensure that they are not complicit in human rights abuses. Complicity consists two elements: first, an act or omission by a company that aids another to carry out a human rights abuse, and second, the knowledge by the company that its act or omission could provide such help. Accusations relating to complicity can arise in a numerous contexts such as: (i) direct complicity, where a company provides goods or services that it knows will be used to carry out the abuse; (ii) beneficial complicity, where a company benefits from human rights abuses even if it did not positively assist or cause them; and (iii) silent complicity, where the company is silent or inactive in the face of systematic or continuous human rights abuse. The organisation is required to develop an effective human rights policy and conduct appropriate human rights due diligence.<sup>315</sup>

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<sup>315</sup> <https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-2> (accessed 11 April 2017).

## 2. Labour

Under this pillar, businesses must 'uphold the freedom of association and the effective recognition of the right to collective bargaining.' This implies that the right of all employers and all workers to freely and voluntarily establish and join groups for the promotion and defence of their occupational interests must be respected. Participation in collective bargaining should be encouraged. This is because it is important for the maintenance of the harmonious development of labour relations.

The businesses must uphold elimination of all form of forced and compulsory labour.<sup>316</sup> Forced labour, besides constituting a human rights violation, also divests society of its chance to harness skills and human resources. Where a corporation practices forced labour, the consequences are felt by society, not just an individual. Thus, organisations are encouraged to develop clear policies that prohibit them from using or being complicit in or benefit from forced labour. They should also adhere to provisions of domestic laws and regulations against forced labour and where such are insufficient, they can take recourse to international standards.

Businesses must also uphold the effective abolition of child labour.<sup>317</sup> Child labour damages a child's physical, social, mental, psychological and spiritual development because it is work performed at too early an age. It also deprives children of their childhood and dignity. Thus, organisations must adhere to minimum employable years as prescribed by domestic laws, put in place mechanisms for age verification, and develop and implement mechanisms that help to detect child labour.

Discrimination in employment must be eliminated.<sup>318</sup> This can occur, with respect to the terms and conditions of the employment, such as: recruitment, remuneration and hours of work, maternity protection, and security of tenure. Non-discrimination entails that employees are selected on the basis of their ability to perform. This should be without distinction, exclusion or preference made.

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<sup>316</sup> Principle 4.

<sup>317</sup> Principle 5.

<sup>318</sup> Principle 6.

### 3. Environment

The Compact enlists three principles on the environment: the first encourages businesses to support a precautionary approach to environmental challenges.<sup>319</sup> The notion of this approach, from a business perspective, is the idea of prevention rather than remediation. In other words, it is more cost-effective to take early action to ensure that environmental damage does not occur. Thus, companies must not invest in production methods that are not sustainable (i.e. methods that deplete resources and degrade the environment). In turn, improving environmental performance means less financial risk, an important consideration for insurers.

The second principle encourages businesses to undertake initiatives to promote greater environmental responsibility.<sup>320</sup> This requirement stems from the fact that, businesses have the responsibility to ensure that their activities do not harm the environment. Society expects business to be good actors in the community. The legitimacy of the business is gained through meeting the needs of society. Therefore, companies must define their vision, policies and strategies which should include sustainable development, economic prosperity, environmental quality and social equity.

The third requires businesses to encourage the development and diffusion of environmentally friendly technologies.<sup>321</sup> The technology to be employed should be less polluting, utilise all resources in a more sustainable manner, reuse more of the waste generated, and handle residual wastes in a more acceptable manner. The use of environmentally friendly technologies: (i) helps a company reduce the use of raw materials leading to increased efficiency; (ii) creates new business opportunities and helps increase the overall competitiveness of the company; and (iii) enables a company to use materials more efficiently and cleanly thereby leading to long-term economic and environmental benefits.

### 4. Anti-corruption

Principle 10 of the Compact provides that, 'Businesses should work against corruption in all its forms, including extortion and bribery.' Participants are not only to avoid bribery, extortion and other forms of corruption, but also to proactively develop policies and concrete programmes to address corruption internally and within their supply chains. The significance in

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<sup>319</sup> Principle 7.

<sup>320</sup> Principle 8.

<sup>321</sup> Principle 9.

eliminating corruption hinges on building confidence and trust in business among investors, customers, employees and the public. The rapid development of rules of corporate governance is also prompting companies to focus on anti-corruption measures as part of their mechanisms to express corporate sustainability and to protect their reputations and the interests of their stakeholders. Thus, in fighting corruption, corporations must: (i) introduce anti-corruption policies and programmes within their organisations and their business operations; (ii) report on the work against corruption; and (iii) with other stakeholders, must scale up anti-corruption efforts.

### Relevance of the Compact

It is not in doubt that the Compact is an ingenious way of making corporations adhere to principles of sustainability in their sphere of influence. The drawback of the Compact lies in the absence of clarity of its principles. This could be seen in its failure to provide solid guidance to corporations about the expected conduct. Requirements such as “action need to be taken within a firm's sphere of influence” miss the precision necessary for a viable code of conduct.<sup>322</sup> The language used in the principles is general and there is the probability that corporations can evade their supposed responsibilities. It is, at the barest minimum, a code of corporate conduct.

The Compact does not independently monitor and verify compliance with its principles and as such, lacks accountability. Accountability, or rather the lack of it, is compounded by the lack of serious monitoring, sanctions, enforceable rules and independent verification fostering its misuse as a marketing tool.<sup>323</sup> Some critics argue that the Compact is ‘a public relations smokescreen without substance that allows powerful MNCs to “blue wash” their damaged image.’<sup>324</sup>

The Compact is also devoid of an enforcement mechanism. Instead, it relies on public accountability, transparency and self-interest of companies, labour and civil society to initiate and share substantive action in pursuing the principles upon which the Compact is based.

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<sup>322</sup> A Rasche “A necessary supplement” – what the United Nations Global Compact is and is not’ (2010) 48 *Business and Society* 4 16.

<sup>323</sup> As above, 19.

<sup>324</sup> As above.

### 3.2.9 Extractive Industries Transparency Initiative

The Extractive Industries Transparency Initiative (EITI) is an international standard that promotes responsible control of natural resources.<sup>325</sup> Although it was initially an initiative, it has evolved into a globally recognised governance tool not only for natural resource management but also for greater revenue in extractive industries. The EITI has set standards that provide a mechanism to be followed. In relation to natural resource management, principle 1 states:

We share a belief that the prudent use of natural resource wealth should be an important engine for sustainable economic growth that contributes to sustainable development and poverty reduction, but if not managed properly, can create negative economic and social impacts.

This principle establishes the recognition of the importance of extractive industries in harnessing economic growth, however, if such projects are not well harnessed, it could pose to negative impacts– degradation of the environment, livelihood loss, and biodiversity. The EITI also places emphasis on transparency in revenue collection, financial management, and accountability.<sup>326</sup>

#### Governance structure of EITI in Zambia

In May 2009, Zambia joined the EITI and became compliant on 19 September 2012.<sup>327</sup> The responsibility for implementation of the EITI lies with the Zambia EITI Council (ZEC) which is a multi-stakeholder group consisting of 6 representatives: three stakeholders, the government, civil society, and extractive companies. The Council has 18 members.<sup>328</sup> The Chairman of the Council is the Secretary of the Treasury. The Council is supported by a Secretariat which

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<sup>325</sup> <https://eiti.org/eiti> (accessed 25 March 2016).

<sup>326</sup> This could be seen from the following principles: '(3) We recognise that the benefits of resource extraction occur as revenue streams over many years and can be highly price dependent; (4) We recognise that a public understanding of government revenues and expenditure over time could help public debate and inform choice of appropriate and realistic options for sustainable development; (5) We underline the importance of transparency by governments and companies in the extractive industries and the need to enhance public financial management and accountability; (8) We believe in the principle and practice of accountability by government to all citizens for the stewardship of revenue streams and public expenditure; (9) We are committed to encouraging high standards of transparency and accountability in public life, government operations and in business; (10) We believe that a broadly consistent and workable approach to the disclosure of payments and revenues is required, which is simple to undertake and to use; and (11) We believe that payments' disclosure in a given country should involve all extractive industry companies operating in that country.' – EITI *The EITI Standard* (2016) 10.

<sup>327</sup> In order for a country to implement the EITI, it is required to undertake a number of steps before applying to become an EITI candidate country: (i) government commitment; (2) company engagement; (3) civil society engagement; (4) establishment of a multi-stakeholder group; and (5) agreement on an EITI work plan.

<sup>328</sup> <http://www.zambiaeiti.org/index.php/ct-menu-item-34> (accessed 16 December 2016).

coordinates and oversees the implementation of decisions made. Currently, the Council is donor financed. The funds obtained are used for specific activities identified in the budget.

Despite the establishment of the Council, its effective operation has faced numerous challenges, namely: improving transparency is a long haul process; the EITI reports are less effective in ensuring good natural resource management. These reports ought to generate public debate and influence the way that governments and companies act; weak linkages between the EITI process and the wider society; and the restriction of the implementation of the EITI process to issues of revenue transparency.<sup>329</sup>

### **3.2.10 Global Reporting Initiative**

The Global Reporting Initiative (GRI) Standards represent global best practice for reporting publicly on economic, environmental and social impacts. The Standards require a corporation or organisation to report on its contributions, negatively or positively, to sustainable development.<sup>330</sup> In this manner, the Standards are primarily designed to enable an organisation to carry out a sustainability report. Such a report, published by a company or organisation, presents the organisation's values and governance model and demonstrates the link between its strategy and its commitment to a sustainable global economy.<sup>331</sup>

### **3.3 Influence of international standards on national legislation and policy**

International standards encapsulate modern issues that have emerged in mining, that is to say, sustainability of mining practices. In a nutshell, these standards are anchored on achieving a balance between sustainable development and mineral resource extraction and as such, they advocate for sustainable mining practices.

The influence of international standards can be determined by the extent to which the guidelines set out have influenced the enactment of legislation or development of policies in a particular jurisdiction. In the case of Zambia, with its long history of mining stretching from 1930, the focus was on mineral extraction. Despite the awareness that mining activities posed on the environment, there was no action taken. However, this changed in 1990 when the

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<sup>329</sup> As above.

<sup>330</sup> <https://www.globalreporting.org/standards/gri-standards-download-center/?g=4d13e53e-e0d4-44e2-9d9c-68e5c7744b9f> (accessed 12 December 2016).

<sup>331</sup> <https://www.globalreporting.org/information/sustainability-reporting/Pages/default.aspx> (accessed 12 December 2016).



Environmental Protection and Pollution Control Act (EPPCA) was enacted. The EPPCA, though it covered a few aspects of environmental protection, was weak as it was inconsistent with international norms and practices. The enactment of the EMA was as a result of the experience that the institution had undergone and the desire to incorporate modern trends. However, some of the provisions that were proposed were rejected in Parliament.<sup>332</sup> The EMA, enacted in 2011, enlists as one of its objectives, to 'facilitate the implementation of international environmental agreements and conventions to which Zambia is a party.'<sup>333</sup>

The EMA, other than integrating international norms, deliberately puts in place a provision that requires facilitation and implementation of international agreements and conventions to which Zambia is a party. Under section 84(3), the Minister shall, 'after signing an international agreement designed to protect the environment, as soon as it is practicable— (a) cause the agreement to be ratified; and (b) take appropriate measures to give effect to the agreement.' The use of the word 'shall' denotes an obligation placed on the Minister to ensure that international agreements on protection of the environment, are ratified and given effect as soon as practicable. There is no obligation under the EMA for the adoption of international and regional practices in environmental management. The only obligation is ratification and implementation which is done in accordance with an Act of Parliament— Ratification of International Agreements Act No. 34 of 2016. Despite the requirement under section 84(3), the government has not ratified many treaties on environmental protection. This is due to a lack of political will to do so and the nature of the treaties— they are largely non-binding and mainly encourages States to adopt, cooperate and implement.

The enactment of the MMDA of 2015, just like the EMA, was influenced by international norms based on sustainable mining practices. The MRDP, which forms the guiding framework and basis for MMDA, set as its principle, 'adherence to regional and international conventions and other instruments that are relevant to mining and to which Zambia is a party or a signatory.'<sup>334</sup> Unlike its predecessor which was devoid of such norms, the Act of 2015 has incorporated such norms from the regional and international instrument in its section 4 which requires that, where mining and development of minerals are occurring, certain principles be considered:

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<sup>332</sup> Informal discussion with ZEMA, Friday, 22 May 2015.

<sup>333</sup> Preamble to the EMA.

<sup>334</sup> Ministry of Mines and Mineral Development *Mineral Resources Development Policy* (2013) 6.

- (a) mineral resources are a non-renewable resource and shall be conserved, developed and used prudently, taking into account the needs of the present and future generations;
- (b) mineral resources shall be explored and developed in a manner that promotes and contributes to the socioeconomic development and in accordance with international conventions to which Zambia is a party;
- (c) the exploitation of minerals shall ensure safety, health and environmental protection;
- (d) wasteful mining practices shall be avoided so as to promote sustainable development and prevent adverse environmental effects;
- (e) citizens shall have equitable access to mineral resources and benefit from mineral resources development; and
- (f) development of local communities in areas surrounding the mining area based on prioritisation of community needs, health and safety.

Subsection (b) requires that exploration and development of minerals shall be done in a manner that is consistent with international conventions that the country is party to. This means that the norms enunciated in the international conventions that Zambia is party to apply in relation to mining and mineral resource development. There is no express provision that binds the country to adhere to such international norms neither is there an obligation to ratify and implement international and regional agreements the country may be party too, like in the case of the EMA.

It must be underscored that there are no international conventions, declarations, protocols or treaties applicable to issues peculiar to mining and mineral processing. Specific reference to mining occurs only in treaties relating to the international areas of Antarctica and the Deep Sea.<sup>335</sup> The instruments discussed in this thesis do not prescribe the guidelines for extraction, something which reveals their weakness. The positive aspect, however, is their attempt to address the effects of extractive activities— environmental degradation.

The weakness of international standards lies in the fact that, they are merely a guide and cannot be enforced unless if ratified and Parliament decides to domesticate them. The UNEGMO require governments to create a well-designed legislative framework, which includes both physical and social aspects of the environment, for the mining industry. Such a

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<sup>335</sup> EL Garner 'The case for an international mining law' 2004 10.

framework should emphasis mining legislation that incorporates environmental protection mechanisms. It identifies EIA, grant of permits, and licences as an important aspect. This has been done under the national legislation, however, the UNEGMO does not cover the adequacy or otherwise efficacy of such measures. To the most, it covers the basic aspects required in order to ensure the attainment of sustainable mining practices. There is no enforcement mechanism neither are there daring provisions, breach of which would attract some sort of sanction. In the case of OECD Guidelines, their main emphasis is on companies increasing their environmental performance. There is no binding obligation on them to do so neither is there sanction for failure to do so.

The second weakness relates to the failure of such standards to impose a duty of the mining company. For instance, the Ruggie Framework seeks internal harmonisation within the domestic legal set up of States by emphasising the role of the State. However, the Framework has not balanced the duty of the state with the responsibilities of the investor. This has limited the State's action in ensuring that adequate measures are put in place to protect the environment and human rights without fear of a legal challenge by the investor. Thus, despite setting guidelines, these do not generally impose responsibilities on TNCs to safeguard the environment and human rights in the process of conducting their activities.

In averting these weaknesses, it is desirable that the existing legislation is strengthened and all mining companies compelled to operate using internationally recognised codes of practice, properly referenced in domestic law.

### **3.4 Regional Standards**

The issues of sustainability of mining practices have attracted concerns even at a regional level. In Africa, the African Union has been very influential in developing instruments aimed at ensuring that benefits of mining and enjoyed by the people while ensuring that minerals resources are sustainably extracted. At the sub-regional level, the Common Market for Eastern and Southern Africa (COMESA) and Southern Africa Development Community (SADC) have taken strides to set standards for either investment generally, or mining investment and the need for sustainability.

### 3.4.1 African Charter on Human and Peoples' Rights

The African Human Rights System, embodied in the ACHPR, establishes the African Commission on Human and Peoples' Rights. Its functions, as stated in Article 45 of the Charter, include promotion and protecting of human rights, and interpreting the African Charter.<sup>336</sup> The Commission' responsibility is:

To formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations.<sup>337</sup>

The natural interpretation of this provision suggests that the Commission has a legal mandate to develop principles and rules. Such principles, in the absence of provisions aimed at controlling human rights abuse by corporations, could promote human rights observance. In carrying out this mandate, the Commission is required to obtain inspiration from international law. Article 60 thus provides:

The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.<sup>338</sup>

This article envisages that 'other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations' could be sources of inspiration for the Commission, however, the Commission is yet to do so. This poses a challenge on the protection of human rights. It is argued that the Commission has adopted the classical doctrine under international law. Communication can only be brought by a State against another State Party to the Charter. Private persons or individuals do not have audience before the Commission.<sup>339</sup> Consequentially, a private person or individual can only be involved when a State is held liable for violation of a human right.

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<sup>336</sup> Article 45(1)(2)(3)(4) of the Charter.

<sup>337</sup> Article 45(1)(b), ACHPR.

<sup>338</sup> Article 60.

<sup>339</sup> Article 47.

It is also argued that the ACHPR does not have a set standard for environmental protection. Shelton contends:

No precise standard exists, nor can such a standard be established in human rights treaties. Instead, the conventions state rights to 'adequate' living conditions for health and well-being and to social security without defining the term further. The 'framework' treaty allows national and local regulations to elaborate on these rights, since norms are easier to define and amend on the local level and are more responsive to the needs of the community.<sup>340</sup>

In spite of the absence of a set standard for environmental protection and liability for violation, the Commission has affirmed that 'some perpetrators of human rights abuses are organizations, corporations or other structures of business and finance'.<sup>341</sup> In **SERAC v Nigeria**<sup>342</sup>, the Commission' decision had no concrete finding on corporate liability in violation of the ACHPR by the oil corporations. However, it found Nigerian government liable for its failure to monitor the operations of multinational oil companies which in effect violated fundamental rights and freedoms of the Ogoni community living in the Niger delta.

The Commission also acknowledges positive obligations on States to exercise due diligence to prevent harmful acts of others, to impose sanctions on private violations of human rights and to take the appropriate measures for reparation of the victims.<sup>343</sup> Thus, States are required to investigate, prosecute, and punish acts that violate rights as recognised under international law even though the scope of these positive obligations may depend on the kind of human right involved. Nevertheless, the State may be obligated to offer protection against human rights violations through application of criminal law and criminal procedure.<sup>344</sup>

### 3.4.2 Common Market for Eastern and Southern Africa

The desire to set up a Regional Economic Community was mooted in the 1960s. This was spurred by the notion of regional economic cooperation which was motivated by pan-Africanism solidarity that preceded the post-independence era in Africa.<sup>345</sup> Thus, in 1965 the

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<sup>340</sup> D Shelton 'Human rights, environmental rights, and the right to environment' (1991) 28 *Stanford Journal of International Law* 136.

<sup>341</sup> C Mwalimu *African Regional Human Rights and Corporate Responsibility* (2008) 8 quoting the *AfCionHPR*, Report of 11-25 May 2006, Zimbabwe Human Rights NGO Forum/Zimbabwe, Comm. 245/2002, par. 136.

<sup>342</sup> *Social and Economic Rights Action Centre & the Centre for Economic and Social Rights v Nigeria* Communication No. 155/96 [2001].

<sup>343</sup> SERAC case, par. 143.

<sup>344</sup> As above, par. 142-160.

<sup>345</sup> [http://about.comesa.int/index.php?option=com\\_content&view=article&id=95&Itemid=117](http://about.comesa.int/index.php?option=com_content&view=article&id=95&Itemid=117) (accessed 11 October 2016).

United Nations Economic Commission for Africa (UNECA) organised a meeting of Ministers of Eastern and Southern Africa to deliberate on suggestions on the creation of a mechanism capable of promoting sub-regional economic integration.<sup>346</sup> In 1978, a Ministerial meeting held recommended the need to create a sub-regional economic community albeit in two-phases beginning with the Preferential Trade Area (PTA), for the first ten years, and then upgraded to a common market. In 1981, a Treaty forming the PTA was agreed and signed in Lusaka.<sup>347</sup> In 1993, the PTA became transformed into the COMESA whose Treaty was signed in Kampala, Uganda. This was later ratified in Lilongwe, Malawi in 1994.<sup>348</sup>

The Treaty establishes the COMESA as an organisation of independent sovereign states which have agreed to co-operate in developing their natural and human resources for the good of all their people.<sup>349</sup> The Treaty recognises that economic activities are often intertwined with degrading of the environment, extreme reduction of resources, and severe damage to natural heritage and as such, Member States must co-operate and coordinate strategies for environmental preservation from the harmful effects caused by pollution.<sup>350</sup> In co-operating one with another, Member States are required to adopt common policies for the control of hazardous waste, nuclear, and radioactive materials.<sup>351</sup> In this regard, an action taken by a Member State should further three objectives, namely: preservation, protection and improvement of environmental quality; contribution to protection of human health; and, ensuring prudent natural resource utilisation.<sup>352</sup> Further, preventive action should be taken and where damage to the environment has occurred, the polluter must pay.<sup>353</sup>

In 2007, the Member States adopted the COMESA Common Investment Area (CCIA) Agreement which encourages growth of Member States through establishment of a safe investment environment. Besides covering issues of investment, the Agreement also recognises the need for environmental protection and does not permit waiving of or derogation from measures concerning environment as a way of encouraging the establishment, expansion or retention of investments.<sup>354</sup> This means that a Member State must not, for purposes of encouraging investment into their territory, lower its environmental standards or fail to enforce

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<sup>346</sup> As above.

<sup>347</sup> As above.

<sup>348</sup> As above.

<sup>349</sup> <http://www.africa-union.org/root/au/recs/comesa.htm> (accessed 1 April 2016).

<sup>350</sup> Article 122(2)(3).

<sup>351</sup> Article 122(4).

<sup>352</sup> Article 122(5).

<sup>353</sup> Article 122(6).

<sup>354</sup> Article 5(e).

them. Thus, the Agreement encourages the Member States to take actions necessary for the protection of the environment. Article 22 thus provides:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between investors where like conditions prevail, or a disguised restriction on investment flows, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member State of measures: designed and applied to protect the environment.<sup>355</sup>

The wording of Article 22 makes it clear that a Member State is permitted to adopt or enforce measures that are aimed at protecting the environment. This is, however, on the condition that such a measure must not be arbitrary or discriminatory between investors where like conditions prevail. It is argued that article 22 merely recognises adoption of measures and does not create liability or sanctions in the event that such measures are breached by foreign investors operating in a Member State.

The Agreement permits the Member States, in exercising their power to regulate, to take measures that are designed to protect the environment and where such measures are taken, the investor cannot claim that their investment has been expropriated. Article 20(8) provides:

Consistent with the right of states to regulate and the customary international law principles on police powers, bona fide regulatory measures taken by a Member State that are designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, shall not constitute an indirect expropriation under this Article.

The interpretation of article 20(8) is that a Member State can take an action or measure for the purpose of safeguarding the health of the public, safety and the environment and this would not constitute a wrongful act. Notwithstanding article 20(8), the difficulty lies in demonstrating that the measure is disproportionate to the purpose in question.

### **3.4.3 Southern African Development Community**

The SADC is a regional economic community established by countries of southern Africa. Established on 17 August 1992, the SADC arose as a result of a restructuring of the Southern African Development Coordination Conference (SADCC) which had been constituted in Lusaka,

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<sup>355</sup> Article 22(1)(c).

Zambia, on 1 April 1980. Its Member States are: Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.<sup>356</sup>

The purpose of SADC is to promote deeper economic cooperation and integration in Southern Africa to help address many of the factors that make it difficult to sustain economic growth and socio-economic development. The SADC is governed by a Treaty which provides for the development of sector-specific protocols that detail the objectives, scope and institutional mechanisms for cooperation and integration by member States.

Driven by the need to achieve economic growth and development led most SADC Member States to increase their exploration of mineral resources. At the heart of the SADC Common Agenda is 'Achieving sustainable utilisation of mineral resources and protection of the environment.' Achieving sustainable utilisation of natural resources would prove to be a challenge especially that, despite the stated objectives, the Treaty appeared unclear and inadequate on how these would be achieved in reality. With the passage of time, it became necessary for the SADC Member States to come up with measures that were aimed at sustainable mineral resources exploration. Thus, in September 1997, SADC Member States signed the Protocol on Mining which came into effect in February 2000. The Protocol forms the basis for SADC's work programme on mining. Besides this Protocol, the Member States also adopted the Protocol on Finance and Investment in 2006 whose aim is to guide investment into the region, including mining.

#### 1. Protocol on Mining

The Protocol aims at developing the region's mineral resources through international collaboration which in turn would lead to improving the living standards of the people. Through the Protocol, Member States agree to share information on exploitable mineral resources in the region, enhance the technological capacity of the sector, and encourage and assist small-scale mining.<sup>357</sup> Article 2 urges the Member States to recognise that a 'thriving mining sector can contribute to economic development' and thus, they should 'develop and observe internationally accepted standards of health, mining safety and environmental protection.'<sup>358</sup>

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<sup>356</sup> <http://www.sadc.int/member-states/> (accessed 27 February 2017).

<sup>357</sup> As above.

<sup>358</sup> Article 2(1)(10).



Member States are required to adopt policies that encourage the exploitation of mineral resources.<sup>359</sup> In accordance with article 6(3), they are urged to put in place an appropriate environment that attracts local and foreign investment in the mining sector such as: provision of incentives, allowing externalisation of funds, protection from compulsory acquisition of property, conclusion of IPPAs with investors<sup>360</sup>, double taxation agreements, and BITs with other countries.

In exploiting mineral resources, member states are required to ensure a balance is created between exploitation and protection of the environment.<sup>361</sup> Such a balance requires that the aspirations and needs of present and future generations are met. The Protocol also obliges the Member States to cooperate in programme development aimed at training environmental scientists in fields relating to mining.<sup>362</sup>

It is quite evident that the provisions of the Protocol utilise the words 'urge', 'encourage', or 'cooperate.' The Protocol, agreed at a political level, lacks a binding force in order for it to be actualised. For the most part, it affords Member States the discretion to comply with obligations contained under it without binding directives and sanctions for failure to attain such. The same could be said of the Treaty which does not place investment (in this case in mining) and environmental protection as its priority neither does it deal with both in an explicit manner.<sup>363</sup> Under the Treaty, Member States are obliged to make an undertaking adopting appropriate measures that promote realisation of SADC's objectives, and implementing of the Treaty provisions, including its Protocols.<sup>364</sup> Where a Member State continually fails to fulfill responsibilities that they have taken on under the Treaty or puts in place domestic policies that undermine SADC principles and objectives, sanctions *may* be enforced on any such erring member.<sup>365</sup> The determination of such sanction shall be based on

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<sup>359</sup> Article 6(1).

<sup>360</sup> Sec. 17(2), ZDA Act (as amended by Act 15 of 2012).

<sup>361</sup> Article 8(1).

<sup>362</sup> Article 8(3).

<sup>363</sup> As one of its objectives, Article 5 of the Treaty aims to 'achieve sustainable utilisation of natural resources and effective protection of the environment.' The term 'sustainable utilisation' can be described to be use or extraction of natural resources in a manner that poses no long-term adverse effects that militate against the principle sustainable development while 'effective protection of the environment' would refer to the adequacy of the measures put in place to ensure environmental soundness. The import this article seems to suggest that, the objective of SADC is to ensure that Member States reach a level where their mineral resources are extracted in a sustainable manner while at the same time, having measures in place that are targeted at protecting the environment from the harmful effect of mineral resource exploitation.

<sup>364</sup> Article 6(1).

<sup>365</sup> Article 33(1).

individual cases.<sup>366</sup> The use of the word *may* put the issue within the realm of discretion implying that, even in the face of a clear violation, nothing may be done by SADC.

It must be stated that, although sanctions are there, it is also apparent that such may not be meted out on a Member State that either allows unsustainable utilisation of natural resources or does not have effective measures aimed environmental protection. It appears that the concern of SADC Member States under the Treaty is to encourage regional cooperation and integration as can be seen under article 5(2) of the Treaty. This is fortified by article 21(3) which urges Member States to cooperate in the fields of trade, industry, finance, investment and mining, natural resources and environment.

## 2. Protocol on Finance and Investment

With most SADC Member States keen to develop their economies, they depend on FDI to aid their quest to attain long-term economic goals. This has led SADC to develop policies and procedures encouraging FDI in the Member States. One such policy is the Protocol on Finance and Investment which was signed in 2006 and came into effect in 2011. The Protocol was developed partly due to the concern with the low levels of investment into the SADC, even though a number of measures had been taken to improve the investment environment.<sup>367</sup> During the conclusion of the Protocol, State Parties had become aware that without effective policies on investment protection and promotion, the Region would continue to be marginalised in terms of investment inflows and sustainable economic development.<sup>368</sup> The Protocol outlines SADC policy on investment, requiring the Member States, inter alia, to enact strategies to attract investors, facilitate entrepreneurship, and implement legislation that creates a favourable environment for investment.

State Parties are obliged to promote the utilisation of their natural resources in a sustainable and an environmentally friendly manner.<sup>369</sup> This would entail that such utilisation of resources should have present and future generations in mind. Thus, it is inappropriate for a State Party to encourage investment into its territory by 'relaxing domestic health, safety or environmental measures' and agree to waive or otherwise derogate from, international treaties they have ratified for purposes of encouraging establishment, acquisition, expansion

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<sup>366</sup> Article 33(2).

<sup>367</sup> The preamble to Annex 1 of the Protocol.

<sup>368</sup> As above.

<sup>369</sup> Article 12.

or retention of an investment in its territory.<sup>370</sup> Compliance with the requirement set forth was not there neither was their attainment given the manner in which Development and Environment Liabilities Agreements were concluded at the time of privatisation in 2000. Under these Agreements, investors were required to come up with EMPs whose threshold for environmental liability was lower than that provided for under the law. Feeney observed that:

...the new owners are only required to conduct their operations in accordance with the agreed pollution and emission targets set out in EMPs. In other words, breaches of Zambia's existing environmental standards would be tolerated...GRZ has limited authority to enforce environmental laws...nor will it make changes to Zambian mining-environmental legislation."<sup>371</sup>

Today, although a State may not manifestly relax its health, safety or environmental standards in a bid to attract investment, it may simply choose not to enforce environmental regulations whenever there was a breach. This perhaps explains what is currently happening with mining companies— despite causing air and water pollution, the State has been complacent in dealing with the issue. Notwithstanding this, the Protocol permits a State Party to exercise its regulatory right in the interest of the public and take, maintain or enforce an appropriate measure that ensures that an investment is carried out in a manner takes cognisance of the health, safety or environmental concerns.<sup>372</sup> This provision allows a State Party to exercise its power of eminent domain to regulate investment. Despite such right granted under the Protocol, an examination of the law— EMA, MMDA, and ZDA Act — demonstrates that such right is not exercised nor provided for. The law appears to concentrate on the promotion of investment and protection of an investor's rights.<sup>373</sup> The provisions that should ensure that investment activities are carried out in a way that is sensitive to the health, safety or environmental concerns are either weak or casually couched.<sup>374</sup>

#### **3.4.4 African Mining Vision**

The Africa Union developed the African Mining Vision (AMV) which was adopted by African Heads of State and Government in 2009. The adoption of the AMV was in response to the paradox of being in a continent with huge natural resources and yet, it exists alongside

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<sup>370</sup> Article 13.

<sup>371</sup> P Feeney 'The limitations of corporate social responsibility on Zambia's Copperbelt' 2001. Available at: [www.reports-and-materials.org](http://www.reports-and-materials.org) (accessed 23 February 2016).

<sup>372</sup> Article 14.

<sup>373</sup> Secs. 17(1), 19 & 69, ZDA Act; Article 10(4)(5), Constitution.

<sup>374</sup> Secs. 80 & 81, MMDA.

persistent poverty and disparities. It is an innovative way that establishes how mining can really contribute to domestic economic development.

The AMV is informed by outcomes of numerous initiatives made at sub-regional, continental, and global levels.<sup>375</sup> It considers the substantive benefits, including environmental protection that may be derived from mining. Its main vision is to attain ‘transparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socio-economic development.’<sup>376</sup> This vision comprises, inter alia, ‘A sustainable and well-governed mining sector that effectively garners and deploys resource rents and that is safe, healthy, gender & ethnically inclusive, environmentally friendly, socially responsible and appreciated by surrounding communities.’<sup>377</sup> The weakness of the AMV is that it does not prescribe the standards that must be attained or maintained by mining companies. Its emphasis is on developing strategies on the use of mineral resources to catalyse broad-based growth and development.<sup>378</sup>

### **3.5 National mining and environmental standards**

The domestic framework on mining and environment is contained in the legislation as well as the policies that have been developed by the government. Basically, there are two main policies on mining and environmental protection– the MRDP, and the NPE. The MRDP aims at enhancing sustainable extraction of mineral resources and ensuring that Zambians also benefit from the exploitation of mineral resources while the NPE focusses on the sustainable use of natural resources. These policies dovetail into the Seventh National Development Plan (7NDP) 2017–2021 which is aligned with the overall vision of the country– Vision 2030.

The 7NDP, unlike the preceding development plans, embraces an integrated multi-sectoral approach to planning. Thus, by using an integrated approach, the 7NDP attempts to create an environment that facilitates for the domestication of Sustainable Development Goals (SDGs), AU Agenda 2063, RISDP and other international and regional strategies. The aim of

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<sup>375</sup> These include: the Johannesburg Political Declaration and Plan of Implementation; Yaoundé Vision on Artisanal and Small-scale Mining; Africa Mining Partnership’s Sustainable Development Charter and Mining Policy Framework; SADC Framework and Implementation Plan for Harmonisation of Mining Policies, Standards, Legislative and Regulatory Frameworks; UEMOA’s Common Mining Policy and “Code Minière Communautaire”; Summary Report of the 2007 *Big Table* on “Managing Africa’s Natural Resources for Growth and Poverty Reduction”; and the work of the International Study Group to Review Africa’s Mining Regimes (ISG). See: African Union *Africa Mining Vision* (2009) 1.

<sup>376</sup> African Union *Africa Mining Vision* (2009) v.

<sup>377</sup> As above.

<sup>378</sup> As above, 13.

the Plan is to ‘create a diversified and resilient economy for sustained growth and socio-economic transformation driven.’<sup>379</sup>

The MRDP and NPE have formed the basis upon which legislation has been developed. Considering that mining activities pose a threat to the environment, new legislation has been enacted to address environmental degradation– EMA in 2011, MMDA in 2015, and the recognition of the need for a clean and healthy environment for all under the Constitution (Amendment Act No. 2 of 2016).

### **3.5.1 Mineral Resources Development Policy**

The mining sector remains the economy’s main source of income. Its contribution to foreign exchange earnings has averaged 12.9% for the period 2006-2015.<sup>380</sup> The 7NDP places emphasis on ‘broadening the range of minerals to cover non-traditional mining of gemstones, gold and industrial minerals’ including promotion of value addition to mining products and material efficiency strategies to increase productivity and reduce environmental pollution.<sup>381</sup> In actualising this goal, it enlists a number of strategies which include promoting: exploitation of gemstone products; local and foreign participation in the mining sector; exploration of petroleum and gas; and small scale mining.<sup>382</sup>

The MRDP was developed in 2013 after the review of the Mining Policy of 1995. The review of the 1995 Policy was necessary in order to ensure that the development of the mining industry was done in a manner that creates lasting benefits for the people of Zambia.<sup>383</sup> In this regard, the government sought to: (a) align the Mining Policy with the Vision 2030 to achieve a balance that would create a competitive, thriving and sustainable mining sector that benefits both locals and investors; (b) incorporate arising policy changes; (c) cater for new national aspirations for the sector; and (d) adapt a policy that would suit changing political and economic factors relating to mining.<sup>384</sup> A culmination of these factors led to the development of the MRDP whose formulation was aimed at: (i) attracting both local and foreign investment in the sector; (ii) integration of the sector into the domestic economy; and

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<sup>379</sup> Ministry of National Development Planning *Seventh National Development Plan 2017-2021* (2017) 6-7.

<sup>380</sup> As above, 26.

<sup>381</sup> As above, 64.

<sup>382</sup> As above, 64-65.

<sup>383</sup> Ministry of Mines and Mineral Development *Mineral Resources Development Policy* (2013) 1.

<sup>384</sup> As above, 5.

(iii) ensuring that attainment of acceptable health, safety, and environmental protection standards.<sup>385</sup>

### Guiding Principles

The implementation of the MRDP is guided by six (6) principles namely: (i) the need for sustainable exploitation of mineral resources; (ii) commitment by government to provide a free market enterprise economy; (iii) application of modern principles regarding transparency, accountability, and checks in balance in the administration of laws and regulations relating to mining; (iv) adherence to regional and international convention relating to mining and to which Zambia is a party or signatory; and (v) promotion of the economic empowerment of citizens.<sup>386</sup>

### Objectives

The MRDP contains policy objectives that are aimed at realising the vision of government with respect to the mining sector. The objectives are myriad but include, among others: attracting and encouraging of local and foreign participation in mineral exploitation; facilitating the empowerment of locals to become owners or shareholders in the mining sector; promoting the development of the mining sector, local entrepreneurship, employment creation, and value addition; encouraging orderly and sustainable development of small scale mining; attainment of acceptable balance between mining and health, safety, and environmental protection; and ensuring transparency and accountability in mineral resources development.<sup>387</sup>

### Measures and strategies

In achieving the objectives set forth, the MRDP outlines measures and strategies such as: (i) maintaining a stable and internationally competitive fiscal regime that adequately caters for the industry' volatility; (ii) maintaining an efficient computerised mining cadastre system; (iii) strengthening legislative provisions to avoid sterility in mineral development; (iv) ensuring that exploration, mining, and processing of minerals complies with health, safety, and environmental protection; (v) promotion of large scale mines; (vi) encouraging small scale mines to use appropriate, affordable, and safe technology; (vii) promoting locals' ownership

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<sup>385</sup> As above, 2.

<sup>386</sup> As above, 5.

<sup>387</sup> As above, 6.

of large scale mine through the Citizen Economic Empowerment Act; and providing an appropriate legal and fiscal regime.<sup>388</sup>

#### Safety, health, environment and quality

The MRDP recognises that mining activities have a negative effect on the safety, health and environment of communities. In view of this, it has sought to ensure that impacts are avoided, minimised and mitigated in line with environmental and mining laws. This is to be achieved by: government ensuring that exploration, mining and processing comply with safety, health and environmental regulations; maintaining the Environmental Protection Fund; developing environmental assessment processes; capacity building of responsible institutions; and ensuring that exploration of minerals in game management areas, parks and forests comply with environmental regulations.<sup>389</sup>

#### Large, small scale mining and citizen empowerment

The MRDP places an obligation on the government to promote the development of large scale mines.<sup>390</sup> It also requires that small scale mines are developed through: encouraging the use of appropriate, affordable and safe technology, capacity building, awareness creation, and support their access to finances.<sup>391</sup> The core obligation is ensuring that locals are empowered by: encouraging mining companies to float their shares on the Lusaka Securities Exchange; promotion of ownership of large scale mines; and reserve a portion of mineral royalty.<sup>392</sup>

### **3.5.2 Mines and Minerals Development Act**

The MMDA 2015 is the principal legislation on mining. It repealed and replaced the MMDA No. 7 of 2008. According to its preamble, the Act was enacted to:

Revise the law relating to the exploration for, mining and processing of, minerals; provide for the safety, health and environmental protection in mining operations; provide for the establishment of the Mining Appeals Tribunal.<sup>393</sup>

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<sup>388</sup> As above, 7–10.

<sup>389</sup> As above, 8.

<sup>390</sup> As above.

<sup>391</sup> As above, 9.

<sup>392</sup> As above.

<sup>393</sup> Preamble.

Generally, the Act deals with mining rights, licences, permits, gemstone mining, health and safety, environmental protection, and geological services on analysis, mineral royalties and charges. Besides the MMDA, other pieces of legislation on mining include: Mines Acquisition (Special Provisions) Act, Chapter 218<sup>394</sup>; and Mines Acquisition (Special Provisions) (No. 2) Act, Chapter 219 of the Laws of Zambia.<sup>395</sup> Other pieces of legislation that have a bearing on mining include: the Arbitration Act; Business Regulatory Act; Citizenship Empowerment Act; Environmental Management Act; Income Tax Act; Ionizing Radiation Protection Act; Lands Act; Petroleum (Exploration and Production) Act; Valued Added Tax Act, Zambia Development Agency Act; and Zambia Wildlife Act.

### Custody of minerals

The President holds the rights of ownership in, searching for, mining and disposing of minerals on behalf of the people.<sup>396</sup> This affords the government exclusive power over mineral resources within the confines of its boundaries, whether mined by itself, its citizens, or foreign companies.

### Mining rights

Mineral rights may be defined as a landowner's right to receive a portion of the profits of any minerals that are extracted from the land. Mineral rights apply to all types of resources, such as oil and gas, ores and metals or other raw materials.<sup>397</sup> The term mineral rights also describe the numerous beneficial ways the owner can profit from the resources in the ground. They give the landowner the right to sell or profit from minerals extracted from the ground in several ways. They can be sold, developed or leased, depending upon the landowner's needs and desires. Many landowners allow oil or other mineral companies to extract the mineral from the ground in return for the royalty income from the revenue.<sup>398</sup> It may well be said that a mining right affords the holder an expansive range of rights.

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<sup>394</sup> The Mines Acquisition (Special Provisions) Act was enacted to 'facilitate the acquisition by the Republic of a 51 per centum interest in each of the main Zambian copper mining companies; and to provide for matters connected therewith.' – Preamble.

<sup>395</sup> The Mines Acquisition (Special Provisions) (No. 2) Act was enacted to 'facilitate the incorporation under the laws of Bermuda of a company hitherto incorporated under the laws of Zambia by the name Zambian Anglo American Limited, and to provide for matters incidental thereto or connected therewith.' – Preamble.

<sup>396</sup> Sec. 3(1).

<sup>397</sup> <http://www.investopedia.com/terms/m/mineral-rights.asp#ixzz3g8irsOUw> (accessed 17 October 2015).

<sup>398</sup> <http://www.investopedia.com/terms/m/mineral-rights.asp#ixzz3g8jEwX43> (accessed 17 October 2015).



The MMDA obliges a person to obtain a mining right before they can explore for minerals or carry on mining operations.<sup>399</sup> Besides obtaining a mining right, exploration, mining or mineral processing shall not be carried on until there is granted prior approval of the environmental impact assessment by the ZEMA.<sup>400</sup>

The Act requires that an application for assignment of mining right is submitted to the Mining Cadastre Office. At the time of the application, the applicant must submit proposed positions of all beacons defining the location and extent of the land under application.<sup>401</sup> Where the mining area is subject to another mining right, the applicant shall apply for consent from the holder of the mining right.<sup>402</sup>

### Mining licence

The Act obliges a person who intends to carry on any artisanal mining, small-scale mining or large-scale mining to apply for a mining licence.<sup>403</sup> The application must be made to the Director of Mining Cadastre.<sup>404</sup> The Committee, in considering an application for a licence, is obliged to consider, *inter alia*, the adequacy of the proposed programme of mining operations and its compliance with ZEMA requirements.<sup>405</sup> In granting a licence, the Committee attaches numerous conditions that include: the programme of development; construction and mining operations; applicant's undertaking for the employment and training of citizens; applicant's undertaking for the local business development; applicant's capital investment forecast; and the applicant's undertaking for the management of the environment in the mining area.<sup>406</sup>

### 3.5.3 National Policy on Environment

The NPE has been designed to 'create a comprehensive framework for effective natural resource utilisation and environmental conservation and which will be sensitive to the demands

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<sup>399</sup> Sec. 12(1).

<sup>400</sup> Sec. 12(2).

<sup>401</sup> Sec. 18(1).

<sup>402</sup> Sec. 16(1).

<sup>403</sup> Sec. 29(1). On artisanal mining, it can only be undertaken by a citizen or a co-operative wholly composed of citizens whereas small-scale can be undertaken by either a citizen or citizen-influenced or citizen-empowered company— sec. 29(2)(3).

<sup>404</sup> Sec. 30(2).

<sup>405</sup> Sec. 35.

<sup>406</sup> Sec. 32(2).

of sustainable development, thereby filling the existing vacuum.<sup>407</sup> The development of the Policy arose out of the recognition that 'natural and cultural resources are in danger of further widespread depletion and degradation.'<sup>408</sup>

## 1. Rationale

The Policy underscores the government's commitment, in collaboration with the people, to effectively manage the environment not only for the present generation but also the future. Thus, the objective is to ensure sound environmental management within a framework of sustainable development in Zambia.<sup>409</sup> It places emphasis on the duty of any institution, community, or individual to conduct their activities in a manner that does not negatively affect the environment.

## 2. Guiding principles

The NPE has established thirteen principles that integrate decision-making, legislation, financing mechanisms, regulation and enforcement. These are: (a) polluter must pay and need the need to conserve resources, reduce consumption and recycle and reuse material to the maximum extent possible; (b) use of cost effective and benefit measures for prevention of pollution and degradation; (c) where biotic resources are used, ensure that such use will be wise, sustainable and consistent with maintaining the integrity of ecosystems and ecological processes; (d) use of non-living resources should be consistent with environmental best practice; (e) respect for traditional knowledge in the development of ownership and environmental management systems; (f) effective governance through decentralisation of environmental management services; (g) maintaining principles of sound resource utilization, social justice, equitable resource allocation and care for the environment; (h) raise profile of national concerns, aspirations and contributions of those people and agencies involved in conservation, protection and utilization of the environment and natural resources; (i) prioritise needs and establish new prospects for the improvement of the standard of living; (j) catalyse the implementation of sustainable environmental, social and economic development tenets bringing together in an holistic strategy; (k) coordination of strategies and actions relating to the environment and natural resources; (l) mainstreaming environmental concerns; and (m) ensure

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<sup>407</sup> Ministry of Tourism and Arts *National Policy on Environment* (2007) 1.

<sup>408</sup> As above.

<sup>409</sup> As above, 9.

strategic planning at all levels by incorporating Environmental Impact Assessment (EIA) as an essential development tool.<sup>410</sup>

### 3. Objectives

The objectives of the NPE are myriad but include promotion of a sound environmental and natural resource protection in their entirety by balancing social and economic needs.<sup>411</sup> The policy aims to achieve this by linking activities, interests and perspectives of all groups. It is also the aim of the policy to ensure broad-based environmental awareness and commitment to enforce environmental laws and to the promotion of environmental accountability.<sup>412</sup> Thus, a commitment is made to build individual and institutional capacity to sustain the environment, regulate and enforce environmental laws, and promoting sustainable development.<sup>413</sup>

### 4. Policy measures

In order to attain the objectives set out, the policy has identified eleven key measures that have to be undertaken. These are: (a) creating institutional mechanism for policy implementation; (b) creating a legal framework that implements the Policy and supports sustainable environmental management; (c) integration of environmental concerns in development plans at national, provincial and district levels; (d) developing a system and guidelines that enhance environmental benefits; (e) environmental education and public awareness; (f) private sector and community participation; (g) human resource development and applied research; (h) control of air quality and minimising of climate change effects; (i) biological diversity and biosafety conservation; (j) promotion of sustainable land use; (k) initiatives on transboundary conservation.<sup>414</sup>

### 5. Sectors of concern

The NPE deals with the following sectors: Agriculture, Fisheries, Tourism, Forestry, Wildlife, Mining, Water, Energy and Heritage. With regard to the mining sector, the aim is to ensure that mining activities conform to sustainable natural resource utilisation and protection of the environment. In this regard, current and post-mining operations should be managed in a

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<sup>410</sup> As above, 13–14.

<sup>411</sup> As above, 15.

<sup>412</sup> As above.

<sup>413</sup> As above.

<sup>414</sup> As above, 16, 18, 20, 21, 23-25, 30-32, & 34.

manner that avoids negative effects on the environment and communities that live near such facilities. Thus, mining companies must ensure that they incorporate, in their operations, environmental regulations that conform to international standards.<sup>415</sup>

On the water sector, the policy requires that water resources are efficiently and effectively managed so as to promote conservation and acceptable quality for all people who should have access to clean potable water.<sup>416</sup>

## 6. Integrated approach

The strategies developed to achieve the objectives of each sector identified should ensure that sound environmental management is achieved. However, matters of policy, planning, regulation and control relating to ecosystems, natural landscapes and natural resources cut across all sectors and as such, these cannot be fully addressed through sector-based management alone. Thus, an integrated approach is required in the following sectors:

### a. Land

A policy is required to cover conservation and enhancement of environmental quality. This means that protected areas must be set aside to maintain under natural conditions, biodiversity, soils and water resources. Sustainable land use for identified purposes must be encouraged and where there is degradation, rehabilitation must be carried out.<sup>417</sup> Currently, the government is in the process of developing a policy on land matters.

### b. Water

Water is required for all human activities and hence, it should be utilised in a sustainable manner. In cases where water resources are shared with other countries, these should receive appropriate planning and management, and co-ordination in order to safeguard the integrity of the country's hydrological assets.<sup>418</sup>

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<sup>415</sup> As above, 44.

<sup>416</sup> As above, 46.

<sup>417</sup> As above, 53.

<sup>418</sup> As above, 54.

c. Atmosphere and climate

Measures designed to curb atmospheric pollution must be developed especially in industrial, mining, energy and forestry. Further, an institutional mechanism should be put in place in order to properly structure such arrangements and to ensure long-term sustainability.<sup>419</sup>

d. Biological diversity and biosafety

Measures are required to coordinate efforts to conserve biodiversity and rehabilitate depleted areas. The principles enunciated in the NPE must be used to rectify the situation and this requires a full commitment by the public and private sector. For coordinated implementation, links between all relevant agencies in both the public and private sectors must be strengthened.<sup>420</sup>

e. Heritage resources

This is important for purposes of fostering national identity, education and research. The policy recognised the absence of participation in heritage management by local communities and private sector making it difficult to have a symbiotic relationship. Therefore, there is need to coordinate developmental activities with conservation activities where heritage resources are concerned so that they are not wantonly lost through insensitive developments.<sup>421</sup>

### **3.5.4 Environmental Management Act**

The first piece of legislation enacted to deal with environmental issues was the Environmental Protection and Pollution Control Act (EPPCA) Chapter 204 of 1990. According to its preamble, the EPPCA was:

...an Act to provide for the protection and control of pollution, to establish the Environmental Council of Zambia and to prescribe the functions and powers of the council and to provide for matters connected with or incidental to the foregoing.

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<sup>419</sup> As above.

<sup>420</sup> As above.

<sup>421</sup> As above, 56.

The EPPCA provided a single and comprehensive national legislative and administrative structure for environmental protection.<sup>422</sup> Its main objective was to harmonise the needs of human beings and the environment by reducing damage to the environment. The Act also established the Environmental Council of Zambia (ECZ) in 1992 to regulate environmental matters and deal with related issues. However, inadequate incorporation of international standards within national legislation; little provision for the involvement of local communities in the implementation and enforcement of related legislation; weak penalties; and lack of intra and inter-sectoral institutional arrangements and few coordination mechanisms for effective integration of legislation were found to be its main weaknesses. This led to its repeal and replacement by the EMA, which is the principal legislation on environmental management, in 2011. According to the preamble, the objectives of the EMA are, *inter alia*:

...provide for integrated environmental management and the protection and conservation of the environment and the sustainable management and use of natural resources; provide for the preparation of the State of the Environment Report, environmental management strategies and other plans for environmental management and sustainable development; provide for the conduct of strategic environmental assessments of proposed policies, plans and programmes likely to have an impact on environmental management; provide for the prevention and control of pollution and environmental degradation; provide for public participation in environmental decision-making and access to environmental information; establish the Environment Fund; provide for environmental audit and monitoring; facilitate the implementation of international environmental agreements and conventions to which Zambia is a party...

It is argued that pursuant to the objectives set out in its preamble, the Act makes provision for, an integrated environmental management, safeguarding and preservation of the environment, and the sustainable management and utilisation of non-renewable natural resources. It also provides for atmospheric protection from air pollution and forbids a person, without a licence, from discharging pollutants into the environment.<sup>423</sup> Further, it also provides for protection against transboundary waste, water pollution, and unauthorised production of pesticides and toxic substances.<sup>424</sup>

The Act is complemented by other spatial legislation such as: Workers Compensation Act, National Heritage Conservation Act, Zambia Wildlife Act, Water Resources Act, Public

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<sup>422</sup> According to its preamble, the objectives of the Act were: to provide for the protection of the environment and the control of pollution; to establish the Environmental Council and to prescribe the functions and powers of the Council. The Act, under Parts VI-IX and XI, made provision for offences and penalties of polluters of water, air, noise or chemicals.

<sup>423</sup> Secs. 31 & 32.

<sup>424</sup> Secs. 44, 46 & 65.

Health Act, Zambezi River Authority Act, Lands Act, Land Acquisition Act, Local Government Act, Urban and Regional Planning Act, Forestry Act, Fisheries Act, and several statutory instruments.<sup>425</sup>

### Superiority of the Act

The EMA is the superior legislation on matters of environmental management and if any other Act is inconsistent with it, such shall not prevail. Section 3 states:

Subject to the Constitution, where there is any inconsistency between the provisions of this Act and the provisions of any other written law relating to environmental protection and management, which is not a specific subjected related to law to a particular environmental element, the provisions of this Act shall prevail to the extent of the inconsistency.

This provision establishes the superiority of the Act. The exception recognises the Constitution to which the EMA is subject to, that is to say, if any of its provisions were inconsistent with the Constitution, then the latter prevails. This would mean that, where there is no specific legislation dealing with a peculiar environmental issue, such shall not be deemed inconsistent and can apply.

### Responsible institution

The ZEMA or Agency has been established as a body responsible for matters pertaining to environmental management. Its main function is to 'do all such things as are necessary to ensure the sustainable management of natural resources and protection of the environment, and the prevention and control of pollution.'<sup>426</sup>

The Agency is managed by a Board consisting of thirteen part-time members that are appointed by the Minister.<sup>427</sup> The functions of the Board are prescribed in section 12 as:

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<sup>425</sup> For instance, Statutory Instrument 29 of 1997 (Mines and Minerals (Environmental) Regulations) provides the framework for conducting and reviewing the EIA for the mining sector, and the regulations for auditing the project implementation are provided. Statutory Instrument 102 of 1998 (Mines and Minerals Environmental Protection Fund) Regulations provide for the setting up and operating the Environmental Protection Fund.

<sup>426</sup> Sec. 9(1).

<sup>427</sup> According to sec. 11(1), these are: '(a) one representative each from the Ministries responsible for— (i) the environment and natural resources; (ii) health; (iii) mines and minerals development; (iv) local government; (v) agriculture; (vi) energy and water development; and (vii) national planning; (b) a representative of the Attorney-General; (c) a representative of the Zambia Association of Chambers of Commerce and Industry; (d) one person representing non-governmental organisations dealing with environmental management; (e) one person representing an institution involved in scientific and industrial research; and (f) two other persons.'

carrying out the functions of the Agency; (ii) oversee the implementation and successful operation of the policy and functions of the Agency; (iii) review the policy and strategic plan of the Agency; (iv) provide guidance to the Director-General and staff of the Agency; (v) approve the annual budget and plans of the Agency; (vi) monitor and evaluate the performance of the Agency against budgets and plans; and (v) establish and approve rules and procedures for the appointment, discipline, termination and employment conditions of persons retained by the Agency. Besides these functions, the Board may also execute any other duty as may be conferred or imposed on it or under the EMA– to attend to strategies on environmental management that are submitted to it, and serve as an appellate body for review of any decision made by the Agency.<sup>428</sup>

### **3.6 Mechanisms for environmental protection**

In modern regulatory control mechanisms, the most commonly used are 'command and control' regimes as opposed to 'market-based' instruments. Command and control mechanisms are based on legislation which creates a broad framework for the control of various pollutants. This mechanism requires emissions sources to install specific pollution control technologies or meet a specific emissions levels. This approach is particularly desirable where adverse effects occur with an increase in accumulation of the pollutant.<sup>429</sup> Market-Based approaches are based on specifying a level of pollutants that may be emitted into the environment. In this approach, a maximum limit of emissions is set for a specified pollutant.<sup>430</sup>

In Zambia, the regulatory mechanism adopts both approaches in dealing with protection of the environment from the activities of mining companies. The primary aim of these mechanisms is to avoid harm to the environment by adopting actions that are anticipatory in nature. The necessity for such mechanisms stems from the fact that the country must be able to set standards that enable it to regulate the performance of mining companies operating within its borders.

Under the legislative frameworks, there are four mechanisms that are utilised: first, EIA; second, Environmental Audits; third, Licensing; and fourth, Environmental Monitoring.

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<sup>428</sup> Secs. 22(2) & 112(1), EMA.

<sup>429</sup> New York State Energy Research and Development Authority 'Market-based environmental protection mechanisms and the impact on energy production and use' Final Report, October 2011, 3.

<sup>430</sup> As above.



### 3.6.1 Environmental impact assessment

Environmental impact assessment refers to the process of examining, analysing and assessing proposed activities, policies or programmes to integrate environmental issues into development planning and maximising the potential for environmentally sound projects and sustainable development.

The OECD defines an EIA as an ‘analytical process that systematically examines the possible environmental consequences of the implementation of projects, programmes and policies.’<sup>431</sup> Under the EMA, it is said to be a ‘systematic examination conducted to determine whether or not an activity or a project has or will have any adverse impacts on the environment.’<sup>432</sup>

The OECD and EMA definitions share similar attributes with the one espoused under the Espoo Convention on Environmental Impact Assessment on a Transboundary Context. The Convention defines ‘environmental impact assessment’ and ‘impact’ as follows:

“Environmental impact assessment” means a national procedure for evaluating the likely impact of a proposed activity on the environment;

“Impact” means any effect caused by a proposed activity on the environment including human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interaction among these factors; it also includes effects on cultural heritage or socio-economic conditions resulting from alterations to those factors.<sup>433</sup>

Arising from this definition, an EIA can be described to be a precautionary national procedure that is undertaken to ensure that potential negative impacts of proposed projects are identified and mitigated in the planning process. The basic contents of an EIA relate to the quantity and quality of water, quality of air, noise levels, cultural resources and landscapes, historical sites and cultural heritage, and ecosystem and ecological processes.<sup>434</sup>

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<sup>431</sup> *Glossary of environment statistics*, studies in methods, Series F, No. 67 1997. Available at: <http://stats.oecd.org/glossary/detail.asp?ID=828> (accessed 17 February 2015).

<sup>432</sup> Sec. 2, EMA.

<sup>433</sup> Article 1(vi)(vii).

<sup>434</sup> M Bekhechi ‘Legal and regulatory framework for environmental impact assessment in African countries’ in B Chaytor & KR Gray *International environmental law and policy in Africa* (2003) 275.

## Legal Basis for Environmental Impact Assessment

The EMA requires a person who wishes to undertake a project that may have an effect on the environment to seek approval from ZEMA.<sup>435</sup> This requirement is not just for any project but those whose activities may cause negative effects on the environment. The rationale for this is to avoid or reduce negative effects that may arise through long-term integrated planning and the coordination.

The Minister is permitted under section 30 to make regulations that are aimed at the effective management of EIAs– *Environmental Impact Assessment Regulations, SI no 28 of 1997*. The EIA Regulations, demands that before a developer commences implementation of a project, an Environmental Impact Statement (EIS) must be prepared and availed to relevant regulatory authorities for review and approval.<sup>436</sup>

With regard to mining projects, the MMDA makes it mandatory that a ‘person shall not undertake exploration, mining or mineral processing activities without obtaining the prior written approval of the environmental impact assessment relating to the exploration, mining or mineral processing operations’ by ZEMA in accordance with the EMA.<sup>437</sup> Under the MMDA, there has been enacted, the *Mines and Minerals (Environmental) Regulations, SI 29 of 1997* which make provision for requirements to be met prior to prospecting, exploration or conducting mining operations.

## Failure to undertake Environmental Impact Assessment

Part XI of the EMA provides for offences and penalties– wilful failure to undertake an EIA, failure to come up with a project brief or an EIA report, and making a false statement on an EIA report that has been submitted. To this end, section 117 of the EMA provides that anyone that:

- (a) wilfully fails to undertake an environmental impact assessment contrary to the provisions of this Act;

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<sup>435</sup> Sec. 29(1).

<sup>436</sup> These regulations specifically require that a developer prepares and submits an EIS for: (a) Any project set out in the Second Schedule, whether or not the developer is part of a previously approved project; (b) Any alterations or extensions of any existing project which is set out in the Second Schedule; or (c) Any project which is not specified in the Second Schedule, but for which the Council determines a project brief should be prepared.

<sup>437</sup> Sec. 12(2).

- (b) fails to prepare and submit a project brief or an environmental impact assessment report as required under this Act; or
- (c) recklessly or fraudulently makes a false statement on an environmental impact assessment report submitted under this Act; commits an offence and is liable, upon conviction, to a fine not exceeding seven hundred thousand penalty units or to imprisonment for a period not exceeding seven years, or to both.

This provision is necessary as it permits ZEMA to ensure compliance with the legal requirements under the Act relating to conducting of EIAs. In the case of (a) and (b), ZEMA would refuse to grant permission to undertake the project until the proponent has complied. In (c), two possibilities could occur: (1) the false statement may be discovered by ZEMA at submission or scrutiny stage, in which case, permission may be withheld, or (2) permission may have already been granted before it is discovered that the proponent had recklessly or fraudulently made a statement that was false in the EIA report.

### **3.6.2 Environmental audit**

Environmental auditing refers to a 'systematic, documented, periodic and objective evaluation of how well conservancy authorities and equipment are performing in conserving or preserving the environment.'<sup>438</sup> As an emerging tool in environmental management, an environmental audit is a convergence of private and public interest. An audit is an effective management tool for corporations to be environmentally proactive. It is a means to assess and improve the environmental performance, to identify and to reduce the environmental risks and hazards of the companies.<sup>439</sup>

Conducting an environmental audit, on the one hand, increases the certainty, effectiveness and efficiency by which a firm manages its environmental affairs. On the other, it benefits the government by providing it with more and better environmental protection. Also, it benefits the environment by facilitating compliance with prescribed regulatory requirements that are aimed at reducing the impact of industrial activity to the natural environment.<sup>440</sup> In doing so, the public is reassured that they need not fear that an industry may damage their environment, which ultimately may affect their health.

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<sup>438</sup> Sec. 2, EMA.

<sup>439</sup> L Aucoin 'Environmental audits: a multi-stakeholder perspective' unpublished LLM Thesis, University of British Columbia, 1993 2.

<sup>440</sup> As above.

The relevance of conducting an environmental audit is undoubted. In the words of Aucoin:

Environmental auditing is generally undertaken to determine and increase the reliability and hence usefulness of relevant environmental information. It provides information on the strength and weaknesses of the corporation, generating data for continual improvement. Environmental audits ensure that environmental risk analysis is incorporated in the decision-making process.<sup>441</sup>

Environmental auditing is provided for under the EMA and the regulations thereof. According to the *Environmental Impact Assessment Regulations*, an environmental audit should be carried out by at least two competent persons from among those who had prepared the EIS or by a person approved by ZEMA.<sup>442</sup> The information contained in the Audit report pertains to whether the EIS is being effected and complied with.<sup>443</sup>

The EMA instructs ZEMA to undertake environmental auditing and monitoring. Section 101 provides:

- (1) An owner of premises or a person undertaking a project shall take all reasonable measures to mitigate any adverse effects not contemplated in the environmental impact assessment made in respect of the premises or the project, and shall prepare and submit an environmental audit report on the measures to the Agency annually or as the Agency may, in writing, require.
- (2) The Agency shall carry out an environmental audit of all the activities that are likely to have an adverse effect on the environment.
- (3) An inspector may enter upon any land or premises for the purpose of determining the extent to which the activities carried out on the land or premises conform to the environmental impact assessment made in respect of the land or premises.
- (4) An owner of premises or a person undertaking a project for which an environmental impact assessment is made shall keep accurate records and make annual reports to the Agency describing the extent to which the project conforms, in operation, to the environmental impact assessment.

This provision gives responsibility to the person undertaking the project to avail accurate records showing adherence to the conditions of the EIA conducted for the mining project. The ZEMA is also required to carry out an independent environmental audit to confirm

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<sup>441</sup> As above, 3.

<sup>442</sup> Regulation 28(4), Environmental Impact Assessment Regulations, Part VII.

<sup>443</sup> Regulation 8(1), Mines and Minerals Act (Environmental) Regulations, Part II.

that the project proponent has conformed to the EIA as required. According to section 102(1), ZEMA is required to monitor:

- (a) all environmental phenomena with a view to making an assessment of any possible changes in the environment and their possible impacts; or
- (b) the operation of any industry, project or activity with a view of determining its immediate and long-term effects on the environment.

This entails that ZEMA has the mandate to monitor the operation of mining companies with a view to determining present and future adverse impacts on the environment. This would seem to suggest that, conducting of EIAs is an ongoing process throughout the life of a mining activity. Although EIA is required before commencing a mining project, it does not spell the end after approval of the project has been granted by ZEMA. Thus, despite the legal obligation placed on ZEMA to undertake environmental monitoring through audits, there is little being done. This is partly attributable to the absence of an effective EIA system of monitoring which has the capability of eroding the potential benefits of conducting EIA. Due to the lack of an efficient and effective monitoring and evaluation systems, there is usually lack of proper analysis, interpretation, and examination of the consequences especially after the accomplishment of the process.<sup>444</sup>

The absence of an effective system of monitoring is compounded by the fact that, despite the enactment of the EMA, the EIA regulations in existence are those that subsisted under the repealed EPPCA. Despite the Minister being mandated to make appropriate regulations intended for the carrying out of the provisions of the EMA<sup>445</sup>, only the Environment Management (Licensing) Regulations of 2013 have been promulgated. This reflects little importance generally attached to environmental management.

### **3.6.3 Licensing**

Mining operations cannot be carried out without obtaining a mining licence.<sup>446</sup> The MMDA requires a person who intends to carry on any artisanal mining, small-scale mining or large

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<sup>444</sup> C Mpanga 'Critical analysis of the Environmental Impact Assessment (EIA) process relevant to the mining industry in Zambia' unpublished LLB Obligatory Essay, University of Zambia, 2014 53.

<sup>445</sup> Sec. 134(1), EMA.

<sup>446</sup> This is a licence that permits the 'extraction of material, whether solid, liquid or gaseous, from land or from beneath the surface of the earth in order to win minerals, or any operations directly or indirectly necessary or incidental to the extraction of the material.'

scale mining activities to obtain a mining licence.<sup>447</sup> The application made should be submitted to the Mining Licensing Committee which shall— (a) consider such an application and grant, renew, or refuse to grant or renew mining rights and non-mining rights; (b) terminate, suspend or cancel mining and non-mining rights; (c) amend terms and conditions of mining and non-mining rights; and (d) advise the Minister on matters that relate to the functions under the Act.<sup>448</sup> The Committee may, in considering an application, consult any person in the area to which an application relates who may be affected by the grant, termination, suspension, cancellation or renewal of a mining or non-mining right.<sup>449</sup>

Besides the Committee, there has also been established the Mining Cadastre Office as the central administrative office for the processing of applications for mining rights and mineral processing licences. The role of the Cadastre Office is to, *inter alia* administer mining rights and mineral processing licences and maintain public cadastral maps and cadastre registers.<sup>450</sup> The licence, once granted, only permits mining operations and has no control over the adverse effects of mining even though a condition may be imposed on the licence holder to ensure the mining activities are done in a manner that is sustainable.<sup>451</sup> Thus, mine operators, due to the nature of operations, require a licence from ZEMA in order for them to discharge any pollutant into the atmosphere.

There are three types of licences that ZEMA grants to mine operators: ambient licence, emissions licence, and pollution licence.

#### 1. Ambient licence

The EMA requires any person who conducts an activity that produces or has the potential to produce, a substance that is likely to deplete the ozone layer to obtain a licence for this purpose.<sup>452</sup> One such licence is the ambient licence whose purpose is to control air pollutants in order to maintain air quality.<sup>453</sup> Ambient quality standards cap the level to which pollution is

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<sup>447</sup> Sec. 29(1).

<sup>448</sup> Sec. 6(1).

<sup>449</sup> Sec. 6(6).

<sup>450</sup> Sec. 8.

<sup>451</sup> Sec. 32(2), MMDA provides: 'There shall be attached to a mining licence as part of the conditions of the licence (a) the programme of development, construction and mining operations as approved by the Director of Mining Cadastre; (b) the applicant's undertaking for the employment and training of citizens; (c) the applicant's undertaking for the promotion of local business development; (d) the applicant's capital investment forecast; and (e) the applicant's undertaking for management of the environment in the mining area.'

<sup>452</sup> Sec. 31(2)(a) & 32(1), EMA

<sup>453</sup> Sec. 49, EMA describes "air quality" as the 'prescribed concentration of a pollutant in the atmosphere at the point of measurement.'

permitted in a particular sector. It sets levels of pollutants to be discharged either in the air or in water bodies.<sup>454</sup>

The Minister is mandated to make regulations for the monitoring of substances that are discharged into the environment and the ambient quality of the environment in places that surround the discharge.<sup>455</sup> The ZEMA is authorised to establish ambient air quality<sup>456</sup>, emission standards<sup>457</sup>, and guidelines.<sup>458</sup> The guidelines are aimed at assessing ambient air quality so as to protect generally, the health, safety or welfare of persons, animal and plant life or property affected by the activities conducted by an operator.<sup>459</sup>

## 2. Emissions licence

An emission is the release of a pollutant whether solid, liquid or gas into the atmosphere.<sup>460</sup> The law sets standards for emission which stipulate a number of concentration levels of pollutants that can be released. These standards apply to industries that emit pollutants such as mines and quarry to which they are obliged to conform. Emission standards are based on assumptions that: (a) certain pollution levels will not bring out undesirable effects; (b) each environment has the capacity to accept substances without undesirable consequences and; (c) the capacity to assimilate such substances can be measured, and allocated to each actor.<sup>461</sup>

The obligation to issue an emission licence is placed on ZEMA which may stipulate condition upon such a licence.<sup>462</sup> A person who intends to operate an industry or plant that emits or discharges pollutants or contaminants into the environment is required to apply to ZEMA for an emission licence.<sup>463</sup> In issuing such a licence, the ZEMA have to take into consideration two factors: (1) the rate of emission, concentration, and nature of the pollutant produced; and (2) the best practicable technology available to control pollutants during the emission process.<sup>464</sup>

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<sup>454</sup> D Shelton & A Kiss *Judicial handbook on environmental law* (2005) 35.

<sup>455</sup> Sec. 43(1)(k), EMA.

<sup>456</sup> Sec. 49, EMA describes 'ambient air' as the 'atmosphere surrounding the earth, but does not include the atmosphere within a structure or within any underground space.'

<sup>457</sup> This is the specified standard of the amount of a pollutant emitted from a specific source – sec. 49, EMA.

<sup>458</sup> Sec. 52(1)(a), EMA.

<sup>459</sup> Regulation 6, Environmental Management (Licensing) Regulations, 2013.

<sup>460</sup> Sec. 2, EMA.

<sup>461</sup> D Shelton & A Kiss *Judicial handbook on environmental law* (2005) 35.

<sup>462</sup> Sec. 33, EMA.

<sup>463</sup> Regulation 4(1), Environmental Management (Licensing) Regulations, 2013.

<sup>464</sup> Sec. 52(2)(a)(b), EMA.

### 3. Pollution permit

Mining and its related activities can be a source of significant environmental damage. Pollution of surface and ground water, air, and damage to land are some of the impacts that have been documented in the past. Empirical studies have revealed that mining activities can result in pollution if not well managed. Health and safety risks may also be considerable for people working in the mine or living in the nearby area.<sup>465</sup> Thus, the Minister is mandated by law to issue guidelines and institute programmes relating to: (i) the elimination of substances that deplete the ozone layer; (ii) management practices of activities likely to lead to the degradation of the ozone layer and the stratosphere; or (iii) the reduction and minimisation of risks to human health created by the degradation of the ozone layer and the stratosphere.<sup>466</sup>

The law allows a person to discharge any pollutant into the environment on condition that such discharge is in line with the pollution control standards.<sup>467</sup> In order to effectively monitor and control water pollution, ZEMA, in liaison with any relevant authority, is mandated under section 48 to, inter alia: establish water quality and pollution control standards; order or carry out investigations of actual or suspected water pollution, including the collection of data; and, determine the analytical methods by which water quality and pollution control standards can be determined. The *Environmental Management (Licensing) Regulations of 2013* provides for the quality levels of any effluent released into a water body from a mining area licensed as a discharge site.

#### 3.6.4 Environmental monitoring

Environmental monitoring refers to constant or periodic determination of actual and possible impacts that any activity or phenomenon has on the environment.<sup>468</sup> There are two institutions that monitor the environment: the ZEMA, and the MSD. The EMA places an obligation on ZEMA to monitor:

- (a) all environmental phenomena with a view to making an assessment of any possible changes in the environment and their possible impacts. Also, it monitors the operation of any industry, project;

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<sup>465</sup> M Silengo 'An integrated framework for environmental management and protection in Zambia' unpublished PhD Thesis, University of Salford, 1996 193.

<sup>466</sup> Sec. 31(1)(b), EMA.

<sup>467</sup> Sec. 46, EMA.

<sup>468</sup> Sec. 2, EMA.



- (b) the operation of any industry, project or activity with a view of determining its immediate and long-term effects on the environment.<sup>469</sup>

Specifically, the ZEMA is required to monitor the environment through: (1) use of specific sampling and other procedures<sup>470</sup>; (2) developing and enforcing measures aimed at preventing and controlling pollution<sup>471</sup>; (3) monitoring changes in natural resources, their utilisation and effect on the environment<sup>472</sup>; and (4) carrying out investigations and collection of data of suspected or actual water pollution<sup>473</sup> or air pollution<sup>474</sup>.

As part of monitoring the activities of mining companies, the EMA was complimented by subsidiary legislation such as the *Environmental Impact Assessment Regulations*, *Water Pollution Control (Effluent and Waste Water) Regulations*, *Air Pollution Control (Licensing and Emission Standards) Regulations*, *Mines and Mineral (Environmental) Regulations*, and *Environmental Protection Fund Regulations*. These Regulations were promulgated between 1993 and 1997 pursuant to section 96 of the EPPCA.<sup>475</sup> However, in 2013, the *Water Pollution Control*, and *Air Pollution Regulations* were revoked.<sup>476</sup> The others are still in force pursuant to the Interpretation and General Provisions Act which states in section 15:

Where any Act, Applied Act or Ordinance or part thereof is repealed, any statutory instrument issued under or made by virtue thereof shall remain in force, so far as it is not inconsistent with the repealing written law, until it has been repealed by a statutory instrument issued or made under the provisions of such repealing written law, and shall be deemed for all purposes to have been made thereunder.

Thus, these Regulations are in existence as though the Act which created them has since been repealed and replaced. Since their enactment, the Regulations have not been reviewed. Although the EMA and MMDA contain some progressive provisions, the Regulations are still old hence not in tandem with modern practices of environmental control. Consequently, this has added to continued pollution of air, water, and improper handling of waste.

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<sup>469</sup> Sec. 102(1), EMA.

<sup>470</sup> Sec. 26(3)(e), EMA.

<sup>471</sup> Sec. 9(2)(c), EMA.

<sup>472</sup> Sec. 9(2)(k), EMA.

<sup>473</sup> Sec. 48(1)(d), EMA.

<sup>474</sup> Sec. 52(1)(d), EMA.

<sup>475</sup> According to sec. 96 of EPPCA, 'The Minister in consultation with the Council, may by statutory instrument make regulations for anything which has to be prescribed under this Act, for the protection of any aspect of the environment and for the control of pollution in the environment.'

<sup>476</sup> Regulation 76 of the Environmental Management (Licensing) Regulations of 2013 revoked the Water Pollution Control, and Air Pollution Regulations.

### 3.7 Pollution and compliance to environmental standards

Compliance basically refers to the ‘conformity with obligations, imposed by a state, its competent authorities and agencies on the regulated community, whether directly or through conditions and requirements, permits, licenses and authorizations’ in implementing provisions of the law.<sup>477</sup> Under the EMA, compliance to environmental standards by the holder of mining rights is a requirement. Section 39(2), permits the Agency to impose conditions or set out requirements necessary to preserve or safeguard the environment. In ensuring compliance with environmental standards, regulations, such as the *Environmental Management (Licensing) Regulations of 2013* made pursuant to the EMA, spell out the compliance requirements.

#### 3.7.1 Pollution

Pollution literally refers to any form of environmental injury. Defining the term ‘pollution’ is a daunting task as there is no single definition which is comprehensive. The EMA defines it as:

[T]he presence in the environment of one or more contaminants or pollutants in such quantities and under such conditions as may cause discomfort to, or endanger, the health, safety and welfare of human beings, or which may cause injury or damage to plant or animal life or property, or which may interfere unreasonably with the normal enjoyment of life, the use of property or conduct of business.<sup>478</sup>

The above definition suggests that pollution is a negative consequence of introduction of contaminants into the natural environment. This definition brings out two core elements: first, *the presence of pollutants in the environment*. A pollutant has been deemed, by the United Nations, to mean:

Human activities inevitably and increasingly introduce material and energy into the environment, when that material or energy endangers or is liable to endanger man’s health, his well-being or his resources, directly or indirectly, it is called a pollutant.<sup>479</sup>

The EMA describes the term ‘pollutant’ as:

...Any substance whether liquid, solid or gaseous which-

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<sup>477</sup> United Nations Environmental Programme *Training manual on international environmental law* (2015) 39.

<sup>478</sup> Sec. 2, EMA.

<sup>479</sup> United Nations Conference on ‘Human environment (identification and control of pollutants of international significance)’ DOC.A/CONF.48/8, 7 January 1972.

(b) may, directly or indirectly, alter the quality of any element of the receiving environment; or

(c) is hazardous or potentially hazardous to human health or the environment; and includes objectionable odours, radio-activity, noise temperature changes or physical, chemical or biological changes to any segment or element of the environment.<sup>480</sup>

The second element is that *the pollutants must cause discomfort*. The mere presence of pollutants in the environment may not suffice as constituting 'pollution'. Thus, such quantities must either: (i) threaten the health, safety and welfare of human beings; or (ii) injure or damage plant or animal life or property; or (iii) interfere unreasonably with the normal enjoyment of life, the use of property or conduct of business.

### 3.7.2 Air pollution

Air pollution is a condition of the 'ambient air arising, wholly or partly, from the presence of one or more pollutants in the air that endangers the health, safety or welfare of human beings or that interferes with the normal enjoyment of life or property, endangers animal life or causes damage to plant life or property.'<sup>481</sup> This means that the presence of pollutants in the atmosphere must cause a rise in the atmospheric air surrounding the earth. The rise of such pollutants poses a threat to the health, safety or welfare of human and plant life or property. It is by far the most harmful form of pollution to the environment. Its inhalation leads to lung cancer, asthma, allergies, and various breathing problems along with severe and irreparable damage to flora and fauna.

The pollutants of air include: dust elements, gases produced by combustion processes: carbon monoxide, carbon dioxide, nitrogen oxides, sulphur dioxide, noise and vibrations produced by blasting, processing plant operations. The sources of this kind of pollution are in three main types: (1) discreet particulates (smoke, dust, aerosol, fumes, and mist); (2) vapours; and (3) gases. In mining activities, air pollution may be caused by fugitive dust from open cast mining, access roads, slimes dams, and ore processing plants.

In order to control air pollution, the Environmental Management (Licensing) Regulations of 2013 have set Ambient Air; and Emissions Standards that must be complied with.

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<sup>480</sup> Sec. 2, EMA.

<sup>481</sup> Sec. 49, EMA.

## Ambient air standards

Ambient air standards prescribes the maximum amount of pollutants that are allowed in the environment. The Environmental Management (Licensing) Regulations of 2013 place an emission limit– the limit, level, rate, amount or concentration of a given substance discharged in the air that must not be exceeded attempt to limit air emissions discharged into the environment and hence requires a developer to obtain a licence.<sup>482</sup> In order to protect the health of human, animal or plant life, and the environment, a developer is obliged to abide by the set guidelines.<sup>483</sup>

The Second Schedule of the Regulations require that: (a) the holder of a licence to submit monthly emission returns to ZEMA; (b) the holder not to emit more than 1000mg/Nm<sup>3</sup> of sulphur dioxide from the smelter and convertors into the environment; (c) the holder to emit 50mg/Nm<sup>3</sup> of dust into the environment; (d) the maximum amount of Arsenic to be discharged is 0.5mg/Nm<sup>3</sup>; (e) the maximum amount of copper content in the air is 1.0mg/Nm<sup>3</sup>; and (f) the maximum amount of lead emission to the environment is 0.2 mg/Nm<sup>3</sup>. Notwithstanding these stipulations, the Auditor General's Report found that large scale mining companies that have smelting facilities have not been in compliance. For example, Chambishi Copper Smelter and Ndola Lime had not made any monthly returns submission for the years 2009-2013. It was found that dust emissions averaged 157.1-2679.5mg/Nm<sup>3</sup> with the highest pollution recorded at Ndola Lime– 5550mg/Nm<sup>3</sup>.<sup>484</sup> It was also found that an average of 358.6-86155mg/Nm<sup>3</sup> of sulphur dioxide was being discharged into the environment, for example, Mopani emitted up to 155 769mg/Nm<sup>3</sup> which was 155% higher than the set limit.

On the content of arsenic compounds permitted to be released into the environment, the discharge ranged from 0.4-4.7mg/Nm<sup>3</sup> with Mopani emitting up to 38.8mg/Nm<sup>3</sup>.<sup>485</sup> The amount of copper content in the air emitted into the environment averaged 2.7-151.3mg/Nm<sup>3</sup> with Mopani emitting 854.2mg/Nm<sup>3</sup>.<sup>486</sup> Lead content in the emissions was also higher than the prescribed standards– between 0.3-23.4mg/Nm<sup>3</sup> with Mopani emitting up to 75.9mg/ Nm<sup>3</sup>.<sup>487</sup>

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<sup>482</sup> Environmental Management (Licensing) Regulations, regulation 2.

<sup>483</sup> As above, regulation 6.

<sup>484</sup> Auditor General Report 'Management of environmental degradation caused by mining activities in Zambia' (2014) 15.

<sup>485</sup> Auditor General Report, 15.

<sup>486</sup> As above.

<sup>487</sup> As above.

## Emission standards

The Environmental Management (Licensing) Regulations requires a holder of an air emission licence to: (a) comply with the emission limits prescribed; (b) install air measuring devices and pollution control equipment at the plant, undertaking or process that emits air pollutants; (c) collect such samples and conduct such analysis of the emissions as the Agency may direct for the monitoring of emission levels; (d) operate an internal system that monitors air emissions; (e) submit emission returns to the Agency twice a year; (f) report immediately to the Agency any emissions exceeding the limits prescribed; and (g) take appropriate measure to contain the release of emissions so as to avoid, lessen or deal with their adverse effect.<sup>488</sup>

The Regulations, as stated above, require a licensee to install devices and pollution control equipment at their plant. Given the adverse nature of Sulphur dioxide on the environment, it was agreed between ZEMA and Mopani in 2013 that appropriate equipment is acquired by the mine to capture 50-60% of the Sulphur dioxide and converting the same to acid.<sup>489</sup> Although this has been done by the company, the problem this has now been created is that of acid mist. The acid plant is built close to the residential area, Butondo Township, and in the event of a breakdown, the effect is catastrophic, leading to death at times. Though the residential houses near the plant have been deemed not to be fit for human habitation, the challenge has been, who should pay for relocation costs between government and Mopani? This is yet to be resolved.<sup>490</sup>

### 3.7.3 Noise pollution

The EMA describes 'noise' as 'any undesirable sound that is intrinsically objectionable or that may cause adverse effects on human health or the environment'<sup>491</sup>. The term 'noise pollution' is not defined anywhere in the Act. In order to gain understanding of 'noise pollution', the two definitions, if read together, could offer some meaning. What could be deciphered from the meaning of 'noise' in the context of 'pollution', is that noise pollution is an undesirable sound that brings about discomfort or endanger the safety, health, and wellbeing of human beings or interfere unreasonably with their ordinary enjoyment of life or conduct of business.

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<sup>488</sup> Regulation 7(1).

<sup>489</sup> Informal discussions with ZEMA, Ndola Office, Wednesday, 1 July 2015.

<sup>490</sup> Informal discussions with Green and Justice Organisation, Friday, 3 July 2015.

<sup>491</sup> Sec. 2, EMA.

Noise emanating from mining activities poses a problem to those that live in the mining area. The noise levels are excessive and have affected the operation of hospitals that are located near the mines.<sup>492</sup> This poses a threat to the lives of those who are admitted to the hospitals. Unfortunately, there is no action yet on the problem, which has continued.

### 3.7.4 Water pollution

The term 'water' refers to:

water in its natural state, including— surface water; water which rises naturally on any land or drains or falls naturally on to any land, even if it does not visibly join any watercourse; or ground water.<sup>493</sup>

Water resources must be managed and used efficiently, sustainably and beneficially in the public interest. This would entail that water resources should be protected, developed, used, conserved, and controlled sustainably, beneficially, reasonably and equitably for all generations whether current or future.<sup>494</sup>

The management of water may be affected by pollution— the EMA defines water pollution as 'the introduction, directly or indirectly, of pollutants into an aquatic environment'.<sup>495</sup> Under the Water Resources Management Act (WMRA) 21 of 2011, it is said to mean: (a) any contamination of the biological, chemical or physical properties of water, including changes in colour, odour, taste, temperature or turbidity; or (b) any discharge of any gaseous, liquid, solid or other substance into any water resource.<sup>496</sup> Such discharge should be likely to create a nuisance or render the water detrimental, harmful or injurious, or potentially unsafe or injurious to the health, safety or welfare of any human being, bird, fish or other aquatic ecosystem, livestock, wildlife or the environment.

#### Discharge of water pollutants

The law does not allow a person to release, apply or dump any poisonous, toxic, or obnoxious matter into the water in contravention of the set standards on control of water pollution.<sup>497</sup> This

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<sup>492</sup> Informal discussion with ZEMA, Ndola Office, Wednesday, 1 July 2015.

<sup>493</sup> Sec. 2, WMRA.

<sup>494</sup> Sec. 6(g)(p), WMRA.

<sup>495</sup> Sec. 45(1), EMA.

<sup>496</sup> Sec. 2.

<sup>497</sup> Sec. 46, EMA.

means that discharging pollutants is permitted but this must be done in accordance with the set standards.

### Sources of water pollution

The source of water pollution can be said to be in two major categories: (a) direct, and (b) indirect. Direct sources entail where contaminants are introduced directly into the water bodies. Indirect sources would refer to a situation where contaminants find their way indirectly into the body of water and would include percolation of contaminants into the groundwater system or entry into the main water supply or from the atmosphere through rain water. Regardless of the source, mining and mineral processing activities pollute the water and cause a significant negative effect on the environment.

There are three main types of pollution that mining activities cause: (i) *Acid Rock Drainage (ARD) or Acid Mine Drainage (AMD)*; (ii) *Erosion and Sedimentation*; and (iii) *Processing Chemicals and Metal pollution*. Acid Rock Drainage or AMD occurs when large quantities of rock containing sulphide minerals are excavated and reacts with water and oxygen to create sulphuric acid. The acid then leaches from the rock which may either percolate into the ground to the water below or be carried off by rainwater in water bodies and thus, polluting them.

With regard to processing chemicals and metal pollution, most mining operations use metals such as: arsenic, cobalt, copper, cadmium, lead, silver and zinc in extracting metals. When these are leached out and carried downstream, it increases the concentration of these metals in the water thereby causing harmful effects on both humans and other living organisms.

The development of mining industries disturbs soil and rock during the process of construction of roads, open pits, and underground mines. Erosion from waste rocks that have been piled and get washed away after heavy rainfall often increases the sediment load of nearby water bodies. In addition, mining may alter the stream's morphology by disrupting a channel, diverting its directional flow, and altering its slope or the bank's stability. These disturbances can significantly change the characteristics of stream sediments, reducing water

quality.<sup>498</sup> Higher concentration of sediments in the water increases the turbidity thereby reducing the light available to water plants necessary for photosynthesis.<sup>499</sup>

### Emission standards

In order for a person to discharge pollutants in the water bodies, an emission licence must be obtained. Regulation 7(2) of the Environmental Management (Licensing) Regulations requires the holder to: (a) comply with the effluent and waste water standards prescribed; (b) install at the premises, pollution control equipment for the treatment of effluent or waste water; (c) carry out regular effluent or waste water discharge quality and quantity monitoring and submit records of the monitoring to the Agency twice a year; (d) employ Best Management Practices (BMPs) to control or abate the release of pollutants in the environment; (e) submit emission returns twice a year; and (f) immediately report any unusual release of waste.

The third schedule of the Regulations prescribes a number of pollutants that can be discharged into the water body. Where waste water is to be discharged into the environment, such must contain: (a) a pH value of 6-9; (b) total suspended solids not exceeding 100mg/litre; (c) total dissolved solids of less than 3000mg/litre; (d) a reduced sulphate burden of 1500mg/litre; (e) less than 1.5mg/litre of copper compounds; (f) less than 1.0mg/litre of total cobalt compounds; (g) maximum limit of 1.0mg/litre of total manganese; and (h) maximum contents of 2.0mg/litre for iron.

Despite these elaborate prescriptions, water bodies are continually being polluted through mining activities. The waste water discharged into the environment has caused pollution of the surface water bodies with Mopani and KCM causing the most pollution. In the case of Mopani, the water discharge from its mining activities was highly acidic with an average pH value of 3.4-5.0 contrary to the 6-9 prescribed by the Regulations.<sup>500</sup> Also, total suspended solids, dissolved solids, sulphates and chemical contents such as total Copper, Cobalt, Manganese and Iron were higher than minimum standards set by the Regulations and in some instances exceeding 100%.<sup>501</sup>

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<sup>498</sup> SW Johnson 'Hydrologic effects' in JJ Marcus (ed.) *Mining environmental handbook* (1997) 149.

<sup>499</sup> RP Mason 'Mining waste impacts on stream ecology' in CD Da Rosa (ed.) *Golden dreams, poisoned streams, how reckless mining pollutes America's waters and how we can stop it* (1997) 149.

<sup>500</sup> Auditor General 'Management of environmental degradation caused by mining activities in Zambia' (2014) 23.

<sup>501</sup> As above.



A report was done on pollution of Musakashi River, though it acknowledged that, though total dissolved solids discharged by Non-Ferrous Company Africa (NFCA) could have been well beyond the limit, concluded that the pollution was moderate and within prescribed guidelines. The reason advanced was that the impact of the tailings from the mine and the impact of a faster-flowing water course broke down these solids introduced into the river thereby increasing the turbidity of the water.<sup>502</sup>

In the case of KCM, the effluents from its Mutimpa Tailings Dam are discharged into Mwambashi River which in turn pours its waters into the Kafue River, a source of fresh water for residents of Chambishi, Kalulushi and Garnaton.<sup>503</sup> The discharge contains Sulphur in excessive levels contrary to what is legally provided under the Regulations. In 2016, ZEMA had to issue an order directing the shutdown thereby leaving over 500 000 residents without water.

### **3.7.5 Land pollution**

Land pollution has no standard definition as it consists of different degrees as well as levels of pollution. Mishra defines it as 'any physical or chemical alteration to the land which causes its use to change and renders it incapable of beneficial use without treatment.'<sup>504</sup>

Mining activities cause pollution on the land through the deposition of sub-economic ores, hazardous waste material on surface.<sup>505</sup> Coarse wastes, such as waste rock, are usually placed in heaps— waste rock dumps, which currently occupy an area of over 10 000 hectares on the Copperbelt. These dumps can alter subsurface drainage, and when it rains can revert to an amorphous slurry which spreads to surrounding areas.<sup>506</sup>

Fines or tailings, placed behind dam walls as slurries, are also a source of pollution. Tailings dams often contain residue of copper and cobalt. Such residue deposits are highly susceptible to erosion due to steep slopes and the presence of fine, dispersed particles which

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<sup>502</sup> Zambia Institute for Environmental Management *An environmental and social impact assessment for Musakashi River catchment and its tributaries: an independent impact assessment of industrial mining waste pollution in Chambishi* (2013) 28.

<sup>503</sup> Informal discussion with ZEMA, Ndola Office, 1 July 2015.

<sup>504</sup> PC Mishra *Soil pollution and organisms* (1989) 255.

<sup>505</sup> Other non-mining causes of soil pollution include sewerage spills and non-sustainable farming practice such as the heavy use of organic pesticides, house hold dumping and littering and oil spillage.

<sup>506</sup> M Silengo 'An integrated framework for environmental management and protection in Zambia' unpublished PhD Thesis, University of Salford, 1996 199.

end up being deposited in neighbouring streams.<sup>507</sup> Zambia Institute for Environmental Management observed thus:

The tailings dam has impacted many farmers along the river's edge, with the effluent changing the extent of the river system, and helping to cause floods. The flooding itself, coupled with the toxicity of the floodwater, has destroyed crops and has likely impacted the fertility of the soil... As well as impacts on farming practices, many people complained of the lack of fish within the river. Fish had previously been an important supplementary component of diets in the local area, but pollution has meant that there are no longer any fish within the river system near to the dam. <sup>508</sup>

The tailings generally have adverse characteristics such as poor physical properties, toxic substances, nutrient deficiencies, high acidity or alkalinity, and salinity which affect the water and fertility of the land. The seepage from tailings has the potential to contaminate not only the soil but the groundwater too.

### **3.8 Corporate standards**

Corporate standards refer to standards that a corporation adopts or develops for purposes of guiding its internal affairs. Legally, there is no requirement for an investor or developer to adopt or come up with any standards. This is in spite of the fact that, upon attaining a certificate of registration, licence or permit, the Board is permitted to attach conditions, none of which relate to standards.

International standards developed by the World Bank, ICMM, ISO, and Global Compact require mining companies to respect human rights, safety, and the environment and establish policies that are aimed at attaining respect. The standards set by ISO, GRI and OECD require corporations to implement an EMS. The corporations that subscribe to these standards are obliged to develop internal mechanisms whose aim is to ensure the attainment of sustainable mining practices that address social and environmental issues. Although the standards prescribed by these guidelines are bereft of enforcement mechanisms, their adoption demonstrates good corporate citizenry and seriousness to address such issues.

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<sup>507</sup> D Limpitlaw 'Environmental impact assessment of mining by integration of remotely sensed data with historical data' Mine Environmental Engineering Conference II paper presentation, Brunel University, 29–30 July 1998.

<sup>508</sup> Zambia Institute of Environmental Management *An environmental and social impact assessment for Musakashi river catchment and its tributaries: an independent impact assessment of industrial mining waste pollution in Chambishi* (2013) 44–45.

The policies adopted by mining companies usually centre on human rights, safety, health, and the environment. In other instances, some may also embrace human rights. For purposes of the thesis, only policies of four large scale mining companies will be discussed—Kansanshi Copper Mines, Lumwana Copper Mines, Mopani Copper Mines, and Konkola Copper Mines.

## 1. Kansanshi Copper Mines

Kansanshi Copper Mines is operated by First Quantum Minerals (FQM) Ltd which is specialised in producing copper, gold, nickel and zinc. In Zambia, FQM mines copper and gold.<sup>509</sup> First Quantum Minerals, an Australian firm, acquired the mine in 2001 and owns 80% of the mine and smelter; and 100% in Sentinel mine.<sup>510</sup> It also owns Kalumbila Minerals Limited where Copper, Cobalt, Nickel, Uranium, and Iron Ore are mined.

The mine has developed two policies: the environmental, and social policy. The Environmental Policy contains the Company's overarching environmental obligations such as: a commitment to prevention of pollution; compliance with applicable environmental laws; and continued improvement to protect the environment.<sup>511</sup> Without generality, the company commits itself to: recognising effective environmental management; develop, design and operate facilities in an environmentally sound manner; dispose of wastes and by-products in a safe and responsible manner; develop, implement and constantly update the environmental management systems to manage, reduce and where possible, prevent environmental pollution resulting from its activities; and conduct audits of its environmental systems in accordance with the EP and ISO 14001 Standards. In order to address environmental issues, \$ 4 800 000 is annually set aside for such purposes.<sup>512</sup>

The Social Policy centres on 'sound, strategic business sense to involve local communities.' The company engages the local community to 'build and maintain effective long-term and mutually beneficial relationships, and conduct business in a way that provides long term economic opportunity and supports social well-being.'<sup>513</sup> The company's commitment is based on: building relationships that are based on transparency, mutual trust and respect; communicating with the local communities directly and openly and resolving grievances in a

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<sup>509</sup> <http://www.first-quantum.com/Our-Business/Our-Products/default.aspx> (accessed 9 October 2016).

<sup>510</sup> <http://www.first-quantum.com/Our-Company/overview/default.aspx> (accessed 9 October 2016).

<sup>511</sup> First Quantum Minerals 'Environmental Policy' 9 December 2013.

<sup>512</sup> Informal discussions with Kansanshi Copper Mines, Saturday, 27 June 2015.

<sup>513</sup> First Quantum Minerals 'Social Policy' 9 December 2013.

timely, interactive and culturally appropriate manner; and providing benefits through opportunities like employment, business development, education, training or community investment over the long term.<sup>514</sup>

In view of these principles, the company has committed itself to develop strategies and programmes aimed at the local community's capacity building, ensure participation of local communities through employment and contracting opportunities, ensure that local contractors provide safe, reliable and competitive goods and services to the company's operations, and work with communities to identify community investment opportunities that support local cultures and priorities.<sup>515</sup>

Despite the elaborate and clear intentions of the company, the actions of the company have not been incident free. In 2014, the company was challenged by the locals who objected its decision construct the Chisola dam. The point of contention was locals' disapproval of the mine's relocation plan owing to the adverse effect that it would have on the environment and ultimately human life.<sup>516</sup> In as much as the mines have committed themselves to involve locals in their decision making processes, this was not the case. The Policy commitments are cursory in nature and do not form a binding obligation on the company.

## 2. Lumwana Copper Mines

Lumwana Copper Mines commenced its operations in 1999 after having obtained a licence from the government. At that time, Equinox Minerals Limited was the company that was permitted to operate the mine until 2008 when 100% of its shares were acquired by Barrick Gold. Currently, the mine extracts Copper, Cobalt, Gold, and Uranium.

In order to ensure that the activities of the mine do not negatively affect the area surrounding the mine, Barrick Gold has developed a Human Rights Compliance Programme which was formally launched in 2011. The Programme is grounded in ensuring that corporate values are adhered to. It is not intended to be a risk mitigation effort but a reflection of the company's core values and its commitment to respect for human rights.<sup>517</sup> In this regard, the programme strives to adhere to relevant human rights norms, best practices for compliance programmes generally, and mining companies specifically.

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<sup>514</sup> As above.

<sup>515</sup> As above.

<sup>516</sup> Informal discussions with Kansanshi Copper Mines, Saturday, 27 June 2015.

<sup>517</sup> Barrick Gold Corporation 'Human rights compliance program' (2011) 1.

The programme also attempts to maximise efficiencies with other company compliance programmes and activities wherever possible, enabling a coherent company approach composed of a culture of compliance, clear human rights guidelines and requirements, and effective global operationalization.<sup>518</sup> The programme maintains consistency with the UN Guiding Principles on Business and Human Rights.

The company is not obliged to adhere to human rights best practices. In fact, at the most, the company can only 'try' to attain the best human rights practices. This means that, where it does not do so, there is no sanction against its failure on the basis that a core value of its policy was breached. In recent times, the locals have complained of suffering numerous illnesses as a result of the uranium, a by-product of copper processing, contained in the water. The company, despite having a sustainability department whose task is to sensitise the locals and address their issues, has maintained that such is not true as the uranium has no effect if it is never processed and is kept in 'ore' state.<sup>519</sup> The position taken by the company does not reflect best human rights norms as enunciated by the UN Guiding Principles on Business and Human Rights, to which it subscribes to. The UN Guiding Principles require the company to respect the rights of the locals. Its failure to do so is not only a violation but also, a breach of its commitment.

### 3. Konkola Copper Mines

Konkola Copper Mines is the largest copper mining company in Zambia. It is owned by Vedanta Resources which acquired it in 2004 following the withdrawal, as shareholders, by Anglo American in 2002.<sup>520</sup> The mining operations are on the Copperbelt–Kitwe (Nkana Refinery, Nkana Acid Plants and Nkana Smelter), Chingola, Chililabombwe, and Nampundwe. The main mineral extracted is Copper and its by-products.

There are three Policy documents that have been developed by KCM– the Safety, Health and Environment (SHE); Human Rights; Social and Water Management. The SHE Policy commits the company to conduct 'effective management of health, safety and the environment' as an integral part of its business. It focuses on the safety of its employees and other persons who may be affected by the operations of the mine. The company strives to comply with

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<sup>518</sup> As above.

<sup>519</sup> Informal discussion with Lumwana Copper Mine, Friday, 24 July 2015.

<sup>520</sup> <http://kcm.co.zm/corporate-profile/company-overview/> (accessed 12 October 2016).

applicable national, regional and local SHE regulations and statutory obligations. In this regard, it is incumbent on the company to develop, implement and maintain SHE management systems consistent with world-class standards. Under the SHE Policy, the company endeavours to improve and enhance environmental conditions and avoid, reduce or mitigate the environmental impacts to communities nearby in areas where the mine operates. In handling environmental matters, a minimum of \$ 1 300 000 000 is annually set aside to address environmental issues.<sup>521</sup>

Under the Human Rights Policy, the company is committed to principles of sustainable development including protecting human life, health and environment, and promoting social well-being and adding value to the communities in which it operates. This stems from the fact that protecting and respecting human dignity is central to its business operations. The company ensures that employees are fairly and reasonably paid and remunerated on structure that complies with statutory obligations of the country in which it operates. Its operations are based on zero tolerance for any form of forced child labour directly or through contracted labour. In this regard, it endeavours to promote fair working conditions as guided by international conventions.

In its Social Policy, the company is committed to the principles of sustainable development, protection of human life, health and environment, ensuring social well-being, and adding value to the communities. The respect for human dignity lies at the core of its business philosophy and as such, its operations are managed in a fair and equitable manner. In mitigating risks and adverse effects on communities and environment, the company seeks to avoid involuntary resettlement and where feasible, consider displacement when business requirements make it unavoidable. In 2004, KCM had planned to sink the fourth shaft. This meant that the locals had to be relocated to another area. However, after consultations and numerous discussions on re-directing the Kakosa stream and raising the dam walls, the shaft was instead relocated.<sup>522</sup> Where people are displaced as a result of mining activities, the company endeavours to adopt and implement best possible measures to improve or at least restore their quality of life and standards of living of displaced persons.

The Water Management Policy recognises the social, economic and environmental value of water and the increasing global concern of water scarcity. Thus, the company is committed to avoiding pollution of surface water, ground water and other water resources

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<sup>521</sup> Informal discussion with Konkola Copper Mines, Thursday, 2 July 2015.

<sup>522</sup> As above.

arising from its activities. Where waste water is discharged, it shall be treated to international best practice standards before discharging into the environment. The company also strives to participate in local or regional water catchment planning activities for the purpose of securing sustainable water resources. Despite this commitment, KCM is still failing in its obligations to avoid pollution and treating water prior to its discharge in nearby water bodies. Since 2012, the major problem that KCM has not handled is discharge of total suspended solids effluents, which are usually above the statutory limits and untreated. The mine's dewatering process removes 350 000 cubic metres per day and where it is not treated, the total suspended solids contents are between 1500-2000ppm. Where the total suspended solids are treated, it has to be 100ppm, however, average the TSS is 260 ppm.<sup>523</sup> This signifies the failure to handle the problem despite explicit commitment by the mine.

#### 4. Mopani Copper Mines

Mopani Copper Mines Plc. (Mopani) is owned by Glencore AG, FQM and ZCCM–IH. The company conducts its mining operations in Mufulira (where there is a mine, smelter, concentrator and copper refinery), and Nkana (which has a mine, concentrator and cobalt plant). Copper and Cobalt are the main minerals that are extracted by Mopani.

Glencore has developed a Code of Conduct which applies to all businesses that the company controls, its employees, and contractors that deal with it or its subsidiaries. The Code does not include prescriptive rules but merely defines the minimum requirements that apply to its operations.<sup>524</sup> The Code has four core components— health and safety; human rights; communities; and environment. On health and safety, the aim is to maintain a health and safety culture where everyone proactively supports the Glencore health and safety objectives and commitments. Glencore is responsible for its own safety and that of its colleagues, contractors and the communities in which it operates and as such, it is committed to a strong safety culture that requires visible leadership from all levels of line management.<sup>525</sup>

On human rights, Glencore supports the respect for human rights in a manner which is consistent with the UDHR. It strives to uphold the dignity, fundamental freedoms and human rights of its employees, contractors, and the communities in which it operates.<sup>526</sup> In this regard, the company ensures that human rights awareness is embedded in its internal risk assessment

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<sup>523</sup> As above.

<sup>524</sup> Glencore 'Code of Conduct' 4.

<sup>525</sup> As above, 6.

<sup>526</sup> As above, 8.

processes and recognises the unique relationship of indigenous peoples with the environment in which they live.<sup>527</sup>

Regarding communities, the Code aims to build lasting relationships with communities in which a company operates. Thus, in its relationship with local communities, the company respects and promotes human rights within its area of influence. This includes respect for the cultural heritage, customs and rights of those communities, including those of indigenous peoples. The company commits to working with governments, local authorities, community representatives, inter-governmental and non-governmental organisations and other interested parties to develop and support community development projects.<sup>528</sup>

On the environment, the company obliges the company to minimise any negative effect on the environment in accordance with the precautionary principle.<sup>529</sup> It commits itself to comply with applicable laws, regulations and other requirements for environmental management. Where these are less stringent than its own standards, higher standards would be applied. Throughout the lifecycle of mining activities, the company conducts ongoing consultations with local communities and other stakeholders to ensure appropriate operations.<sup>530</sup> Although this may be the company's desire, the reality reveals otherwise. While the company is expected to conduct consultations with the local communities, this does not happen as there is no willingness on its part to resolve concerns expressed regarding the negative effects of its activities on Kankoyo and Kantanshi areas whose land has now become infertile.<sup>531</sup>

### **3.9 Corporate social responsibility**

Globally and domestically, there has been pressure on corporations to be more accountable and transparent about their actions in the communities they operate. At the centre of the matter is a requirement that companies focus not only on the profitability and production of the company but direct their core business to social responsibilities which imply being involved in sustainable development of the communities.<sup>532</sup> Thus, the concept of corporate social responsibility (CSR) has become an imperative tool used by corporate entities to demonstrate

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<sup>527</sup> As above.

<sup>528</sup> As above, 9.

<sup>529</sup> As above, 10.

<sup>530</sup> As above.

<sup>531</sup> Informal discussion with Zambia Human Development, Thursday, 2 July 2015.

<sup>532</sup> Bench Marks Foundation 'Corporate social responsibility and the mining sector in southern Africa: a focus on mining in Malawi, South Africa and Zambia' June 2008 5.



their ideals and ideologies to the communities located in the areas of their operation. It is a move garnered towards greater sustainability in the industry.<sup>533</sup> At an international level, the ISO has developed ISO 26000 as a guide for CSR activities.

The use of CSR has been to show a company's good neighbourliness to the communities nearby. Whereas the CSR activities conducted have been laudable, the problems come with their true intention with some critics arguing that the intention of CSR is not to serve the communities per se, but as an attempt to obtain favours from a government. In Zambia, mining companies have conducted CSR activities in their sphere of influence.

The basis for CSR is sustainability of the mining industry. The attainment of sustainability is viewed within the three dimensions of sustainable development– economic, environmental and social. On economic development, this facet envisions a situation where a company invests its generated revenues in the community so as to ensure its future development and long-term livelihood. Regarding environmental protection, the emphasis is on minimising the effects of mining activities on the environment during natural resource exploitation and rehabilitating the land used demonstrates a serious commitment and action by the company. In relation to social cohesion, the company, in carrying out CSR activities, is required to reduce the social and cultural disruption to communities. This is partly attained through maintenance of dialogue with stakeholder and being transparent in its mining operations.

### **3.9.1 International Organisation for Standardisation, ISO 26000**

The ISO 26000 was developed in 2010 to offer guidance on social responsibility. It is an attempt to harmonise the socially responsible behaviour of enterprises at international level. Unlike other standards developed by ISO, the ISO 26000 is not a “management system standard” or a “management standard” neither is it for certification, contractual nor regulatory use. It is merely a standard developed to offer orientation and recommendations on how responsible behaviour towards society can be enhanced. The ISO 26000 defines ‘social responsibility’ as:

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<sup>533</sup> H Jenkins & L Obara ‘Corporate social responsibility (CSR) in the mining industry: the risk of community dependency’ 2. Available: <http://pdfsu.com/booklib.php?ref=EbookDig&q=Corporate-Social-Responsibility-CSR-in-the-mining-.pdf> (accessed 23 November 2016).

the responsibility of an organization for the impacts of its decisions and activities on society and the environment, through transparent and ethical behaviour that: contributes to sustainable development, including health and the welfare of society; takes into account the expectations of stakeholders; is in compliance with applicable law and consistent with international norms of behaviour; and is integrated throughout the organization and practice in its relationships.<sup>534</sup>

From this definition, it is argued that the ISO 26000 places a responsibility on an organisation to act in a socially responsible manner. Although cultures and norms may differ from one country to another, organisations are nevertheless required to respect international norms of behaviour.

## Principles

The perception under the ISO 26000 is that, an organization's performance on social responsibility can influence: its competitive advantage; reputation; ability to attract and retain workers or members, customers, clients or users; maintenance of employees' morale, commitment and productivity; the view of investors, owners, donors, sponsors and the financial community; and its relationship with companies, governments, the media, suppliers, peers, customers and the community in which it operates. Therefore, the ISO 26000 provides guidance on the underlying principles of social responsibility, recognising social responsibility and engaging stakeholders, the core subjects and issues pertaining to social responsibility.<sup>535</sup> There are seven core principles that are enunciated under the ISO 26000: ethical behaviour; respect for rule of law; respect for international norms of behaviour; respect for stakeholders' interest; accountability; transparency; and respect for human rights.

### 1. Ethical behaviour

Behaviour is considered ethical if it 'is in accordance with accepted principles of right or good conduct in the context of a particular situation and is consistent with international norms of behaviour.'<sup>536</sup> Such behaviour should be based on honesty, equity and integrity. An obligation is placed on an organisation to promote ethical behaviour by taking numerous actions, among them, identifying and stating its own core values and principles.

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<sup>534</sup> International Standards Organisation *International Standard 26000: guidance on social responsibility* (1st edition)(2010) 3.

<sup>535</sup> As above, 1.

<sup>536</sup> As above, 2.

## 2. Respect for the rule of law

Compliance with all applicable laws and regulations is mandatory for an organisation operating in a country. The obligation to comply is required even where the laws or regulations are not adequately enforced.

## 3. Respect for international norms of behaviour

International norms of behaviour are 'expectations of socially responsible organisational behaviour derived from customary international law, generally accepted principles of international law, or intergovernmental agreements that are universally or nearly universally recognised.'<sup>537</sup> These norms, derived from international law, are to be complied with by an organisation.

## 4. Respect for stakeholder interests

An organisation should respect, consider and respond to the interests of its stakeholders by taking into account the rights, claims, and interest of all stakeholders.

## 5. Accountability

This principle requires an organisation to be accountable for decisions and activities that impacts on society, the economy and the environment. Thus, the management is answerable to the controlling interests of the organisation where its decisions and activities affect society and the environment.<sup>538</sup>

## 6. Transparency

Transparency refers to 'openness about decisions and activities that affect society, the economy and the environment, and willingness to communicate these in a clear, accurate, timely, honest and complete manner'.<sup>539</sup> Openness about decisions and activities of the organisation does not require proprietary information made public or divulging of confidential information which would, if given out, breach legal, commercial, security or privacy

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<sup>537</sup> As above, 3.

<sup>538</sup> As above, 10.

<sup>539</sup> As above, 4.

obligations. The transparency of an organisation should be in relation to— nature of its activities, identity of controlling interest, decision-making processes, standards of performance, source of funds, and effect of its decisions and activities.<sup>540</sup>

## 7. Respect for human rights

Respect for human rights and the importance thereof must be recognised by an organisation. Particularly, the rights set out under the International Bill on Human Rights must be promoted. Where no adequate protection of human rights have been provided for, norms of behaviour must be observed and steps taken not to exploit such a situation.

### Core Areas of Social Responsibility

The ISO 26000 standards address seven core areas of social responsibility: Organisational Governance; Human Rights; Labour Practices; Environment; Fair Operating Practices; and Community Involvement and Development.

#### 1. Organizational governance

This is the core function of every organisation as it provides a framework for decision making within the organisation. In the context of social responsibility, it is a means by which an organisation can be made to behave in a socially responsible manner. In this manner, effective governance hinges on incorporating the principles of social responsibility into decision making and implementation. These principles are: accountability, transparency, ethical behaviour, respect for stakeholder interests, respect for the rule of law, international norms of behaviour and human rights. Further, an organisation should consider the practices, the core subjects and the issues of social responsibility when it establishes and reviews its governance system.<sup>541</sup>

#### 2. Human rights

The State has a duty to protect, respect, and fulfil the citizen's enjoyment of human rights. To respect human rights, due diligence must be exercised, risks to human rights ascertained, complicity avoided, grievance mechanism established, and the vulnerable protected. Civil and

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<sup>540</sup> As above, 11.

<sup>541</sup> As above, 22.

political rights must be respected while economic, social and cultural rights must be guaranteed.

### 3. Labour practices

Labour practices of an organisation encompass all policies and practices relating to work performed within, by or on behalf of the organisation, including subcontracted work.<sup>542</sup> It extends beyond the relationship of an organisation with its direct employees or the responsibilities that an organisation has at a workplace that it owns or directly controls.<sup>543</sup> Although the primary responsibility for ensuring fair and equitable treatment of workers lies with the government, organisations are expected to abide by principles outlined in international instruments in instances where legislation is weak or absent. The ISO Standards encourages organisations to ensure that the conditions of work comply with domestic laws and regulations and are consistent with relevant international labour standards.<sup>544</sup>

### 4. Environment

An organisation is obliged to adopt an integrated approach that takes into consideration the direct and indirect economic, social, health and environmental implications of their decisions and activities.<sup>545</sup> An organisation should respect and promote: environmental responsibility; adopt the precautionary approach; undertake an environmental risk management; and enforce the principle of polluter pays in carrying out its activities which may negatively affect the environment. The core responsibility of the organisation should be to protect the environment, biodiversity and restoration of natural habitats.

### 5. Fair operating practices

These concern ethical conduct in an organisation's dealings with other organisations. It is a way in which an organisation uses its relationships with other organisations to promote positive outcomes which can be achieved by providing leadership and promoting the adoption of social responsibility more broadly throughout the organisation's sphere of influence.<sup>546</sup> An

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<sup>542</sup> It includes: include the recognition of worker organisations and representation and participation of both worker and employer organisations in collective bargaining, social dialogue and tripartite consultation to address social issues related to employment— as above, 33.

<sup>543</sup> As above, 33.

<sup>544</sup> As above, 36.

<sup>545</sup> As above, 40.

<sup>546</sup> As above, 48.

organisation must, in its dealings, prevent corruption, practice responsible political involvement, adhere to ethical standards, accountability and transparency, conduct its activities within the realm of fair competition, and respect property rights of others.<sup>547</sup>

## 6. Community involvement and development

Community involvement is a public good that helps to strengthen the civil society. It goes beyond identifying and engaging stakeholders in regard to the impacts of an organisation's activities and encompasses support for and building of a relationship with the community. Thus, an organisation's community involvement depicts a recognition that the organisation is a stakeholder in the community with whom it shares common interests.<sup>548</sup>

### 3.9.2 Corporate policies

There is an obligation placed on the state to enact appropriate legislation that prescribes the conduct of corporations operating within its borders. The ISO Standards require organisations to adhere to such legislation and in its absence or inadequacy, a corporation can adopt the standards. The Standards, which can also act as a supplement to the already existing legislation, place a responsibility on an organisation to develop policies or codes of conduct that ensures that its activities do not negatively affect those who either interact or live around the corporation or organisation. With specific focus on mining companies, the responsibility to adopt codes of conduct or policies is even more pronounced. The codes of conduct or policies developed or adopted by corporations attempt to ensure that activities of a firm take cognisance of; community participation; human rights; safety, health, and environmental considerations; and labour practices. The concern is the extent to which mining companies operating in Zambia have developed policies or code of conduct.<sup>549</sup>

Despite the ISO 26000 placing an obligation on a state to enact appropriate legislation on CSR, there is no such legislation under Zambia's laws. The MMDA has section 4(f) which makes provision for the 'development of local communities in areas surrounding the mining area based on prioritisation of community needs, health and safety.' Given its wording, it is argued that the provision is inadequate for two reasons: first, it is merely a principle that has not explicitly stated what 'development' entails; and secondly, the obligation to do so is

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<sup>547</sup> As above.

<sup>548</sup> As above, 60.

<sup>549</sup> Owing to numerous constraints, the assessment was only based a few large scale mining companies and not all the mines.

presumably placed on the Government. This would mean that the only obligation for the mining companies is everything else, other than performing CSR activities. In this regard, section 4(f) is not given its full effect. However, there is an apparent attempt if section 4(f) was read together with section 119 of the MMDA. Section 119 provides that:

- (1) The Minister may, by statutory instrument, make regulations for the better carrying out of the provisions of this Act.
  
- (2) In particular, and without prejudice to the generality of subsection (1), regulations may provide for—  
  
...  
  
(e) participation by mining right and mineral processing licence holders in the development of local communities.

A decipher of section 119 shows that the Minister can issue a statutory instrument for purposes of requiring mining right and mineral processing licence holders to participate in the development of local communities. While this would be the most plausible thing to do, the exercise of such power is discretionary. Considering that the Minister is part of the government, it would be unlikely that such regulations can be made given the fact that, in most instances, it is the foreign investor that would hold more power over their investment. Thus, making a statutory instrument compelling the foreign company to perform CSR, may not be well received by the mining company. A further problem, inherent in section 119, is that there is also no recourse where the Minister has not made such a statutory instrument. To date, there is such instrument issued by the Minister and this effectively means that mining operators are not legally obliged to carry on CSR under the MMDA.

#### Mining companies and CSR activities

Mining companies operating in Zambia have a number of CSR programmes within their areas of operation. Although the MRDP and MMDA do not effectively impose obligations on mining companies to conduct CSR activities, companies have however conducted such activities based on their policies.

## 1. Konkola Copper Mines (KCM)

Konkola Copper Mines, the largest copper mining company in Zambia, is owned by Vedanta Resources which acquired it in 2004 from Anglo American Corporation in 2002.<sup>550</sup> According to its vision, KCM aims to ‘create sustainable livelihood opportunities and be actively involved in improving the quality of life for society by contributing to the basics needs of those in the community.’ Although this statement can be understood to refer to conducting of CSR activities, in terms of policy, the company does not have one that specifically relates to CSR.<sup>551</sup> Nevertheless, the company has conducted CSR activities thereby ensuring that the impact of its investment goes beyond paying taxes by benefiting the communities in areas where the company operates.

Currently, KCM has spent well over US\$150 million on CSR activities which are in four main areas: health; education; sustainable livelihoods; and sports development.<sup>552</sup> Pertaining to health, KCM has continued to operate two hospitals and eight clinics previously managed by ZCCM, providing free medical services to its employees and their dependents.<sup>553</sup> In terms of education, the company has expanded the schools it inherited from its predecessor—ZCCM—and introduced literacy, hygiene, and scholarship programmes. In a bid to promote sustainable development, KCM works with the local community to originate sustainable projects that ensure self-sustenance and development beyond the life of the mine i.e. the company has introduced youth skills development and a sustainable livelihoods programme which provides livestock to small scale farmers. Regarding sports development, KCM supports four football teams which in turn provide employment to young talents.

## 2. Mopani Copper Mines

Mopani Copper Mines Plc. (Mopani) is a company owned by Glencore AG, FQM, and ZCCM—IH. The company extracts Copper and Cobalt. In the last few years, as part of its CSR activities, Mopani has rehabilitated the Mufulira–Sabina road, funded the upgrade of the township infrastructure, rehabilitated the local sports facilities, and been supporting local

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<sup>550</sup> <http://kcm.co.zm/corporate-profile/company-overview/> (accessed on 12 October 2016).

<sup>551</sup> The company has nine (9) Policies relating to: biodiversity; energy and carbon; HIV/AIDS; health, safety and environment; human rights; water management; supplier and contractor management; security; and whistle blower. See: <http://kcm.co.zm/corporate-profile/company-policies/> (accessed 29 August 2017).

<sup>552</sup> <http://kcm.co.zm/our-commitment-to-zambia/corporate-social-investments/> (accessed 24 August 2017).

<sup>553</sup> The company also provides subsidised healthcare to the general public while supporting a number of initiatives since 2007— eye screening financing, provision of artificial limbs, kidney disease surgery, malaria programme, and launch of an HIV/AIDS Policy.



sports.<sup>554</sup> In conjunction with Copperbelt Energy Corporation, Mopani has constructed the Mwekera Bridge in Kitwe East and built a training school for mining and engineering artisans.<sup>555</sup>

### 3. Kansanshi Copper Mines

The CSR programs conducted by Kansanshi are in five key areas— governance, economics, environment, social and labour. Thus, in conducting its mining activities, the company ensures that the host communities benefits. To this effect, the company recruits employees from local communities, makes charitable donations, offers scholarships and supports community initiatives and non-mining infrastructure development.<sup>556</sup> Socially, the company aims to improve the community's quality of life by conducting numerous activities e.g. supporting local entrepreneurs, community skills development, improving education infrastructure, and upgrading health facilities. In the recent past, the company has equipped Kansanshi Clinic, renovated Solwezi Hospital, supplied clean water, and conducted health sensitization programs.<sup>557</sup>

### 4. Kalumbila Mineral Limited

Kalumbila Minerals Limited is operated by First Quantum Minerals (FQM) Ltd, an Australian firm, specialises in the mining of copper and gold.<sup>558</sup> The mine, located 200 kilometres from Solwezi, engages in mining and exploration of Copper, Cobalt, Nickel, Uranium, and Iron Ore. In terms of its CSR obligations, FQM does not have specific policies that guide its CSR activities. Notwithstanding this, the company has drilled boreholes that supply drinking water to the community. The problem presented by the community is that of groundwater pollution from mining activities which has led to numerous diseases.<sup>559</sup> The other issue is that, while the ISO 26000 requires an organisation to respect the culture of the community, the same cannot be said of Kalumbila Minerals. In 2015 the land that was acquired by the mine extended beyond the community's burial site. In meetings held between the mine and the locals, the mine

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<sup>554</sup> In 2012, MCM completed the rehabilitation of the Kitwe ring road and the Mufulira–Sabina road at a cost of \$4.5 million and \$10.5 million respectively. It also funded the upgrade of the sanitary infrastructure for an entire township. In 2013 \$650,000 was spent on the rehabilitation of the local sports stadiums. See: <http://www.glencore.com/public-positions/supporting-development/zambia/> (accessed 14 July 2015).

<sup>555</sup> <http://www.glencore.com/assets/public-positions/doc/20170330-Mopani-investment-statement.pdf> (accessed 1 September 2017).

<sup>556</sup> <http://www.first-quantum.com/Corporate-Responsibility/Economics/default.aspx> (accessed 1 September 2017).

<sup>557</sup> <http://www.first-quantum.com/Corporate-Responsibility/Social/default.aspx> (accessed 1 September 2017).

<sup>558</sup> <http://www.first-quantum.com/Our-Business/Our-Products/default.aspx> (accessed 9 October 2016).

<sup>559</sup> Informal discussion with ActionAid, Thursday, 23 July 2015.

insisted that the graves are moved to another place or excavation is done around the burial site. The locals declined to accept the proposition citing cultural norms, however, the mine offered contracts of K10 000 to persons that would be willing to exhume the bones of the dead and bury them at a new grave site located a few kilometres away from the present site.<sup>560</sup>

## 5. Lumwana Copper Mines

Lumwana Mine is owned by a Canadian firm, Barrick Gold Mines. The company undertakes CSR activities in infrastructural development e.g. building of class room blocks and teachers houses in the district. In 2015, the company drilled boreholes within the community to enhance the water supply. They are also in the process of setting up water kiosks to serve as reservoirs that distribute water to the community. Despite the mine having a sustainable community department that interacts with the community, it has lagged behind in implementing community development projects.<sup>561</sup>

### Effectiveness of CSR corporate policies

Although most mining companies have developed some policies that touch on CSR activities, there is little evidence as to how this recognition of the need to address environmental sustainability issues has affected communities, and whether community development initiatives have been effective in contributing to more sustainable communities.<sup>562</sup> It is argued that CSR programmes hardly addresses the real issue at hand— unattended to environmental pollution — hence pointing to the ineffectiveness of such programmes. The basis for this assertion lies in the fact, although mining companies have built, operate or support health facilities, it is rare that the people in the local community benefit due to the unaffordability of the services.<sup>563</sup> In some instances, where the residents are granted audience to discuss CSR activities, the mining companies usually deny environmental liability.<sup>564</sup> This compounds the belief that such practices by mining companies are but only a strategy to keep environmental activists quiet, some of whom have been returned by companies as employees or independent contractors.<sup>565</sup> It is argued that, though CSR seems to be a plausible act, such activities hardly address

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<sup>560</sup> As above.

<sup>561</sup> W Mayondi 'Mining and CSR in Zambia: a case study of Barrick Gold mine' Unpublished Masters in Development Studies Victoria University 2014.

<sup>562</sup> D Sharma & P Bhatnagar *Corporate social responsibility of mining industries* (2014) 3.

<sup>563</sup> Informal discussion with Zambia Human Development on MCM, Thursday, 2 July 2015.

<sup>564</sup> Informal discussion with Green and Justice Organisation on MCM, Friday, 3 July 2015.

<sup>565</sup> Informal discussion with an anonymous resident of Mufulira and employee of MCM, Thursday, 2 July 2015.

environmental harm caused. To a lesser extent, such activities may only be used as a smokescreen— to divert attention from environmental repair through provision of social services.

While CSR programmes may benefit both mining companies and local communities, mining companies are not obliged to compensate communities neither are they responsible for all of the impacts associated with mining, including those that are not a direct cause of mining activities. The fact that mining companies are not obliged to compensate local communities for the impacts associated with mining confirms that CSR programmes are only voluntary measures.

### **3.10 Corporate accountability**

Corporate accountability refers to the ability of those affected by a corporation to hold it accountable its operations. As an approach, it focusses on stricter regulation of corporate behaviour by a government.<sup>566</sup> As a concept, corporate accountability requires fundamental changes to the legal framework in which companies operate by placing environmental and social duties on the directors of a corporation.<sup>567</sup> This affords the local communities an opportunity to seek compensation from the company when they have suffered loss as a result of directors failing to uphold those duties.

Under Zambia's legislation, corporate accountability has not been explicitly provided for, however, section 126 of the EMA seems to have made lurid reference by placing criminal liability on every director or manager of a body corporate where a body corporate, in which they are a part of, commits an offence under the Act. This means that the law considers an act by the body corporate as though it was personally done by the directors or managers. This provision does not per se afford an affected person a right to be compensated by reason of the acts of the director but ensures that directors act in a proper manner. The actions or inactions of a company are deemed to have been made by the director and as such, where an offence is committed by the company, it is deemed to have been done by the directors. The exception is where 'the director or manager proves to the satisfaction of the court that the act constituting the offence was done without the knowledge, consent or connivance' or 'that the director or manager took reasonable steps to prevent the commission of the offence.' Although

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<sup>566</sup> P Lund-Thomsen 'Corporate accountability in South Africa: the role of community mobilizing in environmental governance' (2005) 3 *International Affairs* 81 627–628.

<sup>567</sup> <http://www.ejolt.org/2013/05/corporate-accountability/> (accessed 23 September 2017).

the provision is there, there is yet to be an issue brought before the courts of law on the application or applicability of section 126.

### **3.11 Conclusion**

The aim of the chapter was to assess to what extent the environment is protected from the effects of mining activities under the domestic framework. In addressing this objective, the international and regional standards that have been developed as a benchmark for environmental protection were interrogated.

It is clear that there is no comprehensive treaty or convention on mining standards. However, there are a few instruments, guidelines and codes that have enunciated the standards that are applicable to mining and mineral processing. The common feature of these instruments is that they are all aimed at prescribing sustainable mining practices. Their weakness lies in their inability to be enforced or creation of binding obligations on the State. They have, however, been influential in the enactment of the EMA and MMDA of 2015.

The SADC and COMESA have attempted to lay a foundation which unfortunately is not elaborate. Although the SADC protocols are seemingly more elaborate and progressive, they mostly focus on harmonisation of policies in the region. Considering that these rules are developed at a political level with their implementation requiring the political will of the Member States, compliance is a challenge as other Member States may be reluctant to enforce against an erring Member.

The EMA provides the mechanisms that are used in order to ensure that mining is sustainably carried out— Environmental Impact Assessment; environmental audits; licensing; and environmental monitoring. The aim of such mechanisms is to also ensure compliance by mining companies. However, despite the elaborate nature of provisions providing for such mechanisms, there is no compliance on the part of most mining companies.

Corporations are also required under international guidelines to develop policies that are aimed at ensuring environmental sustainability during mining activities. These policies, by and large, though instructive and lucid, are voluntary. This means that a company can choose not to carry out what is required under the policy and no sanction would arise. In some instances, mining companies only comply due to other commitments they have which compel

them to act in a particular manner in order for them to obtain loans or favours, in the case of corporate social responsibility.

## Chapter 4

### Enforcement of environmental laws

#### 4.1 Introduction

In order to ensure that mining companies adhere to environmental standards, it is imperative that mechanisms aimed at ensuring compliance are put in place. The underlying assumption is that environmental protection and human rights cannot be enjoyed disjointedly. Thus, in actualising the right to a clean, safe and healthy environment, it is essential that environmental standards are enforced and adhered to by way of compliance. In this regard, the EMA authorises the ZEMA to impose such conditions, penalties or sanctions against the polluter to ensure that they fulfil their operational conditions under their respective licences, operate their facilities as prescribed by law, and respect the law. Despite elaborate provisions under the law, the challenge facing environmental protection lies in the nature of enforcement actions taken by the ZEMA. If the sanctions meted out for breach are simply fines, mining companies may only take these to be a part of the cost of doing business. Although prosecution may be a good avenue of holding the polluting mining firm liable, it may be an unpopular view to be taken by ZEMA. The plausible explanation is that the EMA arguably affords ZEMA the power to act as both 'the jury and executioner.' Through provisions of the Act, ZEMA is the whistle blower and advisor of the state, the initiator of EIAs, and enforcer of environmental matters in Zambia.

Besides ZEMA, non-governmental organisations (NGOs) have also been instrumental in ensuring effective enforcement of environmental regulations and standards. Their jurisdiction or power usually lies with communities whom they represent and protect from polluting activities emanating from mining companies. Although the activities that NGOs undertake are myriad, their most valuable contribution is to protection of the environment and human rights enforcement through litigation in instances where a mining firm has breached environmental regulations. There are two most active NGOs: Citizens for a Better Environment (CBE); and Zambia Institute for Environmental Management (ZIEM). These have, in some instances, in partnership with other NGOs, conducted litigation in the interest of the public. While they generally have the ability to do so, the insistence by the courts on matters of standing has affected their participation in the enforcement of environment and human rights protection.

The courts of law could also play a significant role in enforcing environmental regulations and protection of human rights. The role played by the courts is evidenced in the manner in which legislation relating to environmental issues is interpreted while simultaneously integrating emerging principles of law in decisions rendered. This provides a coherent and comprehensive strategy for integrating diverse sectoral laws into a cross sectoral approach and for ensuring effective implementation of legislation. This is particularly crucial in attaining the basic fundamental rights. This implies that the responsibility of the court is to act judiciously as well as be proactive in enforcing provisions on environmental and human rights protection. However, in cases that are before it, the courts have either misread, misapplied, or misconstrued lucid legal provisions. Thus, instead of the courts being vanguards for environmental and human protection, they have in turn ended up being violators thereby playing a little part in enforcement of environmental provisions.

It is imperative that institutions that are bestowed with the responsibility of protecting the environment perform their duties effectively. This would, in turn, ensure respect for the environment and ultimately lead to its protection. To do so, vigilance and prevention are required on account of the irreversible damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.<sup>568</sup>

In this chapter, the primary objective is to critically assess the effectiveness of the environmental regulator, legal interpreter, non-state bodies, and the community in ensuring accountability of the mining companies with respect to the adverse effects of the mining activities on the environment and human rights.

## **4.2 Statutory institutions and authorities**

Issues relating to the environment transcends numerous sectors in Zambia and as such, government institutions and authorities are involved in the management of such issues. These institutions are: the Ministry of Water Development, Sanitation and Environmental Protection (MWDSEP); Ministry of Mines and Mineral Development (MMMD); and Human Rights Commission. The MWDSEP is responsible for policy formulation on matters relating to the environment, natural resources, and control of pollution. It is also in charge of coordinating, monitoring and evaluation of the operations of statutory bodies such as the ZEMA. The MMMD has two departments: mines safety, which formulates legislation relating to safe and

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<sup>568</sup> *Gabčíkovo – Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, par. 140.

sustainable mining practices, and water affairs which are responsible for water resource management. Besides the Ministries and ZEMA, there is also the HRC, a body charged with the mandate of ensuring every person's rights in Zambia are protected.

#### **4.2.1 Zambia Environmental Management Agency**

As already stated in chapter 3, the ZEMA has been established as a statutory body responsible for matters pertaining to environmental management. The EMA accords ZEMA its functions with the primary one being, to 'do all such things as are necessary to ensure the sustainable management of natural resources and protection of the environment, and the prevention and control of pollution.'<sup>569</sup> In carrying out this function, ZEMA is required to come up with enforceable measures that are directed at the prevention and control of pollution.<sup>570</sup>

##### Enforcement measures

The ZEMA is obliged to enforce environmental provisions prescribed in Part IX of the EMA, namely: Prevention Order, Protection Order, Restoration Order, Compliance Order, and prosecution.

##### a) Prevention Order

A Prevention Order is an order issued by ZEMA to a person who is, or is likely to be, conducting an activity that may cause a negative impact. Such an order, requires the person to: (a) prepare a written emergency response plan to minimise or remove the risk; (b) have the appropriate equipment, facilities, and trained personnel to deal with the risk; (c) implement the plan where a set of events have occurred; and (d) take necessary measures and ensure that any emergency that occurs is effectively dealt with.<sup>571</sup>

##### b) Protection Order

Where it is considered appropriate to enhance protection and conservation of the environment and its natural resources in a particular area, a Protection Order may be issued to the person that owns, manages, or controls the activity where it is occurring or is likely to occur. Such an

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<sup>569</sup> Sec. 9(1).

<sup>570</sup> Sec. 9(2)(c), EMA.

<sup>571</sup> Section 103(1)(2).



Order can also be issued to a person who caused or allowed the activity.<sup>572</sup> A Protection Order may oblige the person to carry out measures that address any negative impacts of an activity being carried out.<sup>573</sup> Measures to be undertaken aim, *inter alias*, to stop or control the activity, assess the level of the impact and remedy it, prevent a recurrence of the activity, preserve flora and fauna, preserve the flow and quality of water, preserve any geological, physiographical, ecological, archaeological or historical features of the area.

c) Restoration Order

In a situation where there is a release of a pollutant in an excessive amount which could pose a negative effect, an environmental Restoration Order may be issued.<sup>574</sup> The Order compels the polluter to take measures that would assist in minimising or removing the risk to the environment. Such measures may include: land restoration, preventing the commencement or continuation of environmental hazard, cessation of polluting activities, alleviating any injury to the environment, preventing damage to aquifers underneath the land, and flora and fauna, and requiring the person to restore the environment to what it was or nearly, it was polluted.<sup>575</sup>

d) Compliance Order

A Compliance Order is one that may be given where there are grounds to believe that a condition given either in an order or licence that was issued has been breached and hence requires the licensee to remedy the breach within a stipulated period.<sup>576</sup> This Order may suspend the licence or mining right with immediate effect.<sup>577</sup> Where the person fails to conform to this Order, ZEMA may either alter the conditions stipulated in the licence or cancel it.<sup>578</sup> In the case of an Order from the Director of Mines Safety, the Order may: (a) vary the conditions of the mining or non-mining right; or (b) revoke the mining or non-mining right.<sup>579</sup>

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<sup>572</sup> Section 104(1).

<sup>573</sup> Section 104(2)(a).

<sup>574</sup> Section 105(1), Regulation 67, Environmental Management (Licensing) Regulations of 2013.

<sup>575</sup> Section 105(2).

<sup>576</sup> Section 106(1).

<sup>577</sup> Section 106(2).

<sup>578</sup> Section 106(3).

<sup>579</sup> Section 75(4)(a)(b).

## e) Prosecution

The EMA authorises ZEMA to prosecute a person that breaches provisions of the Act. In this regard, the Act permits an inspector from ZEMA to enter and search any industrial facility where there are reasonable grounds to believe that there is kept documents that are relevant to an investigation into an alleged breach of the EMA.<sup>580</sup> For purposes of carrying out an inspection, an inspector may obtain or order production of documents, cessation of operation, obtain samples, or request information from any person in control of any premises.<sup>581</sup> Although the law permits an inspector to enter any premises, the Agency normally informs the mines. However, informing the mining firms has had its negative consequences– it affords the mines time to clean up and by the time the inspection is made, the adverse conditions are no longer present.<sup>582</sup> Also, despite the Act granting inspectors access to enter any facility, access is sometimes denied by mining operators on grounds that ‘they do not meet the requirements of other statutory provisions i.e. safety and health.’<sup>583</sup>

### Extent of enforcement

While it is possible to have provisions that address environmental issues, such provisions would be rendered anachronistic where they cannot be enforced. This means that violation of people’s right to an environment that is clean, safe, and healthy continues. In the face of these elaborate provisions prescribed under the EMA and other legislation, the concern is the extent to which ZEMA enforces these legal provisions. Arguably, ZEMA appears not to have well functional institutional arrangement with other key environmental institutions and this is compounded by poor governance structures with stake holders who include communities. As a consequence, its operations are always being hampered by ineffective decision making that more often lacks public support and institutional ownership in instances where there are breaches of environmental regulations. In totality, it is argued that ZEMA has not adequately addressed mining environmental issues and this is buttressed by following reasons:

#### 1. Independent sample testing

Enforcement of environmental provisions, for the most part, depends largely on scientific findings that are made regarding an issue that has arisen. This means that to make a finding

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<sup>580</sup> Section 15(a)(b)–(g).

<sup>581</sup> Section 15(2)(b)–(d).

<sup>582</sup> Informal discussion with Zambia Environmental Management Agency, Ndola Office, Wednesday, 1 July 2015.

<sup>583</sup> Informal discussion with Zambia Environmental Management Agency, Head Office, Tuesday, 9 June 2015.

of a violation in instances where the mining company is alleged to have exceeded statutory limits for discharge of contaminants requires the carrying out of scientific tests. The challenge for ZEMA is that it does not carry out independent sample testing of the air emissions and waste water effluent that the mines are releasing to the environment. This is partly because it has not set up and registered the laboratories to be used to test the samples collected.<sup>584</sup> Instead, reliance is placed on test results submitted by mining companies in their reports, whose accuracy is also doubtful. Even in instances where an incident has been reported, ZEMA would have to rely on a mining company's equipment. It is suggested that the environmental monitoring equipment that was procured by the government in 2011 is operationalised and the laboratory equipment calibrated so that it operates at the required capacity.<sup>585</sup>

## 2. Capacity to monitor

In order to enforce regulations, it is crucial that there is capacity to carrying out monitoring activities. Under the Act, an inspector is permitted to enter any place to monitor the impact that a certain activity has done on that land or in that premises on the environment.<sup>586</sup> While on such premises, an inspector is permitted to take samples, analyse and examine the nature of materials used for the activity that has been licensed.<sup>587</sup> In inspecting any mining operation, an inspector is obliged to ensure that mining operations do not pose serious effects on the environment and its records are as prescribed by the Regulations.<sup>588</sup> Despite this requirement, ZEMA does not have the capacity, both manpower and resources, to monitor activities of mining companies and as a result, they place heavy reliance on returns that mining companies submit to them. Sinkamba observes that:

If you went to ZEMA today and asked them to give you their own records of air pollution in various mining sites, on daily reports, they will not have that information. They rely on the report which the mining companies do, that is, the monthly reports, quarterly reports and annual reports. They also do not do their own sampling. So this is where we have the problem, they could have done much better if they had adequate resources but they cannot do much because of the situation.<sup>589</sup>

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<sup>584</sup> Auditor General Report 'Management of Environmental Degradation Caused by Mining Activities in Zambia' (2014) 35.

<sup>585</sup> As above.

<sup>586</sup> Sec. 102(2), EMA.

<sup>587</sup> Regulation 8, Water Pollution Control (Effluent and Waste Water) Regulations; and Regulation 64(1), Mines and Minerals Act (Environmental) Regulations; sec. 15(1)(i), EMA.

<sup>588</sup> Regulation 64(2), Mines and Minerals Act (Environmental) Regulations.

<sup>589</sup> Informal discussion with Citizens for a Better Environment, Wednesday, 29 July 2015.

The returns submitted by the mining companies remain unverified by ZEMA. Given the pertinence of environmental monitoring, it is suggested that ZEMA's capacity should be enhanced especially the technical aspect. The absence of technical capacity has also been revealed in a research done by Zambia Institute for Environmental Management which concluded that:

...the capacity of ZEMA is an important element in the enforcement of environmental management programmes of tailings dams, by ensuring compliance with environmental legislation and verifying the effective application of mitigation measures and the accuracy of monitoring results. ZEMA must have access to qualified technical staffs that have the capacity to investigate pollution sufficiently. This would ensure a sufficient field presence to assess whether environmental management programmes are achieving their objectives.<sup>590</sup>

This observation demonstrates that manpower, possessing proper technical skills, is a significant resource in environmental management. Currently, there are six inspectors at ZEMA's Ndola Office to service four provinces where most mines are located– Copperbelt, Luapula, Northern, and North-western provinces.<sup>591</sup> Most of these inspectors lack technical skills necessary for them to inspect the mines. Informal discussions held with mining companies revealed that some inspectors were not technically sound and hence, do not demonstrate competency in execution of their duties. While they may not carry instruments for on the spot testing, the information requested from the mines was far below what they should have actually been requesting for.<sup>592</sup> Some of the inspectors, though they hold numerous relevant qualifications, have not been trained as inspectors, so as to appreciate their role in monitoring mining activities. It is suggested that inspectors at ZEMA are well-equipped and sent for further training, by the institution, in key monitoring skills such as impact assessments, valuations of pollution damage, industrial toxicology, bio-remediation and ecosystem assessments, environmental prosecutions and investigation.

### 3. Territorial coverage

Territorially, the presence of ZEMA is only in three places – Livingstone, Lusaka and Ndola.<sup>593</sup> Although the country has been split into zones for purposes of environmental management

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<sup>590</sup> Zambia Institute of Environmental Management *An environmental and social impact assessment for Musakashi river catchment and its tributaries: an independent impact assessment of industrial mining waste pollution in Chambishi* (2013) 53.

<sup>591</sup> Informal discussion with Zambia Environmental Management Agency, Ndola Office, Wednesday, 1 July 2015.

<sup>592</sup> Informal discussions with KCM, Mopani, and Chambishi Metals between 1 & 3 July 2015.

<sup>593</sup> There is one desk office at Chirundu Border Post but that is basically for monitoring imported chemical and compliance by licence holders.

expedience, this has not worked effectively thereby affecting enforcement of necessary environmental regulations. The distances between the zones and ZEMA are quite far. In most instances, by the time ZEMA is attending to an emergency, as reported by the mine, the situation may not be the same as reported earlier on thereby leading to lapses between reporting an incident by the mines and having the matter attended to by ZEMA. Under the EMA, the Minister is required to appoint an appropriate authority capable of performing certain functions of ZEMA as it may stipulate.<sup>594</sup> Despite this obligation, the Minister is yet to act on it. It is posited that the mandate of ZEMA, especially in mining towns, be extended to local authorities for effective monitoring of mining activities. This would also decentralise the administration of environmental matters and thereby enhance the enforcement of the regulations.

#### 4. Funding

Funding plays a critical role in the operation of any institution. The First Schedule of the EMA prescribes the source of ZEMA's funding as: (i) monies appropriated to it by Parliament; (ii) monies paid in form of fees, grants or donations; and (iii) monies that vest or accrue to ZEMA. The ZEMA may, subject to the Minister's approval, also accept monies: by way of grants or donations; by way of loans; and from charges and fees for services rendered by it. For the most part, the funding of ZEMA mainly comes from government and this is supplemented by monies received from fees and donors for specific project implementation such as national communication, Green House Gas inventories and bi-annual update reporting (BUR).

The challenge in ZEMA's funding is twofold: the first issue relates to poor and erratic funding from the government, something that has negatively affected its performance.<sup>595</sup> The monies, which it normally uses for its operations, are usually remitted late in the year and below what was initially requested for. The explanation given for this state of affairs is that ZEMA forms a part of the MWDSEP and so, there is no need for it to be given more funding than is necessary. This is contestable though, given that, the Forest Department, which falls under the same Ministry is better funded than ZEMA. The plausible explanation for the erratic funding can be attributable to the institutional leadership which has created so many uncertainties within the institution thus affecting its operations. Further, the institution also lacks resource mobilisation strategy hence the over reliance on funding from the government.

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<sup>594</sup> Sec. 10(1), EMA.

<sup>595</sup> During the period of information gathering and thereafter, there was an attempt to obtain the records relating to funding for the last 5 years, but such information was withheld by the authorities.

The second relates to collection of fees from licences and permits issued. Prior to the enactment of the *Environmental Management (Licensing) Regulations* in 2013, ZEMA collected its fees from licences and permits issued. These were used for carrying out its operations as well as supplementing the funding received from government. However, since the enactment of the *Environmental Management (Licensing) Regulations*, this is no longer the case. The *Regulations* require that monies collected by ZEMA be handed over to the national Treasury and at the turn of the year, the Ministry of Finance would then apportion specified sum of money as funding for ZEMA's operations. The reality is that this has significantly reduced the funds that ZEMA would require for its operations thereby negatively affecting the activities of the Agency.<sup>596</sup>

It is argued that the *Regulations* should be revised to allow ZEMA not only to collect fees from its licences and permits as it now does but to use a portion of the same for its operations. Although this could positively benefit ZEMA, there is no guarantee that if funding improves, the performance will correspondingly improve. Arguably, the predecessor to ZEMA—ECZ—litigated more often, despite it having been poorly funded. In fact, the litigation by ZEMA prior to 2013 when they would collect fees from licences, penalties, and EIAs, has reduced. It is asserted that, during the period 2011 to 2013, ZEMA reduced on litigations on environmental compliance as it was easy to raise charges and collect money than to litigate and wait for the court to decide how to dispose of the money. This allowed mining companies to simply include in their budgets penalty fees stipulated in the Act without fear of legal consequences of litigation and reputational costs. Unfortunately, the reduction in litigation trend has continued thereby affecting the level of legal compliance by mining companies.

## 5. Autonomy

The ZEMA, formerly ECZ, was formed in 1990 as an independent body corporate. As ECZ, it was under the Vice President' office. The rationale at that time was to give it autonomy to act. It was the desire of the government, then, to ensure that environmental matters were well managed without interference. However, this position changed with time and the ECZ was placed in the MWDSEP for 'close supervision'. In 2011, following the enactment of the EMA,

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<sup>596</sup> Informal discussion with Zambia Environmental Management Agency, Head Office, Friday, 22 May 2015.

ZEMA took over the role of ECZ.<sup>597</sup> In terms of independence, section 3 of the EPPCA is instructive:

There is hereby established the Environmental Council which shall be a body corporate with perpetual succession and a common seal, capable of suing and of being sued in its corporate name, and with power, subject to this Act, to do all such acts and things as a body corporate may lawfully do or perform.

Although it is expected that the institution is independent in conducting its functions, it is difficult to see how this is possible based on the strict construction of section 3. This provision simply establishes the authority as a corporate body, capable of suing or being sued and does not guarantee its independence in the manner it carries out its mandate. This argument is fortified by two things: first, is the fact that eight of the fourteen members of the Board are from a government Ministry and as such the interest that they serve may only be that of the government<sup>598</sup>; second, the Minister wields a lot of power as he/she appoints the Chair and Vice Chairperson of the Board.<sup>599</sup>

Recent happenings have shown that where the Board has issued a decision contrary to the expectation of the Minister, the latter has interfered with it. In September 2012, the Board declined an application from Mwembeshi Resources Limited for approval of its Kangaluwi Copper Project in the Lower Zambezi National Park. This led Mwembeshi Resources Limited to appeal to the Minister of Water Development, Sanitation and Environmental Protection who overturned the decision of the Board. In his letter, the Minister stated:

I have also carefully considered each and every ground of rejection given by the ZEMA board. In exercise of powers conferred on me by section 115 subsections 1, 2 and 3 of the Environmental Management Act No. 12 of 2011, I have decided to approve the project on the following grounds: (a) the project should go ahead because it will eventually create employment for ordinary Zambians in the area; (b) there are currently available cost-effective technologies and methods to adequately address

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<sup>597</sup> Sec. 7(1) of the EMA states thus, "The Environmental Council established under the repealed Act shall continue to exist as a body corporate as if established under this Act and is hereby re-named the Zambia Environmental Management Agency."

<sup>598</sup> Sec. 11(1) provides: "There is hereby constituted a Board of the Agency which shall consist of the following part-time members appointed by the Minister: (a) one representative each from the Ministries responsible for— (i) the environment and natural resources; (ii) health; (iii) mines and minerals development; (iv) local government; (v) agriculture; (vi) energy and water development; and (vii) national planning; (b) a representative of the Attorney-General; (c) a representative of the Zambia Association of Chambers of Commerce and Industry; (d) one person representing non-governmental organisations dealing with environmental management; (e) one person representing an institution involved in scientific and industrial research; and (f) two other persons."

<sup>599</sup> Sec. 11(2) provides: "The Minister shall appoint the Chairperson and the Vice Chairperson of the Board from amongst the members of the Board, except that the Chairperson and the Vice-Chairperson shall not be public officers."

all the identified negative impacts that may arise from this project; (c) wildlife management in the area will be enhanced and conserved by the proposed managed scheme contained in your submissions. By copy of this letter...liaise with ZEMA for them to issue a Decision Letter with all the appropriate conditions under which the project will operate.<sup>600</sup>

The Minister's decision was based on section 115 of the EMA which empowers him/her to receive an appeal from an aggrieved person or entity regarding a decision made by the Board of ZEMA.<sup>601</sup> The application of section 115 is made subject to subsection 2 which requires the Minister, in reviewing such an application, to have regard to the principles governing environmental management, environmental policies, guidelines, standards, and findings and recommendations of ZEMA. It is argued that section 115(2) is merely procedural and does not compel the Minister to inquire into scientific proof as the basis for his decision. The absence of such guidelines, leaves wide discretion to the Minister, who is a political figure and not a technocrat, to base his reasoning on social factors. This would explain why the Minister stated that employment creation and the availability of cost-effective technologies were adequate to address all the identified negative impacts that may arise from the implementation of the project. This is compounded by the fact that the MMDA does not contain any substantial provisions to guide the implementation of mining in protected areas.

It is clear that the Minister's considerations were outweighed by actual findings that ZEMA and independent studies made. Further, the Minister referred the matter back to ZEMA on grounds that the investor 'liaise with ZEMA for them to issue a Decision Letter with all the appropriate conditions under which the project will operate.' The ZEMA had done its scientific evaluation and made its decision and therefore, cannot be expected to address the same issue. The ZEMA has not yet acted upon the Minister's directive due to a legal suit that has been brought against the Minister's decision.<sup>602</sup>

This scenario clearly shows that the operations of ZEMA can be interfered with by government or its officials. Unfortunately, there appears no solution yet as the interference is

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<sup>600</sup> This was in a letter dated 17 January 2014, addressed to Zambezi Resources Limited. Available at: <http://www.minesandcommunities.org/article.php?a=12557> (accessed 10 December 2014).

<sup>601</sup> Sec. 115 provides: "(1) The Minister shall, where the Minister receives an appeal or an application for review under any provision of this Act, consider and determine the review application and may— (a) allow the application or appeal wholly or in part; (b) dismiss the application or appeal; or (c) refer the application or appeal back to the Board with a request for consideration or further consideration of some fact or issue. (2) In determining a review application, the Minister— (a) shall have regard to the purpose of this Act and the principles set out in section six; (b) shall have regard to relevant environmental policies, guidelines and standards published by the Agency; (c) shall have regard to, but is not bound by, the findings and recommendations of the person conducting the inquiry. (3) The decision of the Minister on a review application shall be given in a written notice delivered to the applicant and to the Director-General, and shall set out the reasons for the decision."

<sup>602</sup> Informal discussion with Zambia Environmental Management Agency, Head Office, Friday, 29 May 2015.



not an isolated incidence. In 2013, ZEMA issued an Environmental Protection Order pursuant to Section 104 of the Act to First Quantum Minerals (FQM) requiring it to stop the illegal action of constructing the Chisola dam without its approval. The Minister, however, gave FQM conditional permission to continue construction of the dam which would cover 200 hectares of woodland, despite the Order being in effect.<sup>603</sup> Also, in 2014, due to massive pollution, ZEMA ordered the closure of MCM's heap leach near Butondo Township, in Mufulira. However, the government directed its opening notwithstanding the fact that there were issues that needed to be resolved between the government and the local inhabitants.<sup>604</sup>

The recent happenings also demonstrate that the Minister has authority to interfere where the Board has made a decision that he/she is not comfortable with and is not required to justify the decision made. The continued issuance of decision by the Board, which decisions were contrary to the expectation of the Minister, resulted in its suspension in 2015. Currently, decision letters are issued by the Permanent Secretary in the MWDSEP. As a solution, the power reposed in the Minister should be given to a tribunal which should be established under the EMA as a body that reviews and hears appeals relating to the environment.

#### 6. Registration of chemicals

The *Environmental Management (Licensing) Regulations* requires that chemicals used by mining companies be registered with ZEMA. However, the EMA is silent on registration or the process thereof. In granting licences to mining companies, ZEMA includes an administrative clause that requires registration of such chemicals. What has proved problematic is the enforcement of such a requirement in the absence of legal sanctions for failure to comply.

#### 7. Collaboration

The EMA requires ZEMA to collaborate with other authorities. Section 9 of the EMA requires ZEMA to:

- (d) develop, in liaison with the relevant appropriate authority, standards and guidelines relating to the protection of air, water, land and other natural resources and the prevention and control of pollution, the discharge of waste and the control of toxic substances;

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<sup>603</sup> <http://www.miningwatch.ca/fr/node/7158> (accessed 15 July 2014).

<sup>604</sup> Informal discussion with Green and Justice Organisation, Friday, 3 July 2015.

- (i) collaborate with Government agencies, appropriate authorities and other bodies and institutions to control pollution and protect the environment; and
  
- (n) collaborate with such local and international agencies as the Agency considers necessary for the purposes of this Act.

The Act identifies appropriate authorities to include, *inter alia*: the Zambia Wildlife Authority, National Heritage Conservation Commission, Commissioner of Lands, Mineral Licensing Committee, and the Board of the ZDA. The rationale for collaboration is for purposes of controlling and prevention of pollution as well as protection of the environment. This requirement assists ZEMA in the enforcement of environmental regulations. Notwithstanding the need for collaboration, the challenge is effective co-ordination between the relevant authorities. This arises from the fact that these bodies have their own mandate to pursue and as such, do not delve into the functions of others authorities for example, the role of the ZDA is to grant a certificate of registration to investors, while that of MMMD is to grant mining licence, and Ministry of Lands and Natural Resources grants land. The only intersecting part is the requirement, at the time of application or granting of a licence, to do an EIA, something which is solely for ZEMA. There is hardly any consultation done between the three bodies. This creates a lacuna on the nature and extent of collaboration. Consequently, as these bodies continue to isolate themselves in their operations, this may lead to a conflict of interest where an issue touches on more than one statute in which one or all the authorities may have jurisdiction. This situation affects the monitoring of activities of the mining industries and the enforcement of the laws thereof.

## 8. Management of environmental legacy

The work of ZEMA has been further complicated by the ‘historical’ or ‘legacy’ issues stemming from 70 years of mining– 1930 to 2000, a period that mines were under state control. During that period, despite the adverse effects of mining, the law still remained weak as government could not create a policy for itself.<sup>605</sup> Thus, during the privatisation process, the appropriate handling of historical environmental liabilities was a key issue during the negotiations, most particularly in the case of KCM.<sup>606</sup> Given the extent and seriousness of environmental and

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<sup>605</sup> Informal discussion with ZEMA, Ndola Office, 1 July 2015.

<sup>606</sup> It has been advanced that ‘During negotiations, the large mining companies were able to dictate their own terms and exact maximum advantage for themselves and their shareholders. The Government of Zambia (GRZ) was not in a strong bargaining position given the parlous state of Zambia’s economy, the decline in world prices for copper, and the fact that a rapid sale of ZCCM was a condition for continuing international aid and debt

public health impacts documented in the EISs, the KCM Consortium refused to accept any legal obligation for historical environmental pollution, most notably downstream impacts on populations and ecosystem functions.

As a consequence, Development Agreements (DAs) between the new mine owners and Government were concluded in which government, through ZCCM-IH, agreed to retain the historical liabilities related to the past activities of ZCCM. These liabilities included those which could not be separated from ongoing operations such as waste depositories that were needed to continue mining. Therefore, at each mine there exist two mining plans– one for the investor and the other for ZCCM.<sup>607</sup> These Agreements were accompanied by *Environmental Liability Agreement* which succinctly stated that:

...all environmental liabilities that may arise as a result of the operation of the Assets by ZCCM prior to Completion and as a result of the operation of the Assets by the Company after Completion in accordance with the Environmental Plan...have been assumed by and vest in GRZ.<sup>608</sup>

There were, inserted under the Agreements, what was known as a “Stability Period” – fifteen (15) years from the date of the Agreement i.e. 2000 to 2015. Clause 19.1 of the DA between the Government and MCM PLC stated:

The Company may terminate this Agreement at any time after the fifteenth anniversary of the date hereof by giving twelve (12) months written notice to GRZ.<sup>609</sup>

During this Period, government undertook not to take any action under, or in enforcing, any applicable Environmental Laws with the intent of: (a) securing the Company’s earlier compliance with Environmental Laws other than that envisaged by the timetable and conditions set out in the EMPs; (b) requiring the Company to clean up and/or remove any stock of pollutants and/or remedy any other condition which was pre-existing as at the date of the Agreement; (c) imposing fines or penalties upon the Company payable under Environmental Laws which are payable in respect of the Company’s non-compliance with such Environmental Laws and where the EMP provides for the remedy of the same; and (d) imposing fines or penalties in an instance where the Company breached environmental legislations or in the case

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relief.’ See: <http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Oxfam-Zambia.htm> (accessed 17 July 2015).

<sup>607</sup> Informal discussion with Misenge Technical Services Limited, Thursday, 30 July 2015.

<sup>608</sup> Clause 2(E), Government of the Republic of Zambia and MCM PLC *Environmental Liabilities Agreement* 31 March 2000.

<sup>609</sup> The only exception was KCM which was granted a 20 year Stability Period.

of penalty charges in respect of the emission of Sulphur Dioxide arising from the ongoing operation of the Mufulira smelter provided that the company remains in compliance with the measures.<sup>610</sup>

Therefore, during the Stability Period, mine owners were only supposed to carry out operations in line with already agreed pollution and emission targets as stipulated in EMPs that were previously submitted. Breaches of existing environmental standards would not be enforced. The effect was that, during the Stability Period, the government's authority to ensure compliance with environmental laws was limited. Sinkamba observed:

Our communities are extremely disadvantaged because of the development agreement which was made in 2000 between government and the mining investors. In certain areas for example, in Kankoyo and Butondo Townships in Mufulira the communities cannot really go to court because the development agreement allowed the mining company to pollute up to end of this year– 2015.<sup>611</sup>

Although DAs were abolished in 2008, they have remained effective until the Stability Period comes to an end.<sup>612</sup> It could be posited that the period 2000 to 2008 was characterised by weak environmental legislation, the historical or legacy issue also remained unaddressed. Presently, historical or legacy environmental pollution is still an issue steeped in controversy. The mine owners have constantly argued that they are only responsible for the pollution post privatisation– this has been mostly cited as a reason for their failure to comply with environmental regulations.<sup>613</sup> While it may be easy to make a finding that a new mine is polluting, it may not be so for old mines that were previously state owned. In fact, it is an arduous undertaking to distinguish between continuances of historical pollution on the one hand and 'current' pollution on the other. This may be because, in many historical mining areas, there are now new operations which make it hard to distinguish between historical and current impacts of mining. However, what is clear is the impact that historical mining activities pose on the environment and consequently, what measures have been adopted to remedy the problem.

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<sup>610</sup> Clause 12.3, Government of the Republic of Zambia and MCM PLC *Mufulira Mine, Smelter and Refinery and Nkana Mines, Concentrator and Cobalt Plant Development Agreement* of 31 March 2000; Clause 12.1, Government of the Republic of Zambia and KCM PLC *Development Agreement* 31 March 2000.

<sup>611</sup> Informal discussion with Citizens for a Better Environment, Wednesday, 29 July 2015.

<sup>612</sup> Sec. 160(1) of the MMDA provides: 'A development agreement which is in existence before the commencement of this Act shall, notwithstanding any provision to the contrary contained in any law or in the development agreement, cease to be binding on the Republic from the commencement of this Act.'

<sup>613</sup> According to informal discussion held with Green and Justice Organisation, Friday, 3 July 2015, 'although Mopani Copper Mines grants them audience, the company denies liability arguing that the effects of Sulphur Dioxide are a result of historical causes.'

#### 4.2.2 Mines Safety Department

The MSD, established under the MMMD, handles four different sectors: mining; environmental issues; explosives; and machinery. It is charged with the responsibility of formulating, monitoring and maintaining legislation that promotes safe and sustainable exploitation of mineral resources, administration of the Environmental Protection Fund (EPF), submission of comments to ZEMA on all mining related environmental applications, and monitoring, and where needed, remedy historical pollution done by the mines.

The MSD formulates and enforces standards on occupational health and safety and promotes effective management of programmes relating to the environment. It ensures that there is the prevention of wasteful mining practices as required under the MMDA. Its activities include: monitoring of the environment; issuing certain authorisations as mandated by law; reviewing programmes on management of the environment; and formulating and reviewing regulations under the MMDA.<sup>614</sup> Other activities are: review of mining related EIA reports, and site verification inspections that are carried out thrice a week.

Where the MSD finds environmental concerns, these are referred to ZEMA for possible action. In the event that no action is taken by ZEMA, despite receiving the comments, MSD cannot act as environmental management is solely within the purview of ZEMA.<sup>615</sup> However, on the basis of available evidence and on matters that are within the competence of the MSD, a recommendation for approval or disapproval of a mining project can be made. This signifies that the MSD and ZEMA interact in carrying out their individual functions. In fact, ZEMA would, from the collection of license and permit fees, give a portion to MSD to fund some of its operations.<sup>616</sup> However, sometime in 2011, the relationship between the two institutions broke down thereby resulting in them operating in isolation from each other. This has not only led to duplication of work and wastage of public funds but also impacted negatively on the enforcement of environmental regulations.

The operations of the MSD, just like ZEMA, are affected by a few challenges namely: (a) it has a small number of inspectors who are lacking in technical capacity; (b) erratic flow of financial resources to facilitate the running of operation by the inspectorate; and (c) policies

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<sup>614</sup> GRZ 'National Report' submitted at United Nations Conference on Sustainable Development June 2012, 26.

<sup>615</sup> Informal discussion with Mines Safety Department, Friday, 3 July 2015.

<sup>616</sup> Informal discussion with Zambia Environmental Management Agency, Ndola Office, Wednesday, 1 July 2015.

that provide for the smooth running of the Inspectorate are weak.<sup>617</sup> It could only be concluded that there is little effort from government to ensure that MSD is robust and fortified to enable it to monitor and enforce environmental regulations. Sinkamba observes:

The Mines Safety Department does not have adequate support from the government to have the necessary resources to be able to be there when they are required to. What I mean is that the budget to MSD is very small compared to what they need to be able to perform and as a result of the little support that they get they have very few inspectors, they do not have the equipment which should be able to assist them and because of those resource shortages, they are not as effective as would have been if they had adequate resources.<sup>618</sup>

Although the institutional challenges are clear, the lack of collaboration between the MSD and ZEMA has also contributed to problem. It is suggested that MSD and ZEMA should collaborate and draw a Memorandum of Understanding detailing the responsibilities and areas of cooperation between them. This would not only enhance accountability in the management of mining related environmental issues but also ensure that enforcement is done when breaches of environmental regulations have been found.

#### Environmental Protection Fund

The EPF, administered by the MSD, was established in 1998 pursuant to the *Mines and Minerals (Environmental Protection Fund) Regulations*. The Fund has been put in place to secure the environment against future environmental liabilities that may arise in case the mines fail to meet the environmental liabilities.<sup>619</sup> Thus, the Fund makes provision for the: (a) mitigation or restoration of negative environmental effects; and (b) facilitation of research that furthers environmental and sustainable natural resource management. In order to achieve its purpose, the Minister may attach any conditions to the mining licence, including requiring mining companies to make contributions to the Fund.

The MMDA has, in section 86, made provisions for the administration and management of the Fund by stating that:

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<sup>617</sup> Informal discussion with Mines Safety Department, 3 July 2015.

<sup>618</sup> Informal discussion with Citizens for a Better Environment, Wednesday, 29 July 2015.

<sup>619</sup> S.I No. 102 of 1998. According to these Regulations, the objectives of the Fund are to: (a) provide assurance to the Director that the developer shall execute the environmental impact statement in accordance with the Mines and Minerals (Environmental) Regulations; and (b) provide protection to the Government against the risk of having the obligation to undertake the rehabilitation of a mining area where the holder of a mining licence fails to do so.

1. There shall be an Environmental Protection Fund, which shall be administered and managed by the Environmental Protection Fund Committee appointed by the Minister.

(b) There shall be paid into the Fund the amount of any cash deposit referred to in paragraph (b) of subsection (2) of section *eighty-one*.

(c) Moneys from the Fund may be applied —

(1) at the expiry or termination of a licence or permit by way of refund to the holder thereof of the amount of any cash deposits referred to in section *eighty-one* that were paid by the holder, to the extent that such moneys are not appropriated under paragraph (b); or

(2) to the payment of any debt due under subsection (4) of section *seventy-five* or under subsection (6) of section *eighty-three* to the extent that the debt is not paid by or recovered from, the person from whom it is due, and regardless of whether proceedings have been taken against that person for an offence under this Part or for the recovery of the debt.

The Mines and Mineral Act (Environmental Regulations) require a developer to contribute to the EPF.<sup>620</sup> The contributions made are dependent on the developer's capacity to remedy the negative effects caused by the environment due to mining activities.<sup>621</sup> In the event that the mine is closed or mining rights assigned expire or are terminated, a developer who had made such contributions is entitled to a refund less any monies owed to government.<sup>622</sup> The contributions to the EPF are calculated according to the performance of a developer and thereafter categorised.<sup>623</sup> The Director then informs the developer of the category in which they fall and contribution that is to be made to the EPF.<sup>624</sup> Where there are new operations in the existing mines, the contribution is made from the time prospecting, exploration or mining operations commence.<sup>625</sup>

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<sup>620</sup> Mines and Minerals Act (Environmental) Regulations, reg. 65(1).

<sup>621</sup> As above, Regulation 65(2).

<sup>622</sup> As above, Regulation 65(3); sec. 122(3)(a), MMDA.

<sup>623</sup> The Eleventh Schedule puts EPF contributions in three categories. The First category requires action taken to rehabilitate i.e. progressive rehabilitation carried out, whether rehabilitation has been properly monitored, and whether the annual rehabilitation audits show progress to meet the target of the EIS to manage environmental pollution. The Second Category focusses on environmental compliance capability and addresses: (a) the financial capability to complete the rehabilitation of the mine area; (b) the materials in place for total mine area rehabilitation; (c) whether suitable expertise is provided for the organisational structure; and (d) whether the developer or the person who holds a mining licence or permit has an approved EIS or project brief. The Third Category handles the basic operational and strategic environmental protection requirements such as: (a) an approved EIS or project brief; (b) discharge of mining operations are permitted or licenced; (c) post-mining land use and slop and profile design, allowing stable land rehabilitation within the mining or permit area; and (d) a water management system is in place or designed to contain, treat, discharge or dispose of contaminated water.

<sup>624</sup> Mines and Minerals Act (Environmental) Regulations, reg. 66(2).

<sup>625</sup> As above, reg. 66(3).

Legally, the EPF mechanism has two major challenges: first, it only restricts itself to environmental concerns upon closure of a mine and does not cover what happens during the life of the mine. There is no other mechanism provided either under the MMDA or MRDP. Second, there also appears to be no claim by an individual for compensation from the EPF on account of any action or inaction of a mining firm. This has been demonstrated in the case of **Lafarge Cement Zambia Limited v Peter Sinkamba** in which the respondent argued that his organisation was entitled to obtain compensation from the appellant due to mining activities, historical and on-going, that disturbed the environment. In rejecting the respondent's argument, Chirwa J said:

Certainly, the respondent misapprehended Section 123 [now 87] of the Mines and Minerals Act and since his claim relates to the EPF, it is manifestly clear that he had no locus standi to commence this action. Section 123(7) has not clothed the respondent with authority to 'recover money or demand from the appellant payment or deposit into the EPF'.<sup>626</sup>

The reasoning of the court was erroneous in that it did not recognise the fact that it is possible to obtain compensation from the EPF as an individual. In its decision, the court did not consider the purpose for the establishment of the EPF— to secure the environment against future environmental liabilities that may arise in case the mines fail to meet the environmental liabilities.

Institutionally, management of the EPF has not been effective as it is characterised by failure of mining companies to fully contribute to the Fund. In some instances, mining companies have provided bank bonds or guarantees not validated by the Bank of Zambia as required by laid down procedures.<sup>627</sup> Further, there is failure to invest the funds collected to avoid loss of value at time of mine closure.<sup>628</sup> Notwithstanding the failure by the mines to comply, there has been failure to take action against defaulting companies.

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<sup>626</sup> *Lafarge Cement Zambia Limited v Peter Sinkamba* [2013] ZMSC 31 (Appeal No. 169 of 2009), J15-J16. Sec. 87(7) provides: 'Any person, group of persons or any private or state organization may bring a claim and seek redress in respect of the breach or threatened breach of any provision relating to damage to the environment, biological diversity, human and animal health or to socio-economic conditions- (a) in that persons or group of person's interest; (b) in the interest of or on behalf of, a person who is, for practical reasons, unable to institute such proceedings; (c) in the interest of, or on behalf of, a group or class of person whose interests are affected; (d) in the public interest; and (e) in the interest of protecting the environment or biological diversity.'

<sup>627</sup> Auditor General Report 'Management of environmental degradation caused by mining activities in Zambia' (2014) 35.

<sup>628</sup> Informal discussion with Mines Safety Department, Friday, 3 July 2015.



The EPF is now managed by the EPF Committee. Despite the change in the management of the EPF, the Committee also lacks adequate resources to be able to ensure that all mining operations comply with regulations of the EPF. This has resulted in a situation where a number of mining companies have not been captured to contribute to the Fund. The funding received directly from the government for its operation is not enough. Although the regulations required that the MSD use only 1% of the funds that are in the Fund, this was not enough. Consequentially, in terms of environmental audits for the EPF, the MSD lags behind schedule due to lack of staff and resources to do validation as well as do the site visits.<sup>629</sup>

### **4.2.3 Human Rights Commission**

The Human Rights Commission (HRC) was established pursuant to a recommendation of the Human Rights Commission of Inquiry. The Commission, popularly referred to as the Munyama Commission after its Chairperson Bruce Munyama, was appointed in 1992 to examine the human rights situation in the First, Second and Third Republics. In Chapter 6 of its report, the Commission recommended the establishment of the HRC. Thus, following the constitutional amendments in 1996, the HRC was constituted under the Constitution as an autonomous body.<sup>630</sup> The primary role of the Commission is to ensure that the Bill of Rights is upheld and protected.<sup>631</sup> The Commission is regulated under Human Rights Commission Act (HRCA) No. 39 of 1996 whose objective is 'to provide for the functions and powers of the Human Rights Commission; to provide for its composition and to provide for matters connected with or incidental to the foregoing.'<sup>632</sup>

#### *Functions of the Commission*

The Constitution prescribes the functions of the Commission under Article 230(3) to include: (a) investigation and reporting on the observance of rights and freedoms; (b) take necessary measures aimed at securing appropriate redress in situation where there is a violation of rights and freedoms; (c) endeavour to resolve a dispute through negotiation, mediation or conciliation; (d) carry out research on rights and freedoms and related matters; (e) conduct civic education on rights and freedoms; and (f) perform such other functions as prescribed.

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<sup>629</sup> Informal discussion with Mines Safety Department, 3 July 2015.

<sup>630</sup> Article 125, Constitution (1996, amendment). The Constitution (2016, amendment) establishes the Commission under Article 230.

<sup>631</sup> Sec. 230(2).

<sup>632</sup> Preamble.

It is clear that the mandate of the Commission is quite wide. This allows the Commission to ensure respect for human rights as enshrined in the Bill of Rights. Although courts have an overarching duty to ensure protection of individual human rights against the state, institution such as the HRC come in to complement the courts, given their inundation with other judicial functions. Ideally, the HRC must promote the domestication and application of international human rights instruments and this is done through its advisory role to government and participation in the State reporting processes required under the numerous human rights instruments.

### *Enforcement of Human Rights*

The Human Rights Commission Act stipulates the functions of the Commission in Section 9. Section 9(a)(c) provides the functions, *inter alia*, as: 'investigate human rights violations' and 'propose effective measures to prevent human rights abuse.' In exercising its power to investigate human rights complaints, the Commission has the power to entertain any human rights abuses either on its own initiative or on receipt of a complaint or allegation.<sup>633</sup>

In the event that a violation is found, the Commission can recommend the punishment of any officer found by the Commission to have perpetrated an abuse of human rights.<sup>634</sup> The fact that the Commission is only able to recommend action to be taken by other appropriate authorities, points to its major weakness i.e. it lacks 'teeth to bite' and this defeats the whole purpose of protecting human rights.

In its report, it was noted by the Commission that mining activities poses an adverse effect on the environment and consequently the rights of those who depend on it. It noted:

The right to a healthy environment has to be upheld in all developmental activities and this calls for a drastic reduction in the amount of pollution currently been seen particularly with mining operations.<sup>635</sup>

This observation was terra firma, however, nothing concrete was put forward as action point serve to aver that 'there are however outstanding environmental issues that still require

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<sup>633</sup> Sec. 10(1)(b) allows any of the following to lodge a complaint with the Commission: (a) an aggrieved person acting in such person's own interest; (b) an association acting in the interest of its members; (c) a person acting on behalf of an aggrieved person; and (d) a person acting on behalf of and in the interest of a group or class of persons.

<sup>634</sup> Sec. 10(4).

<sup>635</sup> Human Rights Commission 'State of Human Rights Report in Zambia: human rights and the environment' (2010) 49.

further study as they are potential time bombs as they relate to human rights and the environment.<sup>636</sup> While the Commission noted the problem, decided that such should be addressed at a later stage after a 'further study'. It is not surprising that the Commission ultimately recommended that:

...while there is a general recognition that development of any kind goes hand in hand with the exploitation of the environment in terms of utilisation of the available natural resources. It is to be anticipated that the environment will suffer some kind of negative effects as a result of the developmental agenda if the tenets of sustainable development are not adhered to.<sup>637</sup>

This supposed recommendation does not fit as proper guidance in terms of enforcement of the breaches that the study done by the Commission revealed. In fact, the Commission merely affirmed the existence of the environmental and human rights harm posed by mining activities. It simply highlighted the prevalence of the problem. Although it is desirable to accord the Commission more effective powers to act on violations, it is not unusual for a Commission not to have the power to issue legally binding orders. This does not mean that the settlement or appropriate remedial steps recommended by the Commission can and should be ignored. It is suggested that the HRCA is amended to allow the Commission to make decisions that are legally binding. The present legislation which allows the Commission to only make recommendations does not afford adequate protection of the rights of the general public.

Besides the legal challenges, the Commission is also underfunded, as it receives its funding from government. Section 22(1)(a) provides that, 'the funds of the Commission shall consist of such moneys as may be appropriated by Parliament.' The use of the word 'may' entails that Parliament is not obliged to appropriate money to the Commission but only gives it discretion to appropriate and the extent of such funds. This status quo affects the Commission's effective operation, especially that the budgetary allocation from government is usually low and mostly delayed. As a consequence, in most instances, its projects are funded by the Commission's partners or donors who may also be compelled to meet administrative and operational costs. In such efforts, its donors have not been so keen about funding research on issues of human rights and the environment— this is with an exception of 2010 when the United Nations Development Programme sponsored the human rights and environment research.

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<sup>636</sup> As above, 74.

<sup>637</sup> As above, 73.

The problem of funding is compounded by a lack of qualified staff, adequate resources or materials, and its presence is not in all the provinces— the Commission does not have presence in Central, Luapula, Muchinga, and North-western.

### 4.3 Community Participation

The Constitution places a responsibility on the State to ensure that environmental standards enforced in Zambia.<sup>638</sup> This implies that the duty bearer for ensuring protection of the environment is the State. Notwithstanding this, there is an obligation on every citizen to protect and conserve the environment and maintain a clean and healthy environment.<sup>639</sup> Mining activities are often conducted within a particular location where the community resides. The MMDA prioritises the community's needs, health and safety in places where such are within the mining areas.<sup>640</sup> This would mean that the mining company must ensure that its activities do not harm the community's needs, health and safety.

It is not in doubt that the community is usually the victim where mining activities lead to pollution of their land, water, and air. In such instances, the issue is whether the community can act in order to ensure compliance of mining companies with the environmental regulations prescribed under the law. There is no specific provision under the law which grants the community the authority to ensure that mining companies comply with the environmental regulations. A study of the MMDA, EMA, or Constitution reveals that most provisions are couched broadly, for instance, 'a person' or 'any person' or 'a citizen'. This presupposes that the use of the words 'a group of persons' refers to a community as well.<sup>641</sup> Under section 87(7) of the MMDA, a group of persons is allowed to bring a claim and seek redress for breach or threatened breach resulting in damage to the environment. This entails that the community has legal authority to ensure that redress is sought in instances where there is breach or threatened breach of environmental regulations.

In terms of a mining company's liability to the community, section 87(5) of the MMDA provides that the liability shall extend to: (a) harm to the economy or social cultural conditions; (b) adverse effect on the community's livelihood, indigenous knowledge or technology; (c) damage to agricultural production; (d) yield reduction; and (e) contamination or damage to

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<sup>638</sup> Art. 257(f).

<sup>639</sup> Art. 43(1)(c)(d).

<sup>640</sup> Sec. 4(f).

<sup>641</sup> For purposes of this study, a community is described as a group of persons or people who live in a particular area and share certain common interests.

biological diversity. Thus, where liability is found, the compensation shall include costs and medical expenses, disability suffered, and loss of life.<sup>642</sup> In a few instances, communities have litigated against erring mining companies and judgment given in their favour. For example, in *Doris Chinsambwe and 65 others v NFC Africa Mining* the plaintiffs, who were farmers who resided in an area near the mine, brought an action against the defendant in 2014. The plaintiffs alleged that the defendant's failure to maintain water levels in the tailings dam caused flooding of their agricultural land thereby resulting in loss.<sup>643</sup> Agreeing with the plaintiffs, the court held that the defendant was liable for the consequential damage and loss and should make good the loss.

This case demonstrates that a community located in a mining area can successfully take legal action against erring mining companies. It is worth noting that, in the past, the vigilance by communities was hardly there as they were largely unaware of the authority to do so which explains the lack of litigation against erring mining companies. Some studies have attributed this to the communities' lack of information on mineral resources in so far as it relates to the stocks and amounts present.<sup>644</sup> It is asserted that, where levels of awareness are raised, the community would know their rights and understand environmental justice. There was also belief by most communities that engaging the mining companies, as opposed to litigating, would be the most effective method of attaining redress. However, the latter yielded little results in that mining companies proved to be too powerful to negotiate against. Even in situations where this would be possible, there are reports of some influential community representatives being compromised by the mining companies through offering of job opportunities.<sup>645</sup>

In other situations, there has been interference from politicians where the community seeks to engage the mining company with regard to its polluting activities.<sup>646</sup> This is compounded by the fact that, though ZEMA has been established as the appropriate authority to handle such matters, its relevance is doubtful. They appear to be a governmental body rather than an autonomous one. In 2014, ZEMA ordered the closure of the heap leach near Butondo Township, however, the government directed its opening. The considerations taken by the government were not known or disclosed neither were the concerns raised by the

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<sup>642</sup> Sec. 87(9).

<sup>643</sup> *Doris Chinsambwe & 65 others v NFC Mining Limited* [2014] HK 374.

<sup>644</sup> NS Munyinda & LM Habasonda 'Public participation in Zambia: the case of natural resources management' (2013) 47.

<sup>645</sup> Informal discussions with Zambia Human Development; and Green and Justice, Friday, 3 July 2015.

<sup>646</sup> As above.

community resolved. The government simply usurped the power of ZEMA and allowed the mine to carry on with its polluting activities.<sup>647</sup>

Suffice to say, the community bears the responsibility of ensuring that mining companies operating in their area comply with the set regulations. Where such companies breach the set environmental regulations, legal action can be taken against them.

#### **4.4 Non-governmental organisations**

The nexus between environmental harm and human rights cannot be gainsaid. In fact, the effect on the person is apparent where the environment is polluted. In spite of the lucid link between the two fields, and the presence of statutory provisions and bodies, degradation of the environment and consequently, the violation of human rights continues to be an issue. Thus, the necessity of enforcement of environmental provisions has become more demanding than before. The NGOs have noted with keen interest the need for enforcement of environmental provisions. Through their advocacy and vigilance, NGOs have, in most respects, ensuring that corporations are held accountable for their environmental and human rights violations. According to Jennifer Cassel, the activities of such NGOs are not aimed at articulating 'environmental damage in human rights terms by claiming that environmental damage in itself violates human rights, but rather strives to protect the environment by upholding the more well-established human rights of individuals who fight to protect it.'<sup>648</sup> This underscores the fact that, the aim of NGOs is to secure protection of the environment for the sake of those who depend on it albeit do not have the capacity to handle issues by themselves.

The work done by NGOs to ensure enforcement of environmental provisions is myriad but, in relation to the study, includes carrying out litigation– public interest litigation. In Zambia, there are numerous NGOs that are active in environmental matters. While some purely focus on environmental protection, more notably, CBE and ZIEM, others have wildlife and climate change as their main interest.

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<sup>647</sup> As above.

<sup>648</sup> J Cassel 'Enforcing environmental human rights: selected strategies of US NGOs' (2008) 6 *North western Journal of International Human Rights* 1 107.

#### 4.4.1 Citizens for a Better Environment

Citizens for a Better Environment is an NGO whose work focusses on environmental management. More specifically, the organisation conducts: environmental advocacy; community education; community mobilisation; litigation; and corporate accountability.<sup>649</sup>

In its bid to represent the public who are affected by pollution caused by mining activities, CBE has in many instances brought out a legal suit either in its own capacity or jointly with the victims. It has in fact actively pursued with a view to ensuring that environmental regulations are enforced by the courts of law. It has, for example, brought legal action against some mining companies— Chambishi Metals on pollution of the Chambishi and Mulamba stream; Bwana Mkubwa Mine on pollution of the Munkulungu stream; Konkola Copper Mines on pollution of the Lusakashi stream; Lafarge for failure to pay into the EPF; and Chambishi Copper Smelter for polluting the air around Luwela farming block.

In the context of environmental protection, this kind of litigation does not generally require a direct interest in the relationship between the person seeking the relief and the interests of the environmental damage. Where such is the case, the court 'should be in a position to give effective and complete relief. If no effective relief can be granted, the court should not entertain public interest litigation.'<sup>650</sup> However, the courts that hear such matters have, in most instances, questioned the capacity of CBE to bring a matter before them on behalf of the public. Although the Constitution, EMA, and MMDA have all prescribed a category of persons that may approach the court for enforcement of environmental provisions, the question of whether the court acts judiciously when entertaining such cases may very well be a question of fact.

In *Lafarge Cement Zambia Limited v Peter Sinkamba*, the respondent, suing on behalf of CBE, brought an action against the appellant on grounds that its mining activities were causing environmental harm. Despite the respondent demonstrating the adverse effects that mining activities brought to the area, the court rejected the application on grounds that the respondent did not possess locus standi in the matter. In delivering the judgment, Muyovwe J said:

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<sup>649</sup> Informal discussion with Citizens for a Better Environment, Wednesday, 29 July 2015.

<sup>650</sup> *Mtikila v Attorney General* H.C.C.S No. 5 of 1993.

We take the view that had the learned Deputy Registrar and the learned Judge properly scrutinised the claims and the figures endorsed, they would have both arrived at the inescapable conclusion that the respondent had no *locus standi* in this matter and that if anything the action was frivolous and vexatious...We find that the learned Judge erred when she concluded that the respondent had *locus standi* to commence this matter. We agree that this was a defence on the merits which the learned Judge failed to consider and this was a misdirection.<sup>651</sup>

The reasoning of the court presupposed that *locus standi* is a primary consideration in public interest litigation. The decision was given in contumelious disregard to the provision of the MMDA which the respondent had relied on— section 123 which provided thus:

Any person, group of persons or any private or state organisation may bring a claim and seek redress in respect of the breach or threatened breach of any provision relating to damage to the environment, biological diversity, human and animal health or to socio-economic conditions—

- (5) in that persons or group of person's interest;
- (6) in the interest of or on behalf of, a person who is, for practical reasons, unable to institute such proceedings;
- (7) in the interest of, or on behalf of, a group or class of person whose interests are affected;
- (8) in the public interest; and
- (9) in the interest of protecting the environment or biological diversity.

It is clear from the wording of this provision that, persons, a private or state organisation has *locus standi* to bring an action either in that or any person's or groups interest or on their behalf or in public interest. The explicitness of the provision entails that a person need not struggle to establish standing, however, the court still denied the existence of *locus standi* by overlooking the respondent's claim that the action was brought due to the historical and current pollution of the environment by the mine, which activities were affecting the public. An example could be drawn from the Kenyan case of ***Rodgers Muema Nzioka and 2 Others v Tiomin Kenya Limited***, in which, in granting an injunction to the applicants who brought the matter on behalf of 'mere ordinary rural farming inhabitants', stated:

Environmental degradation is not necessarily individual concern or loss but public loss so in a matter of this kind the convenience not only of the parties to the suit but also of the public at large is to be

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<sup>651</sup> Appeal No. 169 of 2009 at J16.



considered so that if the injunction is not issued it means that any form of feared degradation, danger to health and pollution will be caused to the detriment of the population.<sup>652</sup>

It is argued that the measure for *locus standi* should be based first, on whether activities of a polluting nature affects the public at large; and second, on whether the statute makes provision for such or not. The appellant' claim hinged on both aspects but the court did not address either. Though the appellant attempted to rely on section 87 of the MMDA, as a basis for establishing locus, the court did not delve into whether or how the respondent had no sufficient interest notwithstanding that the requirements under that provision were met. The court chose to rely heavily on the respondent' other argument i.e. that he should be compensated under the Environmental Protection Fund, to which they declined, as a basis for locus, thereby contumeliously disregarding section 87. The position of the court seems to suggest that, sufficient interest or *locus standi* requirement, was subservient to respondent' request for compensation. This demonstrates a dim view by the court on matters of *locus standi* in environmental protection and its importance. It is posited that the court was misguided when it formed an opinion that 'the respondent had no legal authority to bring this action and, therefore, cannot benefit from his wrongs', and ultimately dismissed the matter in its entirety.

In sharp contrast, the case of ***Zambia Community Based Natural Resources Management Forum, Zambia Institute of Environment Management, Zambia Climate Change Network, Chalimbana River Water Conservation Trust, Green Living Movement, David Ngwenyama v Attorney General and Mwembeshi Resources Limited***, also raised the question of *locus standi* but the court did not deny the application on a mere technicality. In her view, Kondolo J stated:

The question of *locus standi* goes to the heart of the matter and "where there is no locus, there is no case". Even though learned counsel for the 2<sup>nd</sup> respondent argued that hearing their client's application first would not prejudice the Appellants, the truth of the matter is that if this court grants the relief sought by the 2<sup>nd</sup> Respondent, the Appellants case with respect to the 1<sup>st</sup> and 5<sup>th</sup> Appellants would either meet an early demise or only be kept alive by further delaying the hearing of this matter on the merits. Regarding the *locus standi* of the parties, I find that the descriptions of the 1<sup>st</sup> to 5<sup>th</sup> Appellants are indeed irregular and should have been represented as indicated in the application to amend.<sup>653</sup>

The interest of the court, at this stage, was to ensure that the matter was not dismissed for minor irregularities in terms citing of parties and hence, it became necessary to amend the

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<sup>652</sup> H.C.C.C 97 of 2001.

<sup>653</sup> *Zambia Community Based Natural Resources Management Forum, Zambia Institute of Environment Management, Zambia Climate Change Network, Chalimbana River Water Conservation Trust, Green Living Movement, David Ngwenyama v Attorney General and Mwembeshi Resources Limited* [2014] HP/A/006, J9.

application. Following the amendment, the respondents contended that the appellants did not live in the area where the mine would be located and hence, are not affected. Disagreeing with the respondents, the Court underscored:

I shall not pronounce myself on the rest of the arguments of the parties save to state that damage to the environment is a matter of public concern and interest which affects all people born and unborn. For this reason, I find that the Appellants do not need to specify or prove exactly how they are affected by the subject project.<sup>654</sup>

The reasoning of the court on this point demonstrates the application of the principle on sustainability. It is argued that this has expanded the scope of locus standi in environmental matters – the criteria for qualification to invoke the court’s intervention is demonstration by the person that they are ‘affected by the subject project’.

It is not surprising that, despite taking on a number of cases aimed at ensuring enforcement of environmental regulations, success has not always been guaranteed leading to discontentment of the organisation. The organisation’s main concern has been government’s interest in prosecuting matters relating to environmental protection. In the words of its Executive Director, Peter Sinkamba:

Also, MSD is not given adequate support by the Attorney General's chambers because even some of the mining companies are in default of their contributions into the Environmental Protection Fund and the Attorney General does not take them to court. For example, the case which I had to take myself to court on behalf of government was supposed to have been undertaken by MSD with the support of the Attorney General but it did not happen. Even when I went to court instead of the Attorney General to come on my side he went on the side of the mining company to defend a defaulting mining company. So the Attorney General's chambers appear to be compromised in the manner in which they handle Environmental Protection Fund cases.<sup>655</sup>

The sentiments expressed were that the government does not prosecute matters where mining companies are in default or breach of their environmental responsibilities. Even in instances where action is taken on its behalf by citizens or organisations, the government has still militated such an action leading to a conclusion that it is compromised and thus fails to act in favour of the environment.

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<sup>654</sup> As above, 22.

<sup>655</sup> As above.

The other challenge faced by CBE lies in the reluctance of the courts to grant interim relief in matters relating to mining pollution. In *Citizens for a Better Environment v Bwana Mkubwa Mining Limited*, the plaintiff sought an interlocutory injunction to restrain the defendant from: first, constructing and operating a new plant site until it had sought the necessary environmental approval from the authority; and second, discharging contaminants into water bodies that the public had access to had an adverse effect on the health and safety of human beings. In rejecting the application, Wanki J said:

I have found and it is clear that the Plaintiff claiming for inter alia damages both general and special, and interest since it is claiming for damages, an injunction according to the authorities cannot be the appropriate remedy. It follows that the Plaintiff does not need the Injunction to protect it from irreparable injury.<sup>656</sup>

Further,

...after reading the many affidavits and the numerous exhibits and after considering the lengthy submissions and the environment as provided by the Legislature dealing with Mining and the environment, I have found and I am convinced that the Plaintiff has not shown on the material before the court that it has a good arguable case with high prospects of success.<sup>657</sup>

The court formed an opinion that an injunction would not lie against the defendant. Its concerted view was that an injunction was not an appropriate remedy and also, the plaintiff did not show that it had an arguable case. This case demonstrates the difficulty that the organisation has encountered in enforcing environmental regulations.

#### **4.4.2 Zambia Institute for Environmental Management**

Zambia Institute of Environmental Management is an NGO that was established in 2006 to 'add value to the environmental sector by fostering greater cooperation and information sharing among environmental institutions.'<sup>658</sup> As part of its mandate, ZIEM aims to strengthen coordination and coherence between institutions dealing with issues related to all aspects of environmental management, environmental governance, climate change, policy and practice,

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<sup>656</sup> *Citizens for a Better Environment v Bwana Mkubwa Mining Limited* [2002] NK 513, J3 (Ruling).

<sup>657</sup> As above.

<sup>658</sup> <http://www.zieminstitute.org/about-us> (accessed 27 February 2017).

advocacy and lobbying.<sup>659</sup> In attaining its mandate, ZIEM has set up programmes that revolve around five sectors: water and air pollution; solid waste management; energy efficiency; climate finance; and sustainable development.

The ZIEM has undertaken a number of programmes that are aimed at attaining sound environmental management. On the Copperbelt, more specifically Chambishi–Kalulushi District, ZIEM developed a tool for an Environmental Social Impact Assessment (ESIA) for local residents to analyse pollution and determine the environmental and social impacts of existing assets.<sup>660</sup> Regarding water pollution, ZIEM is currently implementing a water pollution monitoring and management project (Musakashi Water Pollution Project) in Chambishi while preparing to implement a similar project in Solwezi concerning pollution of Kansanshi River by mining activities. On air pollution, ZIEM implemented: (i) an air pollution monitoring and management project in Mufulira’s Kankoyo Township; ii) an Ambient Air Pollution modelling in Kitwe; and, iii) a project on Indoor Air Pollution in Lusaka.<sup>661</sup>

In 2013, regarding the Kangaluwi Copper Mine Project, ZIEM undertook Ecological Assessment and Cost Benefit Analysis studies and further engaged communities around Lower Zambezi National Park to determine the feasibility of the Project in the Park. The purpose of the studies was to enhance environmental sustainability and contribute to effective policy framework on environmental management and governance of national parks and wildlife policy. More specifically, it was aimed at countering the government’s argument about employment creation at the expense of the environment.

In 2014, ZIEM participated in the case of Doris Chinsambwe against NFCA in which the mine had polluted the plants of the community but the people in that community had no knowledge of the course of action to be taken. Thus, ZIEM trained the community on the correct channel they could take so as to be compensated.

Although ZIEM has participated in legal enforcement of environmental regulations, its operations have been affected by two factors: the first relates to financing of its operations. The organisation has had financial challenges especially in funding projects which are to be carried out and this has led it to operate independently surviving with the help of funders from other countries. According to its Executive Director, Morgan Katati, he lamented that:

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<sup>659</sup> As above.

<sup>660</sup> <http://www.zieminstitute.org/environmental-management> (accessed 27 February 2017).

<sup>661</sup> As above.

Dependency on foreign Aid has its own challenges, in that, the organisation did at some point want to carry out a research on Lumwana Mine, depending on Canada for Funds, but the study was not funded because First Quantum is a Canadian Company.<sup>662</sup>

The issue of funding is serious and cripples the operations of such selfless organisations in their quest to ensure environmental sanity.

The second pertains obtaining evidence on allegations of environmental pollution. The challenge faced by ZIEM has been gathering of substantive documents in terms of binding evidence from government offices, officials, or authorities. Where evidence is sought from government officers, the same is not availed as the persons involved are concerned about losing their employment and as such, remain tight lipped.<sup>663</sup>

#### **4.5 Judicial enforcement**

The Constitution enunciates that judicial authority of the country shall be applied in a just manner and such exercise shall promote accountability.<sup>664</sup> The exercise of such authority is hinged on – (a) justice being done to all, without discrimination; (b) justice not to be delayed; (c) adequate compensation shall be awarded, where payable; (d) promotion of alternative forms of dispute resolution mechanisms; (e) administration of justice without unnecessary concern to procedural technicalities; and (f) protection of Constitutional values and principles.<sup>665</sup>

The judicial authority vested in the courts should be exercised by it in line with the Constitution and other laws.<sup>666</sup> The exercise of such function serves three principal functions: first, settlement of disputes; second, upholding the rule of law; and third, interpreting and applying the law. Sakala observes that:

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<sup>662</sup> Informal discussions, Zambia Institute Environmental Management, Monday, 27 February 2017.

<sup>663</sup> As above.

<sup>664</sup> Article 118(1).

<sup>665</sup> Article 118(2). According to article 118(3), the 'Traditional dispute resolution mechanisms shall not— (a) contravene the Bill of Rights; (b) be inconsistent with other provisions of this Constitution or other written law; or (c) be repugnant to justice and morality.'

<sup>666</sup> Article 119(1)(2).

Constitutionally and institutionally, the responsibility of balancing the scales of justice between the individual whose fundamental rights are violated and the State or its agents being accused of such violations lies heavily on the judiciary.<sup>667</sup>

In environmental matters, the court's role is to give environmental law force and effect. It can well be said that the judiciary is a guarantor of the protective benefits of environmental law, one of which is, to secure the attainment of human rights for both current and future generations. Bosek articulates:

The importance of an effective judiciary in the protection and advancement of environmental rights cannot be over-emphasised. The judiciary plays a vital role in enforcing human rights. It is the institution that is constitutionally designed to be objective, fair and just in applying the law when controversial issues are brought before it. In the area of environmental management, the judiciary has a key role to play, not only in enforcing domestic law, but also in integrating the human rights values set out in international instruments...[it] plays a balancing role between various interests, such as in ensuring that what the present generation values, is spread to the benefit of generations to come. Judicial decisions often help to sustain such values for the benefit of many who are unable to speak for themselves, either because they are not yet born, or because of the many obstacles placed in their way by procedural legal requirements, or in view of inhibiting poverty and other socio-economic factors.<sup>668</sup>

The court's role is also to protect the vulnerable who may not be able to speak for themselves for whatever a judge treats as important, a society comes to judge it as important. Thus, the court's response to environmental problems can have a powerful transforming effect on society.<sup>669</sup> The seriousness with which the judiciary pays attention or responds to environmental issues would ensure environmental quality and promote acceptable behaviours of those that threaten the soundness of the environment. In doing so, they help to ensure environmental responsibility and accountability while advancing the development of the law through their construction of provisions thereby filling the existing legal gaps. Thus, the burden placed on the judiciary is to interpret the law in a manner that meets the aspirations of society taking into consideration sustainability of the environment. Shelton and Kiss observe that a 'challenge to judicial decision-making in this field is to determine the appropriate balance between individual entitlements and more general societal concerns.'<sup>670</sup> Such is the challenge placed on the court and in addressing it, creativity, boldness, and an act of 'judiciousness' is required. The basis for such stem from the formation of the legal basis that every person has a

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<sup>667</sup> JB Sakala *The role of the judiciary in the enforcement of human rights in Zambia* (2013) 85.

<sup>668</sup> 'Implementing environmental rights in Kenya's new constitutional order: prospects and potential challenges' (2014) 14 *AHRLJ* 500.

<sup>669</sup> S Fulton & AH Benjamin 'Foundations of sustainability' *UNEP Advancing justice, governance and law for environmental sustainability* (2012) 21.

<sup>670</sup> D Shelton & A Kiss *Judicial handbook on environmental law* (2005) xxi.

'constitutional' right to an environment that is safe, clean and healthy. Thus, it is cardinal the environmental regulations are enforced by the courts. As was observed by the South African court, where there is no enforcement, mining companies would be 'free to exploit the mineral resources of the country for profit over the lifetime of the mine, thereafter they may simply walk away from their environmental obligations.'<sup>671</sup> This entails that the duty placed on the courts to protect citizens from the effects of pollution and degradation is immense.

It must be mentioned that there appear to be a few judicial decisions and this could be because: the public have not been active in instituting actions and seeking remedies for breach of regulations by mining companies; and, in instances where action has been taken, the courts have not been vigilant in enforcing breach of environmental regulations.

#### **4.5.1 James Nyasulu v Konkola Copper Mines, Environmental Council of Zambia, and Chingola Municipal Council**

In *James Nyasulu and 2000 others*, it was alleged that on 6 November 2006, one of the First Defendant's tailing pipes ruptured, leading to the discharge of effluent which was high in acidic content into Chingola and Mushishima streams. This consequently led to pollution of the water source that feeds into the Kafue River which is the Plaintiff's source of fresh water. On 8 November 2006, the Environmental Council of Zambia (now ZEMA), wrote to the First Defendants instructing it to cease its operations in its leach plants in view of the pollution of the Kafue River. After consuming the polluted water, the Plaintiffs who suffered various illnesses took legal action against the defendants claiming:

1. That the first defendant was liable for discharging the effluent from its mining operations;
2. That the second defendant failed or neglected to carry out inspection or supervise the pipes in question, regularly to meet the required acceptable standards and ensure that no leakage or spillage occurred; and
3. The third defendant failed to take adequate measures to mitigate and control the effects of the pollution of water supply by maintaining sufficient water reserves.

On the first issue, regarding the liability of the first defendant, there were two components— civil liability for damages, and criminal sanctions. On civil liabilities, reliance was

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<sup>671</sup> *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Limited* [2006] ZAGPHC 47, par. 16.9.

placed on Mines and Minerals Regulations as well as the common law duty established in negligence. According to Regulation 23(2)(4):

The holder shall be liable for any harm or damage caused by any mining or mineral processing operation and shall compensate any person to whom harm or damage is caused.

This provision establishes the statutory duty of liability for causing harm or damage and compensation to anyone that is affected. The court also employed the common law principle of negligence stating that KCM owed a duty to the community around its breach of which would result in payment of damages. Relying on the principle established in *Ryland v Fletcher*, the court found that KCM had seriously failed to attain the required standard in that:

...they employed an ill-qualified environmental coordinator 'a craftsman in survey drafting', not schooled in environmental protection...They did not add lime to the discharge, when lime was abundant on the market, when they very well knew that, that act or omission would harm human and animal life and aquatic plants.<sup>672</sup>

The actions of KCM were viewed by the court with a sense of outrage. In the words of Musonda J:

There was gross recklessness, whether human beings died or not. They deprived the community in Chingola the right to life, which is a fundamental right in our Constitution. They disregarded environmental legislation at a time when there is concerted international effort especially by the United Nations Environmental Program (UNEP) to protect the environment. Such disregard for human life was received by this court with a sense of outrage.<sup>673</sup>

Multinational corporations are aware of international standards for sustainable mining practices. These standards require KCM to adhere to measures that are aimed at protecting the environment from the adverse effects of mining activities. Thus, the actions of KCM were reckless as they acted without regard to the fact that the community had access to the water for its survival. The court noted that protection of the environment is a global concern and as most countries have in place domestic legislation on the issue, there is not much room for the

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<sup>672</sup> As above, J20. The reasoning of the court was not based on the MMDA as it had not yet come into existence or its predecessor, EPPCA, which had no such provisions. The EPPCA did not contain provisions that allowed an affected person to take legal action and the remedy the court would give. The only requirement was for the polluter to take remedial action. According to sec. 90(1), 'where the Inspectorate establishes that pollution or despoliation is occurring or has occurred, the Inspectorate shall inform the polluter and order him to take appropriate abatement and control measures specified by the Inspectorate under this Act.' Further, sec. 90(2) provided, 'where the polluter is unable or unwilling to take the abatement and control measures required under subsection (1), the Council may take the measures and in such case, the cost incurred by the Council, shall be paid by the polluter.'

<sup>673</sup> As above, J20.



court' intervention, and so, judges now bear the responsibility to construe statutory provisions. In this matter, it was also argued that KCM breached sections 22 and 24 of the EPPCA and therefore, was liable to criminal sanctions too. Section 22 provided:

In this Part, unless the context otherwise requires "aquatic environment" means all surface and ground waters, but does not include water in installations and facilities for industrial effluent sewage collection and treatment.

Section 24 stated:

No person may discharge or apply any poisonous, toxic, or noxious or obstructing matter, radiation or other pollutant or permit any person to dump or discharge such matter or pollutant into the aquatic environment in contravention of water pollution control standards established by the Council under this Part.

The two provisions (sections 22 and 24) were interpreted by Musonda J who expressed the following views:

In this case Sections, 22 and 24 the former defines a pollutant, that later creates an offence to discharge or application of any poisonous toxic, or noxious or obstructing matter etc. It is my view the Environmental Protection and Pollution Control Chapter 204 the Laws of Zambia is self-sufficient to deal with the present situation. The plaintiffs have proved their case against the first defendant in Common Law and Statutory Law, that the first defendant was reckless and had no regard for human, animal and plant life.<sup>674</sup>

The reasoning of the court was correct and this is buttressed by the fact that sections 22 and 24, besides creating a duty on any person not to discharge pollutants into the environment, it also made it an offence to do so. The court, in recognition of this fact, found KCM criminally liable for causing pollution stating that:

The first defendant must bear moral, criminal and civil liability for this appalling tragedy. Here is a Multinational Enterprise, which has no regard for human life for the sake of profit and turned the residents of Chingola into "Guinea Pigs" and showed no remorse. In their countries of origin, such recklessness would have been visited by severe criminal and civil sanctions.<sup>675</sup>

The observation of the court was an affirmation of the duty that it had to protect the poor communities from the adverse effects emanating from mining activities. In exercising this

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<sup>674</sup> As above, J21.

<sup>675</sup> As above, J20.

duty, the court rightly said it was ‘...not too late to prosecute KCM and set an example’ especially that ‘INDENI was prosecuted in Ndola Principal Resident Magistrates Court for polluting Kaloko Stream...’<sup>676</sup> This implies that, besides civil sanctions, the court was willing to mete out criminal sanctions. However, the court restrained itself from doing so stating that, the ‘only hypothesis for a powerful multinational to supposedly act with impunity and immunity, is that they thought they were politically correct and connected.’<sup>677</sup> This demonstrates that, although the court was aware of its responsibility to protect the poor communities from the adverse effects on the environment caused by mining companies, it declined to mete out criminal sanctions but instead insisted on awarding damages. Its insistence on awarding damages was that it would deter other persons from polluting the environment.<sup>678</sup> This was a wrong approach by the court. The expectation would be that, where a wrong is punishable by law, such must be done. The court must not shy away from acting judiciously by raising political or other reasons for failure in its duties. The reasoning of Musonda J was noted in ***Dominic Liswaniso Lungowe and Others v Vedanta Resources Plc and Konkola Copper Mines Plc***, in which Coulson J said:

There is another aspect of KCM's likely stance which is material. I cannot discount the findings of Mr Justice Musonda in the Nyasulu litigation that KCM "was shielded from criminal prosecution by political connections and financial influence". That is an alarming finding. If in the past KCM has been shielded by political connections and financial influence in Zambia, as the judge found that they were, then that must be another factor relevant to the concerns that I have about the claimants obtaining access to justice in Zambia.<sup>679</sup>

The reasoning of Coulson J buttresses the point raised earlier– the court ought not to have made a mere pronouncement without remedying the problem. Its insistence on the political connection as a reason not to prosecute KCM was a grave error on its part demonstrating its inability to hold the mining company liable for its failure to comply with the set environmental standards.

On the second issue, it was that advanced that ECZ did not do regular inspections of the pipes to ensure that they met the required standards and that there was no leakage or

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<sup>676</sup> As above, J22.

<sup>677</sup> As above, J21.

<sup>678</sup> Justice Philip Musonda held, ‘I order KCM to pay Four Million Kwacha (K4m) to each plaintiff (2000 plaintiffs) as general damages. One Million Kwacha (K1m) as punitive damages, total Ten Billion Kwacha (K10 billion). This is to deter others who may discharge poisonous substances without diminishing their potency not to cause harm to the environment, human beings, animals, etc.’ – at J22.

<sup>679</sup> *Dominic Liswaniso Lungowe & Others v Vedanta Resources Plc & Konkola Copper Mines Plc* [2016] EWHC 975 (TCC), par. 197

spillage. The ECZ was mandated by law to carry out activities aimed at protecting the environment and pollution control.<sup>680</sup> Section 6(1) of the EPPCA stated:

Subject to the other provisions of this Act the functions of the Council shall be to do all such things as are necessary to protect the environment and control pollution, so as to provide for the health and welfare of persons, animals, plants and the environment.

Deciphering section 6(1) would mean that ECZ had the duty to protect the environment and control pollution. The basis for this provision was to safeguard the health and welfare of persons, animals, plants, and the environment. Despite such an immense obligation placed on ECZ and notwithstanding KCM's liability, the court exonerated ECZ stating that:

...[E]vidence of first defendant's negligence and absorbed second defendant who according to him had warned the first defendant and punished the first defendant by not giving them a year's licence. They had been asked to provide analytical reports of their discharge but did not comply. The second defendant could therefore not be said to have failed to perform their statutory duty.<sup>681</sup>

In the court's view, the action that ECZ took of reducing the period of KCM's licence from a year to six months, was sufficient to show that it had met its statutory obligation. This was not proper assessment of the statutory obligation placed on KCM by the EPPCA. Though the plaintiffs' counsel urged the court to make a finding that ECZ neglected its duty by failing to prosecute KCM as required under the EPPCA, the court rejected this view stating:

This very pleading explains the difficulty Environmental Council of Zambia as Governmental Agency not insulated from political control operate and operated under difficult circumstances. They did the best they could by shutting KCM operations. I therefore hold that the case against second defendant is not proved as I find no negligence on their part.<sup>682</sup>

It can be seen that KCM was only punished for harm caused to the plaintiffs and not the damage caused to the environment. The court discharged ECZ from any liability on the grounds that the Agency operated under difficult circumstances. While this may be correct, it is not an excuse for the Agency to fail to discharge its statutory responsibilities. It should have been held liable for such failure. A proper assessment would have been expected from the court especially where there was blatant disregard for the environment by KCM. It was heard by the Parliamentary Committee that:

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<sup>680</sup> Sec. 6(2)(t), EPPCA.

<sup>681</sup> *James Nyasulu* case, J19.

<sup>682</sup> As above, J22.

In line with the provisions of EPPCA, ECZ considered various options in dealing with this matter; they could either prosecute KCM or compel the company to clean up the pollution and pay for any damage arising therefrom. Considering that the law provided that the maximum penalty that any court could impose for such a breach was K10.8 million and taking into account the socio-economic implications of a lengthy shut down of KCM operations, ECZ chose not to prosecute KCM. Instead, ECZ instituted regular physical inspections of the lime stock levels at the company and ordered them to undertake the following remedial actions....<sup>683</sup>

This observation shows that ECZ had an opportunity to prosecute KCM so as to ensure protection of the environment, however, chose not to. One would have expected the court to recognise the failure by ECZ to uphold the law and address the wider environmental harm caused by pollution instead of focusing solely on the harm suffered by the plaintiffs. Taking a firm stance against ECZ would have had the effect of reducing non-performance of the Agency and deter the negative political influence in the exercise of its legal mandate.

On the third issue, it was contended that the third defendant, Chingola Municipal Council, had not taken appropriate steps to control and mitigate the effects that the pollution of the source of water supply caused. Initially, Chingola Municipal Council was made party to the proceedings, however, the local authority was disjoined from the proceedings on grounds that water was not supplied by it but by Mulonga Water, a private company. From the proceedings it was observed:

...in cross-examination of PW1, the witness stated that Chingola Municipal Council is not a supplier of water to Mulonga Water, which was a limited company. Mr Chiteba graciously conceded. The court disjoined the third defendant. The action therefore is against the first and second defendants.<sup>684</sup>

Disjoining the local authority from the proceedings by the court was improper given the overarching duty placed on it under the Public Health Act which obliges it to take all lawful, necessary and reasonably practicable measures—

- (a) for preventing any pollution dangerous to health of any supply of water which the public within its district has a right to use and does use for drinking or domestic purposes (whether such supply is derived from sources within or beyond its district); and

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<sup>683</sup> Parliamentary Report of the committee on energy, environment and tourism for the first session of the Tenth National Assembly appointed on 8 November 2006, 10.

<sup>684</sup> As above, J3.

- (b) for purifying any such supply which has become so polluted; and to take measures (including, if necessary, proceedings at law) against any person so polluting any such supply or polluting any stream so as to be a nuisance or danger to health.<sup>685</sup>

This duty reveals a three prong requirement: first, a local authority is required to prevent any pollution that affects the water supply; second, where such water has been polluted, the local authority is mandated to purify any such supply; and third, take measures against any person who pollutes any such supply or stream so as to endanger health. On the provisions of the Public Health Act, the local authority failed in its statutory duties and should have been held accountable for not taking action against KCM. However, the court seems to have taken a narrow view. The conclusion is that it failed in its duties to enforce the provisions of the law as stipulated.

In 2012, an appeal was lodged at the Supreme Court challenging the decision of the High Court raising four grounds of appeal, namely:

1. the court erred in law and fact when it order the company to pay damages to the Respondents without making a finding of negligence;
2. the court erred in law and fact when it held that the company had disregarded environmental legislation;
3. the court erred in law and fact in holding that the documents of the Respondent's bundle of documents amounted to medical evidence that proved all of the Respondent's cases; and
4. The court misdirected itself in law and fact when it made a uniform award of damages to all the respondents.

On the first ground, the appellant argued that the lower court made a finding of liability without having established elements of negligence. It was contended that where the elements have not been met, an action on the basis of negligence must fail. Further, it was advanced that the respondents drew water from Mulonga Water and Sewerage, but the court did not make a finding on whether the respondents were owed a duty by the appellants. Mwanamwambwa J observed:

From the provisions of section 24 of the Environmental Protection and Pollution Control Act, we are satisfied that the Appellant owed the Respondent a statutory duty of care. This provision clearly

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<sup>685</sup> Sec. 78, Public Health Act, Chapter 295 of the Laws of Zambia.

forbade any person from discharging pollutants into aquatic environment. We, therefore, do not find merit in the Appellants argument that the learned trial Judge did not make a finding on whether the Appellant breached the duty of care it owed to the Respondent.<sup>686</sup>

On the second ground, the appellant contended that it did not owe a duty of care as it was exempted from statutory limits at the time of the incident. Disagreeing with the appellant, the court was of the view that, the licence issued by the ECZ to the appellant gave clear guidelines on the contents of the effluent the appellant was allowed to discharge into the aquatic environment and the appellant was clearly in breach of the licence.<sup>687</sup>

On the third issue, it was advanced that the court erred in law and fact when it held that the Respondent's bundle of documents amounted to medical evidence that proved all of the Respondent's cases. The court agreed with the appellant that the lower court misdirected itself by awarding damages on the basis that unidentified medical reports proved the respondents' case.

On the fourth issue, the appellants' borne of contention was that due to the numerous degrees or varying types of injury suffered, the court could not make a global finding for all of them. It was settled by the court stating that the matter was a class action in which the respondents had a common grievance— the appellants had polluted their water source as a result of which they suffered varying ailments for which they were seeking legal redress.<sup>688</sup> Further, it was stated that:

...the learned trial Judge should have ended at making a declaration as to the Appellant's liability and then ordered each of the Respondents carries out an individual assessment to ascertain the extent of the injury suffered and the quantum of damages due.<sup>689</sup>

Ultimately, the court concluded that the award of damages made by the High Court has the danger of conferring a benefit on other respondents, who would not otherwise have been entitled to such damages depending on the extent of the injury suffered. In the words of Mwanamwambwa J:

It was a serious misdirection on the part of the learned trial Judge to award damages to 2001 Respondents on the basis of 12 un-identical medical reports. Having established that the Appellant had

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<sup>686</sup> *Konkola Copper Mines (KCM) PLC v James Nyasulu & 2000 others* [Appeal No. 1 of 2012], J10.

<sup>687</sup> As above, J13.

<sup>688</sup> As above, J17.

<sup>689</sup> As above, J19.

polluted the Respondents water source the learned trial judge should have referred the matter to the learned Deputy Registrar for assessment. Our considered view is that the award for damages made by the learned trial Judge has the danger of conferring a benefit on other Respondents, who would not otherwise have been entitled to such damages depending on the extent of the injury suffered.<sup>690</sup>

The court could only address the matters that arose in the lower court (High Court), hence, the effect of the judgment was merely a reduction in damages awarded by the High Court. It is asserted that the challenge faced by the courts is its failure to embrace principles of environmental law, which are in consonance with human rights law. It is posited that the court's role is to expansively interpret issues in matters that come before it and not glossing over them. In handling such matters, the court should balance environmental and investment promotion considerations in its judicial decision-making. Doing so would demonstrate that the courts play a significant part in promoting compliance and implementation of environmental regulations.

#### **4.5.2 Martha Muzithe Kangwa and 27 others v Environmental Council of Zambia, NASLA Cement Limited and Attorney General**

The facts of this case are that on 20 February 2008, the 2<sup>nd</sup> respondent was issued with an investment licence by the ZDA. Thereafter, the 2<sup>nd</sup> respondent acquired Farm No. 755, Makeni, Lusaka for purposes of setting up a cement plant as the said land contained a substantial amount of lime deposits, which is a major raw material in the production of cement. On 27 June 2008, the 2<sup>nd</sup> respondent conducted a scoping exercise at the project site in order to get the opinions of the persons who would be affected by the project. The 2<sup>nd</sup> respondent subsequently prepared an Environmental Impact Statement in August 2008, which was submitted to the 1<sup>st</sup> respondent. On 5 December 2008, the 1<sup>st</sup> respondent approved the 2<sup>nd</sup> respondent's project, with conditions.

On 23 October 2009, the appellants wrote a letter to the then Minister of Tourism and Arts complaining that the 2<sup>nd</sup> respondent did not consult them during the formulation of the Environmental Impact Statement. On 23 November 2009, the Minister conducted a visit at the site of the project and consequently ordered the 1<sup>st</sup> respondent to suspend the project on account of the appellants' complaints. By letter dated 24 November 2009, the 1<sup>st</sup> respondent suspended the 2<sup>nd</sup> respondent's cement project on grounds that the stakeholders consulted in

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<sup>690</sup> As above, J21.

the scoping exercise of 27 June 2008, did not reflect those owning properties in the area surrounding the project.

In view of this situation, the plaintiff sought a declaration that the Environmental Impact Statement prepared by the second defendant was fictitious, inaccurate and fraudulent and that the first defendant had no authority to approve a mining and mineral processing project because the location of the project was less proportionate for a mining project of that magnitude and as such, the plant be relocated. Besides the declaration sought by the plaintiff, this case brought about two main issues: first, the refusal of an action on grounds of absence of demonstrable harm; and second, conducting of the project was done in public interest.

On the first issue, the court was of the view that an action could not be brought before it as there was no demonstrable harm. In the words of Musonda J:

The first defendant suspended the second defendant's operations twice, imposed conditions to mitigate environment degradation...There was unanimity by these Expert Agencies that the project was environmentally friendly. The plaintiffs lamentably failed to show any demonstrable harm...This action has been brought prematurely when there has been no demonstrable harm. For these reasons, the action is dismissed with costs to be taxed in default of agreement.<sup>691</sup>

The court did not provide the meaning of the word 'demonstrable harm' or its constituent elements. The natural meaning of the term could be that it is harm which is capable of being proved. Interpreting the term in such a manner would entail that, where harm cannot be proved, an action for damages may be futile at law. The plaintiff asserted that the agricultural area was being turned into a mining area without consultation or research on the negative impact that cement production would have on egg, milk production, boreholes, and pollution. The court, however, dismissed it on the basis that the harm likely to be suffered was not proved. The question would be, should there be harm suffered before a claim can be brought? Recent tenets of environmental law are more inclined towards harm preventive measures. It is thus posited that the insistence by the court on proving 'demonstrable harm' contradicts the precautionary principle which seeks to protect the environment by avoiding environmental damage before it occurs rather than by attempting to remedy such damage after it has occurred.

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<sup>691</sup> As above, J59-60.



A fundamental basis of environmental law is that prevention is superior to remediation because some harm is irreparable, and also, clean-up is more costly than prevention. In this context, the precautionary principle is particularly relevant for three reasons: first, it is intended to apply in situations of uncertainty i.e. where there is risk or doubt, it is therefore relevant at pre-trial stage of litigation where the court is acting on an incomplete record and dealing with one form of uncertainty. Second, it has procedural impacts, such as on the burden and standard of proof, and an emphasis on citizen empowerment. Third, it challenges dominant ways of thinking— to change from a presumption that development or innovation is always good requires us to assess risk in explicit detail, and encourages erring on the side of caution to protect the environment.<sup>692</sup> The court, however, decided to embrace the polluter pay principle, which is not encouraged in recent environmental pollution discourse. This in itself marks a missed opportunity by the Court to enforce the prevention principle.

On the second issue, it was contended that the project should be allowed as it was in the public interest. The second respondent submitted the advantages of the project as:

Creation of more than 300 jobs, provision of cheap cement in Zambia, addition to tax revenue, add to the manufacturing industry improve on the social amenities in the area, help to reduce poverty levels in Zambia.<sup>693</sup>

The stated benefits were at the expense of environmental harm especially to the people who lived in the area where the cement plant would be located. The challenge placed on the court was to create a balance between the benefits that the investment would bring and the sanity of the environment where such a project would be located. In this manner, the court was faced with one question – should the project be allowed to proceed? If so, was the project in the public interest? Upon due consideration of the arguments made, Musonda J posited:

I order the project to proceed and compliance with the first defendant (ECZ) dictated measures to mitigate any environmental degradation. To order otherwise will discriminate first defendant as Lafarge is even closely located to Chilanga Golf Club, police station, shopping complex more populated than areas surrounding NASLA Cement project. You have 300 employees who will lose employment and they

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<sup>692</sup> H McLeod-Kilmurray 'Lowering barriers to judicial enforcement: civil procedure and environmental ethics' in L Paddock, D Qun, LJ Kotze, DL Markell, KJ Markowitz & D Zaelke *Compliance and enforcement in environmental law: towards more effective implementation* (2011) 294-295.

<sup>693</sup> As above, J29.

have families to look after. The public interest is served by allowing the project. If there are any environmental violations they will be remedied....<sup>694</sup>

In the mind of the court, the project could proceed on the grounds that there were measures to mitigate any environmental degradation. Although there would be mitigatory measures spelt out in the EIA, there were none that addressed their peculiar concern— effect posed on boreholes, egg and milk production. The court did not address its mind to this concern as it was preoccupied with the requirement that the appellants prove ‘demonstrable harm’. The consequence of the court's reasoning is that any interest may be overridden by ‘public interest’.

Unfortunately, the court did not attempt to define what was meant by ‘public interest’ except stating that ‘You have 300 employees who will lose employment and they have families to look after. The public interest is served by allowing the project.’ It would be justifiable to infer that public interest refers to the benefit that the project confers on an economy— in this case, creation of employment and not the interest of those that were likely to be negatively affected by the project. However, this may not be the meaning of the term ‘public interest’. In fact, defining the term is an arduous exercise and the meaning thereof is devoid of clarity. In matters where the issue has been raised, the courts have struggled to define the term leading to interchanges with ‘public purpose’ or ‘public use’. In the case of **William David Carlisle Wise v Attorney General**, Bwalya J laments:

...what constitutes public use frequently and largely depends upon facts surrounding the subject. The issue of public use is a judicial question and one of law to be determined on the facts and circumstances of each particular case.<sup>695</sup>

In **Nkumbula v Attorney General**, the court attempted to create a balance between ‘public interest’ and ‘public benefit’ when Baron J stated that:

What is in the public interest or for the public benefit is a question of balance; the interests of the society at large must be balanced against the interests of the particular section of the society or of the individual whose rights or interests are in issue, and if the interests of the society at large are regarded as sufficiently important to override the individual interests then the action in question must be held to be in the public interest or for the public benefit.<sup>696</sup>

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<sup>694</sup> As above, J61.

<sup>695</sup> [1990-1992] Z.R. 124 (HC).

<sup>696</sup> [1972] Z.R. 204.

Deciphering the two cases, the meaning of 'public interest' appears to be subject to determination based on the facts and circumstances. This would mean that whereas certain actions can be said to be in the public interest, others may not be. However, this requires that a balance is struck between the interest of society at large and that of a particular section of it. In this case, the court' inclination was the interest of a particular section of society– the cement company, and not interest of society– the residents of the area where the mine would be located. The issue is not the 300 people that the project was likely to employ but the others who would be negatively affected by the project.

In 2014, following the decision of the High Court, the appellants brought an action against the respondents in the Supreme Court contending that:

1. The Environmental Impact Statement Report prepared by the second respondent was fictitious, false, a misrepresentation and in breach of the EPPCA.
2. The first respondent had no authority to consider and approve EIA Reports relating to a mining and mineral project as per Statutory Instrument No. 28 of 1997.
3. The extent of Plots 37a and 38a of Farm 755 Makeni on which the proposed cement plant was located is less proportionate for a mining project of the second respondent's magnitude.

On the first issue, it was argued by the appellant that the EIS Report prepared by the respondent was false as they were not consulted. In support of their claim, the appellant cited Regulation 10(1) of the Environmental Pollution and Control (Environmental Impact Assessment) Regulations which states that:

The developer shall, prior to the submission of the Environmental Impact Statement to the council, take all measures necessary to seek the views of the people in the communities which will be affected by the project.

This provision places the responsibility to consult with the public on the person seeking to commence a project. It was argued by the appellant that the lower court erred when it restricted consultation to title holders. The court, agreeing with the submission of the appellant, Woods J observed that:

The learned trial Judge clearly misdirected himself when he considered the aspect of title as this provision does not restrict consultation to title holders only. It is also our considered view that restricting

consultation to title holders would also narrow the scope of the tort of nuisance to litigants who have title deeds.<sup>697</sup>

The setting up of a cement plant had the potential to affect those who lived in the area. Regulation 16 requires the developer to obtain views of those who would be affected by the implementation of the project in their community. Thus, the view of the court was well-founded.

On the second issue, it was argued that the first respondent had no authority to consider and approve EIA Reports relating to a mining and mineral project. It was found that ZEMA properly approved the project and attached conditions to mitigate any harmful effects it would have on the environment, which the second respondent agreed to implement. On the aspect of mitigatory measures being imposed by ZEMA, the court expressed the view that:

The appellants failed to prove that the mitigatory measures imposed by the 1<sup>st</sup> respondent were insufficient to curb any harmful effects the project may have on the environment. We agree with the learned trial Judge that the appellants failed to show any demonstrable harm that they were likely to suffer should the project proceed.<sup>698</sup>

The court decided that this ground of appeal lacked merit and dismissed it. This reasoning shows that the court made no effort to delve into what would amount to 'demonstrable harm' or what it constituted. Instead, the court chose to avoid the issue and merely echoed the words of the learned trial judge. It is submitted that the conclusion of the court is in line with the finding of the lower court which too was devoid of proper construction of applicable principles.

On the third ground of appeal, it was stated that the land on which the proposed cement plant was to be located was less proportionate for a mining project. Although the appellants argued in this manner, the court rejected the argument 'that 33 acres of land is insufficient for the mining of limestone as this argument is not supported by evidence on record.'<sup>699</sup>

Besides the main issues raised on appeal, the impact of mining activities on the environment was also brought into question. In the High Court, it was submitted by expert

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<sup>697</sup> *Martha Muzithe Kangwa and 29 others v Zambia Environmental Management Agency, NASLA Cement Limited and Attorney General* SCJ No. 49 of 2014 at 1159.

<sup>698</sup> As above, 1187-1188.

<sup>699</sup> As above, 1171.

witnesses that it was not safe to conduct blasting near buildings and human habitation as the vibrations from the blasting could damage buildings. The Court held that:

The learned trial Judge observed that the appellants' expert witnesses opinions were not a response to the opinions given by the government experts on the project as some of them did not have sight of the Environmental Impact Statement, The Environmental Management Plan and the letter approving the project setting out conditions to mitigate any negative impact the project would have on the environment. We cannot fault the learned trial Judge for arriving at this conclusion.<sup>700</sup>

It was argued that the second respondent outsourced another company to carry out the mining component of the first respondent, hence, this necessitated the need for it to carry out an EIA. Rejecting this argument, Woods J reiterated:

In our view, the fact that the 2<sup>nd</sup> respondent chose to outsource the mining component of its project does not amount to R&M Prospecting Company Limited transferring its mining licence to the 2<sup>nd</sup> respondent...Our considered view is that the Environmental Impact Assessment carried out by the 2<sup>nd</sup> respondent in terms of the impact of the mining activities on the environment was sufficient. We do not see the necessity for R&M Prospecting Company Limited to carry out a separate Environmental Impact Assessment in respect of the same project.<sup>701</sup>

The court dismissed the whole appeal in its entirety.<sup>702</sup> The Supreme Court had an opportunity to rectify the short comings in the High Court' judgment but did not do so. The judgement demonstrates that public interest does not lie in protecting the environment, and man who is at the centre of it, but the economic needs of the country i.e. employment creation. The court failed to create a balance between promotion of investment and environmental protection. Although the court insisted that the person affected proves the harm suffered, it cannot be so.<sup>703</sup> While it is observed that the court addressed the issues presented to it, the reasoning thereof does not show that particular attention was paid to the need to protect the environment. In many respects, much as their reasoning took a different route from that of the lower court, they still reached the same conclusion. The interpretation by the courts of such

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<sup>700</sup> As above, 1168-1169.

<sup>701</sup> As above, 1163-1164.

<sup>702</sup> Dismissing the matter, Judge Wood, stated: 'The 1<sup>st</sup> respondent properly approved the project and attached conditions to mitigate any harmful effects on the environment, which the 2<sup>nd</sup> respondent has agreed to implement. The appellants failed to prove that the mitigatory measures imposed by the 1<sup>st</sup> respondent were insufficient to curb any harmful effects the project may have on the environment. We agree with the learned trial Judge that the appellants failed to show any demonstrable harm that they were likely to suffer should the project proceed. These two grounds of appeal lack merit. We accordingly dismiss them.'— p. 1187-1188.

<sup>703</sup> In the High Court case, Justice Musonda concluded that 'There was unanimity by these Expert Agencies that the project was environmentally friendly. The plaintiffs lamentably failed to show any demonstrable harm. In any event the Agencies especially the first defendant can remedy any harm anytime.'— *Martha Muzithe Kangwa and 29 others v Zambia Environmental Management Agency, NASLA Cement Limited, and Attorney General* [2008] HP 245, J60.

matters militates the development of the field of environmental law, especially where persons affected attempt to seek a remedy for the breach of their right to a safe, clean and healthy environment.

#### **4.5.3 Zambia Community Based Natural Resources Management Forum, Zambia Institute of Environment Management, Zambia Climate Change Network, Chalimbana River Water Conservation Trust, Green Living Movement, David Ngwenyama v Attorney General and Mwembeshi Resources Limited**

In this case, Mwembeshi Resources Limited applied to the relevant authorities to commence copper mining in the Lower Zambezi National Park. Following a protracted process, the Minister of Water Development, Sanitation and Environmental Protection granted Mwembeshi Resources permission to commence large scale mining activities in the National Park. Subsequent to the Minister's approval, the Appellants appealed to the Court raising three main grounds.

The first ground raised was that the decision of the Minister was erroneous as he completely ignored the findings and recommendations of ZEMA. The appellants argued that when the Minister made his decision to approve the project, he was aware that ZEMA had rejected the 2<sup>nd</sup> Respondents project on grounds that the adverse effects on the environment could not be remedied. Further, following the initial rejection of the project by ZEMA, the Minister received fresh submissions from the 2<sup>nd</sup> Respondent which he asked ZEMA to consider but these submissions were also thrown out. The Minister mainly dwelt on political considerations and rejected the advice of ZEMA and other experts. The Respondents counter argued that the Minister is not obliged to accept the findings or recommendations of the person conducting the inquiry when determining an appeal or review. The word 'recommendation' in its natural meaning means that the Minister had a choice on whether or not to accept the recommendation meaning that his choice to approve the project cannot be challenged.

In support of this contention, the Appellants cited section 115(2)(c) of the EMA. It is significant to point out that the EMA obliges the Minister, where an appeal or application is received for review, to consider and decide it. Upon consideration of the appeal or application, the Minister may: (a) allow in whole or in part; (b) dismiss it; or (c) refer it back to

the Board requesting it to consider some fact or issue.<sup>704</sup> Section 115(2)(c) states that: 'in determining a review application, the Minister shall have regard to, but is not bound by, the findings and recommendations of the person conducting the inquiry.' The natural and ordinary meaning of this provision is that findings and recommendations made have no binding effect on the Minister. The word 'recommendation' means that the Minister has a choice on whether or not to accept the recommendation— it is his choice to approve the project and cannot be challenged. Deciding on the interpretation of section 115(2)(c), Kondolo J observed that:

Regarding the discretionary powers of the Minister, the Respondents submitted that section 115 of the Environmental Management Act, 2011 was clear that the Minister was not bound by any recommendations made by any person and on that basis alone, this appeal should fail.<sup>705</sup>

The reasoning of the Court was based on the Supreme Court's decision in ***Minister of Information and Broadcasting Services and Another v Chembo and Others***, in which Sakala CJ observed:

In our considered view, the foregoing meanings of the word "recommendation" do not lead to some result which cannot reasonably be supposed to have been the intention of the legislature. It is and was unnecessary to look for some other possible meaning of the word; the natural and ordinary meaning suffices. Indeed, the issues of morals, democracy, or freedom of speech were unnecessary in defining the word "recommendation"...We are satisfied that the word "recommendation" in the context of the two sections connotes or implies a discretion in the person to whom it is made to accept or reject the "recommendation".<sup>706</sup>

Although section 115(2)(c) is clear, the issue that was not addressed by the Court was the meaning of 'shall have regard to'. It is posited that 'shall have regard to' implies a mandatory obligation to consider the findings and recommendation of the person making the inquiry. However, by including the words 'but is not bound' simply negates the mandatory obligation. The question would be— why is the Minister obliged to have regard to the findings and recommendation of the person making the inquiry and yet not be bound? This is perhaps what the Court ought to have inquired into and also what criteria the Minister used in making the determination considering that the section 115(1) of the EMA is silent. Further, it should have laid what could be the standard approach given that, subsection 2(a)(b) makes it clear that the Minister is guided by principles laid down in section 6, the purpose of the EMA, and

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<sup>704</sup> Sec. 115(1), EMA.

<sup>705</sup> *Zambia Community Based Natural Resources Management Forum, Zambia Institute of Environment Management, Zambia Climate Change Network, Chalimbana River Water Conservation Trust, Green Living Movement, David Ngwenyama v Attorney General and Mwembeshi Resources Limited* [2014] HP/A/006, J22.

<sup>706</sup> *Minister of Information and Broadcasting Services and Another v Chembo and Others* [2007] ZMSC 11.

applicable environmental policies, guidelines and standards which have been published by ZEMA. The Court instead simply relied on the *Chembo* case decided that the word 'recommendation' implied a discretion. This was done without distinguishing the *Mwembeshi Resources* from the *Chembo* case, in which, in the latter case, the Minister does not have technical expertise in the matter. It may well be stated that, in environmental matters, it is imperative that, if technical expertise is available to the Minister by the person making the inquiry, then the Minister should be bound to follow the advice.

The second issue raised was that, by ignoring the findings and recommendations of ZEMA, the Minister had undermined the environmental laws. It was argued by the Appellants that it was mandatory that the Minister, when determining a review application, should have had regard to the objective of the EMA, and other environmental policies and guidelines.<sup>707</sup> However, the Minister premised his approval on issues relating to employment, technology and wildlife management. Ruling on this issue, the Court said:

The Appellants replied by arguing that the Minister does not have unfettered discretion because it is mandatory that his decisions are made with regard to section 6 of the Act and to relevant environmental policies, guidelines and standards published by the Agency. *I find that the Appellants have on this point raised an issue that warrants further inquiry.*<sup>708</sup> [Emphasis mine]

It is argued that a public officer does not have unfettered discretion and thus, the actions of such an officer are subject to restraint by the court. Although discretion entails that the Minister has the power to make a decision about whether to allow or not to, of an application made for review, this must be done in consideration of other elements, such as those envisaged under section 6 of the EMA. It is thus the responsibility of the court to compel public officers to act judiciously in matters where the public have an interest. In the case *in casu*, the court did not impugn the discretion of the Minister despite making such an observation. Further, though the court observed that the actions of the Minister warranted 'further inquiry', nothing more than a mere statement was made.

The third issue raised was that the decision of the Minister was erroneous as the mining licence was issued before an EIA was undertaken, as such, it could not be allowed to commence mining activities in the National Park. The matter was brought before the Court at the time that the MMDA of 2008 was the applicable law. Under that Act, section 25(3)(e)

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<sup>707</sup> Sec. 6 of the EMA lays out the principles upon which environmental management is anchored on.

<sup>708</sup> *Zambia Community Based Natural Resources Management Forum case*, [2014] HP/A/006, J22.



required the applicant of a large-scale mining licence to include an environmental management plan, proposals for pollution prevention, waste treatment, protection of water resources and land reclamation, and the elimination or minimising of negative impacts that mining operations may cause on the environment. Section 26(1)(d) obliged that the Director, in considering such an application, to take into account– the EMP submitted by the applicant and whether it conformed to the stipulations and set domestic standards regarding environmental management.

In addressing this issue, the court observed that there is no law that prevents a party from being issued with a mining licence before completion of the EIA. In the court's view, 'what was forbidden was to commence mining operations before the EIA.'<sup>709</sup> The decision of the court was influenced by the provisions of the MMDA of 2008 and its findings, then, were valid. However, this does not seem to be the current position following the repeal of the MMDA of 2008 in 2015. Section 31(1) of the MMDA of 2015 mandates the Committee to take into account the proposed programme of mining operations which should be adequate and compliant with the decision letter in respect of the environmental project brief or approved by the ZEMA. Unlike section 25(3)(e) which did not require a decision letter issued in respect of the environmental project brief or EIA, section 31(1) obliges the applicant to comply the decision letter. This would mean that, where a decision letter has been issued, the applicant has authority to commence the mining activity subject to the concurrence of the Committee. The Committee is obligated to attach to a mining licence as part of the conditions of the licence the applicant's undertaking for management of the environment in the mining area.<sup>710</sup>

The fourth issue was that the Minister erred when he approved large scale mining without approval from the surface rights holders– Zambia Wildlife Authority, which falls under the Ministry of Tourism and Arts. The Zambia Wildlife Act of 1998<sup>711</sup>, under section 13(1)(a), permitted the granting of a mining right in a National Park. The assigning of such a right was on condition that an EIA is conducted. Section 13(2) made the exercise of such a right subject to section 24(1), and the latter provided thus:

Any person who holds any mining rights in, over, under or in respect of any land comprised in a National Park, may enter and exercise the same within the National Park upon his giving prior written notice to

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<sup>709</sup> As above, 15.

<sup>710</sup> Sec. 32(2)(e), MMDA.

<sup>711</sup> This was the applicable law at the time the matter came up in court. However, this Act has been repealed by the Zambia Wildlife Act of 2015.

the Director-General of his intention to so enter the National Park and to so exercise his right in it and upon compliance with any conditions which the Authority may impose....

Section 24(1) permitted any person who holds mining rights in a National Park to enter and exercise such rights provided there was prior notice obtained from the Authority.<sup>712</sup> The Authority was obliged by the Act not to impose any conditions that would be contrary to the nature of any mining right held.<sup>713</sup> Thus, conditions that would be consistent with the nature of the mining right included those relating to measures specified under an environmental impact assessment approved by the ZEMA.<sup>714</sup> Further, the Minister, after consultation with the Authority, was permitted to prescribe, control, regulate or prohibit land development or mining within any National Park, and could impose any terms and conditions as deemed fit.<sup>715</sup>

It is not in doubt that authority had not been granted by the Authority permitting the mining rights holder to exercise the rights thereof. This made the conclusion, on this issue, by the court plain and simple. What the respondent had wanted to do, was to exercise mining rights without prior approval.

In 2015, the MMDA and Zambia Wildlife Act of 1998 were repealed. The question would be whether the court would still have made the same conclusion in light of the amendments. The current MMDA mandates the Committee, in considering an application for a mining right, to take into account, if land in question is located in a National Park, Community Partnership Park, Game Area, bird or wildlife sanctuary, National Forest, Local Forest, Botanical Reserve or private forest, that the applicant first obtains the necessary written consent of the appropriate authority.<sup>716</sup> Thus, the holder is not permitted to exercise any rights under the MMDA on a land found in a National Park, Community Partnership Park, Game Area or a bird sanctuary without complying with the Zambia Wildlife Act (ZWA), of 2015.<sup>717</sup>

The ZWA does not prevent or restrict the granting in any land within a National Park, Community Partnership Park or bird or wildlife sanctuary of any mining right or its enjoyment.<sup>718</sup> The Act requires that such a right be not granted unless an EIA has been

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<sup>712</sup> Sec. 24(3) made it an offence for any person who entered any National Park without first giving notice to the Director-General or who failed to comply with any condition imposed by the Authority.

<sup>713</sup> Sec. 24(1).

<sup>714</sup> Sec. 24(2).

<sup>715</sup> Sec. 44(1)(2)(i).

<sup>716</sup> Sec. 22(1)(c).

<sup>717</sup> Sec. 52(1)(h).

<sup>718</sup> Sec. 16(1)(a).

done.<sup>719</sup> The exercise of a mining right in such an area is however conditional.<sup>720</sup> The Act requires that, where it feels that a proposed or existing plan or activity of the Government, an organisation or person is likely to pose a negative effect on wildlife found in a National Park, Community Partnership Park, bird or wildlife sanctuary, Game Management Area, may request the Minister that a wildlife impact assessment be conducted.<sup>721</sup> Where the Minister requires an EIA to be conducted, such shall be done in line with the procedures specified under the EMA, taking into account— (a) existing or anticipated impact upon wildlife that is likely to be threatened; and (b) any endangered or endemic species that are or may be affected.<sup>722</sup> In comparison with the Act of 1998, the ZWA of 2015 has brought in further requirements – wildlife impact assessment. Thus, the court would have still been on firm ground.

In the delivery of a ruling in this matter, the concerted view of the court was expressed in the following manner:

I also find that, if this Stay of Execution is lifted, the appeal would become nugatory and rendered the status of a mere academic exercise because the project entails large scale mining which might seriously deface or otherwise affect the environment. On the basis of the foregoing, the Stay of Execution granted to the Appellants on 4<sup>th</sup> February 2014 is upheld.<sup>723</sup>

The upholding of the Stay of Execution granted to the Appellants demonstrates the court' awareness of issues before it. It also establishes that section 115(2) of the EMA is defective as it permits the Minister to disregard ZEMA' and other experts' recommendations on an unfounded basis. This allows a Minister to consider any reason deemed fit – including political.

#### **4.5.4 Doris Chinsambwe and 65 others v NFC Africa Mining**

In this matter, the plaintiffs were farmers and occupiers of land through which the Musakashi stream passes. The plaintiff alleged that the defendant, a mining firm operating within their area, had polluted the stream causing damage to the crops due to its failure to contain the

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<sup>719</sup> Sec. 16(2) provides that, '(2) A mining right shall not be granted in a National Park, Community Partnership Park or bird or wildlife sanctuary without an environmental impact assessment conducted in accordance with procedures specified by the Environmental Management Act, 2011, and which procedures shall take into account the need to conserve and protect— (a) the air, water, soil, flora, fauna, fish, fisheries and scenic attractions in or on the land over which the right is sought; and (b) features of aesthetic, cultural, architectural, archaeological, historical or geological interest in or on the land over which the right is sought.'

<sup>720</sup> Sec. 16(3).

<sup>721</sup> Sec. 38(1).

<sup>722</sup> Sec. 38(2).

<sup>723</sup> As above, 22.

tailings from its mining activities.<sup>724</sup> In their claim for damages, the plaintiffs relied on section 87 of the MMDA which places strict liability on mine owners who causes damage from their mining or minerals processing operations.

The court's view was that this provision raised a statutory duty of care which is distinct from the duty of care in negligence. In addressing the issue, Maka-Phiri J said:

On the facts of the case, it is my considered view that the defendant owes the plaintiff a duty of care by ensuring that the water levels in the tailings dam are properly maintained to avoid any overflow thereby causing flooding downstream. The defendant also has a duty to ensure that the stream is not chemically polluted as it discharges its effluent in the stream. On the findings herein, it is my considered view that by causing the plaintiff's gardens to flood with water from its tailings dam, the defendant breached its duty of care...I am satisfied that the defendant is liable for...the consequential damage or loss and should make good the loss.<sup>725</sup>

Besides finding the mining firm liable and ordering compensation, the court also observed that ZEMA had acknowledged the environmental pollution problems experienced in Musakashi stream caused by the defendant's tailings dam. However, the considered view of ZEMA was that the problems could only be solved by developing a new tailings dam by the defendant who gave a blind eye to the fact that the local farmers depended on the stream for their livelihood.<sup>726</sup> It is not in doubt that ZEMA was aware of the problems that the tailings from mining operations were causing on the environment. Instead of waiting on the mining firm to construct a new tailings dam, something that the firm was not eager to do, enforcement measures under Part X could have been invoked by ZEMA, which it did not do. It was erroneous for the court not to hold ZEMA liable under the EMA for not taking remedial measures or action against the mining firm.

#### **4.6 Conclusion**

The primary objective of the chapter was to critically assess the effectiveness of institutions that have been put in place to ensure accountability of the mining companies with respect to the adverse effects of their activities on the environment and human rights. These institutions have been created to ensure enforcement of environmental regulations and human rights.

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<sup>724</sup> *Doris Chinsambwe and 65 others v NFC Africa Mining* [2014] HK 374.

<sup>725</sup> As above, J16.

<sup>726</sup> As above, J15.

It is argued that enforcement of environmental provisions and human rights protection can only be attained where the community is aware of their rights. This would allow them to assert their rights. However, this may not be enough and so, the work of interest groups or NGO's becomes significant in championing enforcement of environmental regulations and ensuring that ZEMA and MSD are proactive. Also, an active judicial system which promotes public interest litigation is crucial to the attainment of a clean, safe and healthy environment. It is clear from the interpretation adopted by the courts that the decision does not, in most instances, reflect international practices. This is because the interpretation of environmental law by judges is based on either the knowledge that they gained some ages ago or their limited appreciation of the field.

It is suggested that specialised training for judges must be conducted in order to enhance their knowledge that would, in turn, further their interpretation of Environmental Law and its principles. As a long term measure, there must be creation of an environmental court, as a specialised division of the High Court. The judges of this court must be persons that are specialised in the field of environmental law. This is the practice in other African states such as Ghana and Kenya.

## Chapter 5

### Mining and environmental frameworks in SADC states

#### 5.1 Introduction

The mining sector is the backbone of the majority of economies in the SADC region. According to the SADC Secretariat, approximately half of the world's Vanadium, Platinum, and Diamonds originate in the region, along with 36% of gold and 20% of cobalt— other minerals include Copper and Coal. These minerals contribute significantly to SADC Member State's Gross National Product and employment as many of them depend on mineral exports for their foreign exchange earnings.<sup>727</sup>

In harnessing the benefits that mining presents, they have put in place appropriate mining legislation. This has been coupled with the necessary environmental legislation whose aim is to mitigate or counter environmental damage arising mining activities. The legislation of these Member States is varied and quite unique in the manner in which they deal with mining activities and the need to protect the environment. While some address mining and environment in separate pieces of legislation, others are either intertwined or make lurid references to aspects of mining or environment. For instance, Angola and the Democratic Republic of Congo (DRC) have a Mining Code, and Botswana has the Mining and Minerals Act. South Africa has intertwined mining and environmental legislation which dovetail into the country's Constitution. In recognition of the negative effect mining activities pose on the environment, Angola, DRC, Malawi, Mozambique, South Africa, and Zimbabwe have enshrined in their constitutions, the right to a clean, healthy, safe or balanced environment. Whichever the case, what is clear is that the legislation of these countries contains progressive features which are worth assessing.

In light of this, the chapter aims to assess the mining and environmental legislation of SADC Member States with a view to ascertain the best practices from which Zambia could learn and adopt.

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<sup>727</sup> <http://www.sadc.int/themes/economic-development/industry/mining/> (accessed 20 February 2016).

## 5.2 SADC Member States mining and environmental legislation

There are a number of SADC Member States which depend mostly on mineral extraction as a source of their domestic income— Angola, Botswana, Democratic Republic of Congo, Malawi, Mozambique, Namibia, South Africa, Tanzania, and Zimbabwe.<sup>728</sup> These countries have enacted legislation that is aimed at mineral extraction, environmental protection from effects of mining activities, and, in some instances, constitutional guarantee of the right to a clean, healthy, safe or balanced environment.

### 5.2.1 Angola

Angola's mineral sector is the primary contributor to the country's economic growth. The country has the largest and most diversified mineral resources in Africa. Besides diamonds which are in significant abundance, the other minerals produced include: gold, beryllium, copper, iron ore, lead, lignite, manganese, mica, nickel, peat, phosphate rock, quartz, silver, tungsten, uranium, vanadium, and zinc.<sup>729</sup> The extraction and rational utilisation of these mineral resources constitute an essential means by which economic growth and development of the country can be sustained. Thus, it became imperative to create a modern and wide-ranging regulatory system that embraces a series of legal rules and principles on mining. Consequentially, the Mining Code No. 31 of September 2011 was adopted and is the governing legislation on mining activities.

#### 1. Mining Code

The Mining Code is the primary legislation on mining in Angola. It repealed a number of legislations that were enacted prior to 2011.<sup>730</sup> The Code proscribes that the mining of

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<sup>728</sup> With regard to the other SADC member states, their mining sectors marginally contribute to their economies, for example, Lesotho is agrarian. The same can be said of Madagascar whose agricultural sector contributes about 14% of the GDP; Seychelles; and Swaziland (agriculture and tourism). Mauritius's economy is now heading towards a service-oriented and innovation-driven economy with the financial services sector emerging as the most important contributor towards GDP at 13%.

<sup>729</sup> <https://minerals.usgs.gov/minerals/pubs/country/2012/myb3-2012-ao.pdf> (accessed 7 April 2017).

<sup>730</sup> Article 5 lists the following as the repealed legislation: (a) Law N° 1/92, of 17 January 1992 - Geological & Mining Activities; (b) Law N° 16/94, of 7 October 1994 - Diamond Law; (c) Law N° 17/94, of 7 October 1994 - Law on Special Regime for Zones Reserved for Diamond Mining; (d) Decree N° 12-B/96, of 24 May 1996 - Customs Regime Applicable to Mining Sector; (e) Decree N° 4-B/96, of 31 May 1996 - Tax Regulations for Mining Industry; (f) Decree N° 7-A/00, of 11 February 2000 - Delimitation of Concession Areas with Mining Rights; (g) Decree N° 7-B/00, of 11 February 2000 - On Diamond Trading; (h) Decree N° 36/03, of 27 June 2003 - Policy for Concession of Mining Rights to Diamond Mining Sub-Sector; (i) Executive Decree N° 156/06 of 22 December 2006 - On Trading of Diamonds; (j) Decree N° 33/08, of 7 May 2008 - Regulating the Concession of Mining Rights for Certain Strategic Minerals; and (k) Decree N° 2/08, 4 August 2008 - Regulating New Mining Activity Exemption Procedures.

mineral resources must be done in a sustainable manner with strict observance of local community rights and environmental protection.<sup>731</sup> The holder of mining rights must observe environmental conservation standards.<sup>732</sup> It is the responsibility of the authorities to ensure that the relationship between risks to the environment and the benefit that mining activities confer on the community are balanced through regulatory rules.<sup>733</sup>

Article 67 mandates mining operators to adopt internal rules of conduct in environmental matters. Such rules must be in consonance with the legislation that has been put in place. In comparison with the MMDA, there is no such provision that exists. Thus, mining operators, though they may develop codes of conduct such as policies on safety, health, and environment, they do so voluntarily and there is no sanction in instances where they fail to attain the standards set in their own policies.

The Code also requires local community's participation in mining activities. Article 68 affords the local communities the 'right' to be informed about the EIA and the measures that the mining rights holder would put in place in the event that such an activity would pose a negative effect on the environment. The MMDA, through its regulations and the EMA, requires the mining rights holder to conduct an EIA. The difference, however, lies in the fact that, unlike the MMDA, the Code requires that the information for the local communities be disseminated to them through the local traditional authorities.<sup>734</sup> In most instances, as the research revealed in Chapter 4, EIA information dissemination is done by the authorities and the locals are only invited to 'listen in' as opposed to have a view. The similarity, though, between the Code and MMDA is that there is no prior informed consent obtained.

## 2. Environmental Code

Upon attaining its independence, Angola inherited from the colonial era numerous pieces of legislation, decrees, decisions, and orders relating to environmental protection. However, these remained outmoded until the mid-1990s when a new legislation in the form of the

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<sup>731</sup> Article 9.

<sup>732</sup> Article 63(1).

<sup>733</sup> Article 63(2). In article 64(3), mining rights holders are obligated to: (a) comply with obligations resulting from the EIA and EMP; (b) take measures needed to reduce the formation and propagation of dust, waste and radiation in mining areas and in surrounding zones; (c) prevent or eliminate water and soil contamination, utilizing adequate means to that end; (d) not reduce or, in any other way, harm the normal supply of water to the population; (e) execute mining operations to minimize soil damage; (f) reduce the impact of noise and vibrations to acceptable levels; (g) not discharge contaminated waste that is harmful to human health, fauna and flora into the sea, water courses and lakes; and (h) inform the authorities of any occurrence that has caused or is liable to cause environmental damage.

<sup>734</sup> Article 68(2).



Environmental Framework Act (EFA) (No. 5/98 of 19 June 1998) was developed.<sup>735</sup> The EFA draws on the Constitution's article 12 and 24. Whereas article 12 obliges the State to promote, protect, and conserve natural resources by ensuring that their exploitation benefits the community, article 24 mandates it to adopt appropriate measures aimed at protecting the environment. The EFA, administered by the Ministry of Urban Affairs and Environment, embraces principles (general and specific) of environmental protection, preservation and conservation. Specifically, the EFA recognises the right to environmental education and training; participation in environmental decision-making; precautionary principle; attainment of sustainable development; and the protection and preservation of natural and genetic resources.

The EFA recognises the problem of pollution arising from activities done in pursuance of economic development and provides for measures aimed at eliminating or minimising such effects.<sup>736</sup> In order to ensure control of pollution, the Framework allows for the enactment of necessary legislation to address the production, discharge, deposit, transportation and management of gaseous, liquid and solid pollutants.<sup>737</sup> The government is obliged to establish environmental quality standards for the burning of fossil fuels while the importation of hazardous waste is prohibited.<sup>738</sup> These provisions are similar to those enunciated under the EMA. The difference lies in the fact that, although the Framework allows for the enactment of pollution control legislation, no such specific legislation or standards have been developed yet. Thus, standards established by the World Bank and World Health Organization continue to be utilised.

The Framework also prescribes the nature of activities that are subject to an undertaking of EIAs. Unlike the EMA which establishes ZEMA as the competent authority, the Ministry of Environment is the designated body under the Framework.<sup>739</sup> This situation militates the protection of the environment as it places such issues in the realm of politics and consequently making it more difficult to undertake mitigation measures or penalties to be imposed for non-compliance with EIA requirements. It is argued that, in comparison with the EMA, the latter is a better piece of legislation.

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<sup>735</sup> Despite the enactment of this legislation, some of the colonial statutes are still active and enforced with a few that have been reviewed, amended, revoked or repealed.

<sup>736</sup> Article 19.

<sup>737</sup> Article 19(2).

<sup>738</sup> Article 19(3)(4).

<sup>739</sup> Article 22.

### 3. Constitution

The Constitution of Angola guarantees every person their environmental rights. Article 39(1) guarantees everyone the 'right to live in a healthy and unpolluted environment and the duty to defend and preserve it.' The article can be said to be double barreled in that, on the one hand, it guarantees the right, while on the other, places the duty on every person to defend and preserve the health of the environment. It can be asserted that article 39(1) ensures that while the State has the responsibility to protect the environment, the citizen also bears an equal responsibility of preserving it. This is a unique feature as most Constitutions do not link the preservation of the environment to the right.

In article 39(2), the State is obliged to take the necessary measures aimed at protecting the environment and ensure the correct location of economic activities and the rational development and use of all natural resources within the context of sustainable development. This provision ensures that the State balances between economic activities and protection of the environment. It is argued that, where such a balance is not attained, the environment is polluted thereby leading to violation of the right for everyone to live in a healthy and unpolluted environment. Where there is an act that would endanger or damage conservation of the environment, such is punishable by law.<sup>740</sup>

#### 5.2.2 Botswana

Botswana's mining industry has, since the 1990's, dominated its economy. Ever since diamonds were discovered in 1967, the mineral has become the most mined mineral resource that has attracted large-scale production. The high quality of the diamond has resulted in pushing Botswana's position as the world's leading producer of diamond by value. Besides diamonds, which account for 81% of the country's mineral deposit, it also has significant deposits of copper-nickel with 16%, gold 1%, and soda ash 2% that are extracted albeit in smaller quantities. Like many African countries, Botswana's mining sector forms the backbone of its economy. According to statistics, mining contributes 22% of the country GDP earning the government 39.9% in terms of revenues.<sup>741</sup>

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<sup>740</sup> Article 39(3).

<sup>741</sup> African Development Bank Group *Botswana's mineral revenues, expenditure and savings policy: a case study* (2016) 8.

The mining industry is principally governed by the Mines and Minerals Act (MMA), Chapter 66:01 of the Laws of Botswana. Besides the MMA, there are other subsidiary legislation made pursuant to the Act– Mines, Quarries, Works and Machineries Act, Chapter 44:02; and the Environmental Assessment Act, 2011. In instances where prospecting and mining activities result in precious and semi-precious stones' discovery, these are made subject to the Precious and Semi-Precious Stones (Protection) Act, Chapter 66:03.

#### 1. Mines and Minerals Act, 1999

The MMA is the primary legislation that regulates mining in Botswana. The Act vests the mineral rights ownership in 'the Republic and the Minister shall ensure, in the public interest, that the mineral resources of the Republic are investigated and exploited in the most efficient, beneficial and timely manner.'<sup>742</sup> The Minister has power, on behalf of the Republic, to assign mining rights or mineral concession but subject to conditions prescribed under the Act.<sup>743</sup>

In relation to mining and environmental protection, section 65 is instructive and thus states:

- (1) The holder of a mineral concession shall, in accordance with the law in force from time to time in Botswana and in accordance with good mining industry practice, conduct his operations in such manner as to preserve in as far as is possible the natural environment, minimize and control waste or undue loss of or damage to natural and biological resources, to prevent and where unavoidable, promptly treat pollution and contamination of the environment and shall take no steps which may unnecessarily or unreasonably restrict or limit further development of the natural resources of the concession area or adjacent areas.
- (2) In accordance with good international mining industry standards, the applicant for a mining licence or retention licence or any renewal of either shall prepare and submit a comprehensive Environmental Impact Assessment as part of the Project Feasibility Study Report.

Subsection 1 clearly requires the mineral concession holder to conduct operations in a manner that preserves the natural environment and where pollution or contamination occurs, to minimise, control, or prevent it. This provision not only requires the holder to abide by the domestic law in force but also, adhere to good mining practices that may be obtained beyond the borders of Botswana. This view is buttressed by subsection 2 which requires an applicant

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<sup>742</sup> Sec. 3.

<sup>743</sup> Sec. 14(b) requires the Minister, in granting a prospecting licence, to ensure that the proposed programme is adequate and makes proper provision for environmental protection.

for a licence, mining or retention, to adhere to 'good international mining industry standards' in the preparation of an EIA. This requirement is of particular significance as it instructs the applicant to act in accordance with international mining standards. It is a positive requirement especially in instances where the local standards existing in the country may be inferior to those laid down at the international scene. In comparison with the MMDA, there is no similar provision for it. In fact, issues relating to the EIA are referred to the EMA, which also does not refer to international mining practices.

The MMA also oblige the holder of a mining licence is obliged to develop the mine in accordance with the programme of mining operations and in tandem with good mining and environmental practices.<sup>744</sup> Similarly, a mining permit holder is mandated to act in conformity with good mining and environmental practice.<sup>745</sup>

## 2. Environment Assessment Act, 2011

Mining operations in Botswana have traditionally yielded only a limited effect on the environment. Most of the mines are opencast with the main residue being heaps. Given Botswana's extremely low population density and mechanical recovery processes (which produce no major effluent), environmental pollution has not been a major concern.<sup>746</sup> There have, however, been some specific environmental issues that have arisen— reports of high levels of sulphur dioxide at the BCL copper-nickel smelter at Selebi-Phikwe, and abandoned gold mines in Francistown area. Notwithstanding this fact, the country has developed environmental policies and legislation aimed at safeguarding the environment from the harmful effects of mining activities.

In 2011, the Environmental Assessment Act was enacted to provide for EIAs 'to be used to assess the potential effects of planned developmental activities; to determine and to provide mitigation measures for effects of such activities as may have a significant adverse impact on the environment; to put in place a monitoring process and evaluation of the environmental impacts of implemented activities.'<sup>747</sup> Enacted on 17 June 2011, the Act has repealed the Act of 2005.<sup>748</sup> The Act applies to activities which have the potential to cause

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<sup>744</sup> Sec. 45(b).

<sup>745</sup> Sec. 57(b).

<sup>746</sup> K Jefferis 'The role of TNCs in the extractive industry of Botswana' (2009) 18 *Transnational Corporations* 74.

<sup>747</sup> Preamble.

<sup>748</sup> Sec. 74 provides that the Environmental Impact Assessment Act (hereinafter referred to as "the repealed Act"), Chapter 65:07 is hereby repealed.

significant environmental adverse effects or environmentally sensitive locations. In such instances, the Act requires that a statement is made, a threshold determined, and criteria to be used in determining the likely effects of the proposed activity, ascertained.<sup>749</sup> Thus, a person shall not undertake any such activity unless authorisation has been granted by the licensing authority.<sup>750</sup> It is the responsibility of the licensing authority to ensure that, before issuing a permit, licence, consent or approval to any person, ensure that authorisation has been issued for the proposed activity.<sup>751</sup>

In comparison with the EMA, there is a similarity in that, environmental approval must be sought before implementation. While the MMA is silent about this aspect, only requiring the holder to ensure that their activities do not harm the environment, the Environmental Assessment Act makes it clear that prior environmental authorisation must be obtained.

### 5.2.3 Democratic Republic of Congo

The Democratic Republic of Congo (DRC) is endowed with vast resources. Geographically, it covers an area of 2 345 095 km<sup>2</sup> making it the largest country in Southern and Central Africa. It has arable land of nearly 80 million hectares and over 1100 minerals and precious metals. The country has extensive deposits of copper, cobalt, coltan, diamonds, gold, iron ore, silver, tantalum, tin, tungsten, and zinc and oil.<sup>752</sup>

There is hardly any doubt that the mining sector is of significance to DRC. According to reports, the sector has gradually improved in the last few years contributing at least 4.7% of the estimated 9.5% of the GDP.<sup>753</sup> The sector is the country's main source of revenue with a total contribution of US\$761 and accounting for over 11% of the GDP in 2014. It has also provided employment for nearly 500 000 people.<sup>754</sup>

In ensuring sustainable exploration and exploitation of mineral resources, the country has enacted the Mining Code Law No. 007/2002, as the governing legislation on mining. In addition to the Mining Code, other legislations that affect the mining industry include: the Tax Code, Customs Code, Environment Code, Investment Code, and Labour Code.

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<sup>749</sup> Sec. 3.

<sup>750</sup> Sec. 4(1)(a).

<sup>751</sup> Sec. 5(1).

<sup>752</sup> <http://ambriefonline.com/mining-in-the-drc-a-palatable-endeavour/> (accessed 31 March 2017).

<sup>753</sup> As above.

<sup>754</sup> F Scheele, E de Haan & V Kiezebrink 'Cobalt blues: environmental pollution and human rights violations in Katanga's copper and cobalt mines' (2016) 6.

## 1. Mining Code

The Mining Code, enacted on 11 July 2002, is complemented by mining regulations which were enacted by Decree No. 038/2003 of 26 March 2003. The Code is aimed at reducing governmental intervention in the sector while reinforcing its regulatory role. Besides encouraging private investment, the Code provides a comprehensive set of rules applicable to all aspects of mining such as: acquisition of mining rights; transfer, operation, and termination of rights; environment protection; cultural heritage; protection of neighbouring communities; and incentives (tax and customs).

### *a. Prohibited areas*

The Mining Code permits the President to declare an area off mining limits if certain circumstances exist: (a) in national security; (b) the safety of the population is incompatible with mining activities; (c) existence of other planned uses of the soil or sub-soil; and (d) where protection of the environment so requires.<sup>755</sup> In such circumstances, the President may act either on his own initiative or on the proposal of the Minister but after having obtained the opinion of the Mining Registry. Save in instances where the President acts on his own initiative, he can decide to act on the proposal of the Minister guided by the opinion of the Mining Registry.

The MMDA contains provisions that grant the Mining Licensing Committee power to assign, suspend, or cancel mining rights. It does not, however, have provisions that allow the President or Minister or indeed the Mining Licensing Committee to declare an area off limits for mining activities. The declaration of an area as being off limits is a positive action that safeguards the inhabitants of the area where minerals are found or the environment. The lack of provisions similar to article 6 of the Code allows mining activities to be conducted in any area regardless of the circumstances. An assessment of the MMDA shows that mining rights supersede surface rights and any area is subject to mining activities provided minerals thereunder are found. This not only violates the rights of the inhabitants but also leads to the degradation of the environment.

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<sup>755</sup> Article 6.

*b. Appropriate authority on environmental issues*

In accordance with Article 15 of the Code, the Department responsible for the protection of the environment and mining is within the Ministry of Mines. The department is also responsible for the evaluation of the EIS and the EMP relating to the application for mining exploitation rights.<sup>756</sup> This entails that, where there are environmental issues arising from mining activities, the responsible authority is the Ministry of Mines. This provision allows the Department to exercise the powers which are devolved to it by the Code and other regulations, in particular: definition and implementation of the mining regulations concerning environmental protection; technical evaluation relating to the prospecting operations for mineral substances; and, technical evaluation of the EIS and the EMP presented by the applicants requesting mining exploitation rights.

The Mining Regulations of 2003 places other responsibilities on the Directorate responsible for the Protection of the Mining Environment. According to article 11, the Directorate shall: ensure that applications for consent assent/approval/permit/authorisation of environmental study bureaus are the subject of an inquiry/investigation; ensure that the environmental inquiry/investigation of the Environmental Risk Mitigation and Rehabilitation Plan is conducted; and coordinate and participate in the assessment of the EIS, EMP, and the Environmental Adjustment Plan.

In comparison with the MMDA, the Mining Licensing Committee is not the authority on environmental issues and mining as these are covered under the EMA. The EMA has established the ZEMA as the authority on environmental issues relating to mining. The MMDA concerns itself with mining rights, their assignment, exercise, suspension, and cancellation. It is argued that placing a department or section for mining environmental issues should have been placed either under the MMEWD or part of the mandate of the Mining Licensing Committee. This would address the problems of synergy between the authorities established under different pieces of legislations but all relating to mining and environmental protection.<sup>757</sup>

*c. Technical opinion*

The Code requires the registrar, in processing an application for an Exploitation Licence, to obtain technical environmental opinions. Where the environmental opinion has not yet been

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<sup>756</sup> Article 42.

<sup>757</sup> The issue of lack of synergy was discussed under Chapter 3 of the thesis.

issued, the Minister may make a preliminary and conditional decision on the application sent to him by the Mining Registry. In such a situation, the Minister has to postpone his final decision to grant or refuse the Exploitation Licence until he has received the environmental opinion.<sup>758</sup> In stark contrast to the MMDA, the grant of mining rights can be made by the relevant authority but subject to environmental authorisation. In other words, the Mining Licensing Committee can grant the mining rights and thereafter the person or entity so granted, can proceed with seeking environmental authorisation from the ZEMA. This does not, however, mean that grant of mining rights is permission to commence mining activities. The problem presented by assigning mining rights pending environmental authorisation lies in the fact that, where ZEMA refuses to grant environmental authorisation, the appeal lies to the Minister, who may overturn the decision of ZEMA as was the case in the Lower Zambezi case. In considering such an appeal, the Minister is not bound by the opinion of any person.<sup>759</sup>

## 2. Environmental Code

The Environmental Protection Code No. 11/2009 was adopted on 9 July 2011. The Code is intended to define guidelines for the protection of the environment and serve as a platform for specific legislation aimed at governing other fields which are linked (directly or indirectly) to the environment or impact on it. It also provides for fundamental principles concerning the protection of the environment. The Code has been enacted to ensure that the policies and the provisions of the Constitution are implemented.<sup>760</sup>

## 3. Constitution

The DRC adopted its Constitution, also known as the Constitution of the Third Republic, on the 18 February 2006. According to Article 53, 'All persons have the right to a healthy environment that is favourable to their development. They have the duty to defend it. The State ensures the protection of the environment and the health of the population.' This provision gives a right to every person to have an environment that is healthy and favourable to attain full development. The use of the words 'favourable to their development' is somewhat ambiguous leading to the question, what is favourable to the development of a person? The difficulty in answering the question is compounded by the lack of a definition of 'development' in the context of the Constitution. The lack of clarity of article 53 makes the guarantee of the

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<sup>758</sup> Article 76.

<sup>759</sup> This aspect was extensively discussed in chapter 4 of the thesis.

<sup>760</sup> A thorough analysis of the Environmental Code is lacking as I could not secure a copy, either physical or electronic, hence only cursory comments have been made.



right uncertain. Although the provision obliges 'persons' to defend the right, there is no mechanism on 'how' this should be done. What is clear though is the State's commitment to ensuring that environment and the health of its people are protected. Despite this flaw, the Constitution has at least recognised the right of a person to a healthy environment.

The Constitution, under Article 123(15), provides: 'Without prejudice to the other provisions of this Constitution, statutory law determines the fundamental principles concerning protection of the environment and tourism.' This provision requires that fundamental principles relating to environmental issues are under a statute and not the Constitution itself. This is unlike the Constitution of Zambia which has embodied environmental principles which are also mirrored under the EMA.<sup>761</sup>

#### 5.2.4 Malawi

Malawi has been globally known to be an economy whose greatest source of foreign earning, about 85% of the GDP, is in agriculture. Until recently, there has been interest in the mining sector, which has been steadily growing and accounts for 10% of the GDP. This figure is estimated to rise between 20-30% in the coming few years.<sup>762</sup> It can be asserted that, though still in its infancy stage, the mining sector is slowly becoming a significant economic sector.

##### 1. Mines and Minerals Act

There are three Acts that regulate Malawi's mineral sector— the Mines and Minerals Act 1981, the Petroleum (Exploration and Production) Act, 1983, and the Explosives Act. Specifically, on extraction of minerals, the principal legislation is the Mines and Minerals Act, Chapter 61:01. Under the Act, the Minister is required to appoint the Commissioner for Mines and Minerals as the person responsible for matters relating to administration of the Act. The Act defines the rules under which business is conducted in the sector including outlining Government's rights, duties and obligations. This rights, duties, obligations, and applicable restrictions, in relation to the exploration and mining companies, are also covered under the Act.

The Mines and Minerals Act also contains provisions on protection of the environment from mining activities. Section 94(1) of the Act requires the Minister to 'take into account the need to conserve the natural resources' before deciding whether or not to grant a mining right.

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<sup>761</sup> Article 255 and section 6, EMA.

<sup>762</sup> Government of Malawi 'Mines and Minerals Policy' (2015) 1.

The Minister may also require environmental impact studies to be carried out.<sup>763</sup> Where a mining right is granted, conditions, such as prevention, limitation or treatment of pollution and minimisation of the effects of mining on close to the mine or inhabitants, may be included.<sup>764</sup> The provisions of section 94 and 95 afford the Minister discretionary powers to act without requiring him/her to seek advice. The two provisions do not also spell out the grounds upon which the Minister may base his/her decision.

The Mines and Minerals Act, in comparison to the MMDA, falls short of the global sustainable practices. While MMDA was enacted to incorporate international standards on sustainable mining practices, the Mines and Minerals Act has remained as was enacted in 1981. In other words, the Mines and Minerals Act is outdated and not aligned with the Mines and Minerals Policy that was developed in 2015 which covers spheres of environmental sustainability.<sup>765</sup> Although the Policy acknowledges that mining activities cannot be conducted without defacing the environment, the overall objective of the Policy does not emphasise sustainable mining practices but promotion of the sector.<sup>766</sup>

## 2. Environmental Management Act

The Environment Management Act, Cap 69.01, enacted in 1996, makes 'provision for the protection and management of the environment and the conservation and sustainable utilisation of natural resources.'<sup>767</sup> The Act is superior to the protection, management, conservation, and sustainable utilisation of natural resources.<sup>768</sup> It also grants every person the right to a clean and healthy environment.<sup>769</sup>

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<sup>763</sup> Sec. 94(3).

<sup>764</sup> Sec. 95(1).

<sup>765</sup> In Chapter 5 of the Mines and Minerals Policy, the issues identified are mainly three: (i) mining activities cause environmental degradation;(ii) sometimes mining companies do not comply with Environmental Management Plan (EMP) during mining and decommissioning; and(iii) sometimes mining companies do not comply with international standards in Occupational Health and Safety. In light of these issues, government's objective is to 'ensure environmentally sustainable mining practices which will be consistent with international standards.' There is no mention of revision of the Mines and Minerals Act to conform to the Policy.

<sup>766</sup> According to Chapter 1 of the Policy, the main objectives are: (i) to promote the development of the mining sector; (ii) to contribute to socio-economic development of the country including poverty reduction and sustainable development; (iii) to contribute to the country's foreign exchange base; (iv) to optimise mining activities within Malawi so as to enhance "value added" elements of the sector and promote linkages with other sectors of the economy; (v) to expand employment opportunities in Malawi; (vi) to foster the needed economic diversification; (vii) to promote artisanal and small scale mining; and (viii) to promote women in mining – Government of Malawi 'Mines and Minerals Policy' (2015) 3.

<sup>767</sup> Preamble, Environmental Management Act, 1996.

<sup>768</sup> Sec. 5(6).

<sup>769</sup> Sec. 5(1).

The Act establishes the National Council for the Environment whose function is to advise the Minister on matters affecting the environment, recommend integration of environmental considerations, and measures for harmonisation of activities, plans and policies of lead agencies and NGOs concerned with environmental issues.<sup>770</sup> Besides the Council, the Act also establishes the Technical Committee whose functions is to examine any scientific issue referred to it by the Minister; carry out investigation and studies into the scientific, social and economic aspects of activity; and recommend to the Council the criteria, standards and guidelines for environmental control and regulation, including the form and content of an EIA.<sup>771</sup> This is a unique feature which is absent in the EMA. As was discussed in chapter 4, one of the challenges that ZEMA has faced is the ability to conduct timely and effective scientific research into environmental issues that arise. Thus, having a similar institution could complement the technical ability of ZEMA in its quest to address environmental issues.

The Act ensures that environmental issues are addressed at a district level where there is appointed a District Environmental Officer whose duty is to advise the District Development Committee on: (i) matters pertaining to the environment; (ii) reporting on environmental issues; (iii) submitting relevant reports; and, (iv) promoting environmental awareness.<sup>772</sup> Under the EMA, there is no such provision and although there is provision for collaboration with other institutions, this has not worked effectively. This has left the presence of ZEMA to be in three places— Livingstone, Lusaka, and Ndola —and zoning of the whole country. Despite this measure, it is far from guaranteeing effective environmental management. It is posited that the EMA must adopt a provision similar to section 20 of the Environmental Management Act, 1996 which creates the District Environmental Office.

In other respects concerning EIAs, audits, monitoring, licensing procedures, inspections, pollution control, Environmental Fund, offence creation, and immunity of officers, there appear similarities between Zambia and Malawi's Environmental Management Acts.

### 3. Constitution

The Constitution of Malawi is the supreme law of the country.<sup>773</sup> It has undergone a few amendments with the last being in 1998. The Bill of Rights under the Constitution does not contain the right to a healthy environment. However, under the fundamental principles set out

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<sup>770</sup> Secs. 9(1) & 11.

<sup>771</sup> Secs. 15 & 17.

<sup>772</sup> Sec. 21.

<sup>773</sup> Article 5.

in Chapter III, there is mention of protection of the environment and the people who depend on it. More specifically, article 13(d) obliges the State to:

...actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goals:

...

(d) *The Environment*

To manage the environment responsibly in order to –

- i. prevent the degradation of the environment;
- ii. provide a healthy living and working environment for the people of Malawi;
- iii. accord full recognition to the rights of future generations by means of environmental protection and the sustainable development of natural resources; and
- iv. conserve and enhance the biological diversity of Malawi.

According to article 13(d), the State shall adopt and implement policies and legislation aimed at protecting the environment and providing a healthy living environment. The principle does not grant the right even though it recognises the importance of a healthy environment to the people. An assessment of the provisions of the Constitution reveals that, besides enlisting environmental issues as part of fundamental principles, there is no other provision in place. The Constitution of Malawi may not be a good comparator for Zambia given the fact that, the latter has more progressive provisions that go beyond a mere enunciation of a principle.

### 5.2.5 Mozambique

Mineral resources constitute an important factor for the social and economic development of Mozambique. The mineral reserves comprise rich ores of: aluminium, coal, iron, gemstones, gold, tantalite, and titanium. The realisation of the potential that these mineral resources hold can only be attained when these are rationally utilised. Thus, the development of the mining sector necessitated the revision of the legislation relating to the mining sector. This led to the enactment of the Mining Code, Law No. 14/2002 of June 26.

## 1. Mining Code

The Mining Code is the principal law that governs the terms for the exercise of the rights and obligations regarding the use of mineral resources. The Code requires that the environment is taken into account in exercising the rights so granted. The rationale for doing so is to ensure the rational utilisation of the mineral resources for the benefit the national economy.<sup>774</sup>

Article 15(1) requires that, before the beginning of any development or mining activity under a mining concession, an environmental licence and land use permit must be obtained. It is noted that under the MMDA, there are no such requirements. This has led to instances where mining operations are carried out even without having obtained a certificate of title (in this case a land use permit) as was the case for Kalumbila Mines. If such a requirement was present under the MMDA or Lands Act, the foreign investor would have been compelled to acquire a Certificate of Title. On obtaining an environmental licence prior to commencing mining activities, it has already been established that what is not permitted under the MMDA or EMA is carrying on of mining activities without obtaining environmental licence, however, the mining rights would be assigned.

Chapter V of the Code contains provisions on the environmental management of mining activities. Article 35 requires that mining activities are done in conformity with the laws and regulations and in accordance with the protection and preservation of the environment, including social, economic and cultural aspects. Under article 36, the Code prescribes the basic environmental management tools within the context of enforcement of the law– (a) EIA; (b) EMP; (c) Environmental Management Programme; (d) Environmental Monitoring Programme; (e) Mine Closure Programme; (f) Environmental Audit; and (g) Risk and Emergency Control Programme. The MMDA does not have enforcement tools as this is done under the EMA. Notwithstanding this, some of the tools prescribed under the Code do not form part of those enunciated under Part IX of the EMA –the only exception is the Audit, EIA, and Monitoring.

Article 37 of the Code, just as under the regulations made pursuant to the MMDA, classifies mining activities for which environmental authorisations must be sought in different levels. Where an activity is susceptible of causing negative environmental impact and may be placed on more than one level, that activity shall be governed by the higher level rules.<sup>775</sup> Article 38 provides guidelines that must be followed in the environmental management of such

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<sup>774</sup> Article 1.

<sup>775</sup> Article 37(5).

activities— Level 1 (basic environmental management rules); Level 2 (EMP); and Level 3 (EIS). The evaluation, management, and environmental control process of mining activities are to be carried out in line with specific legislation.<sup>776</sup>

## 2. Environmental Code

In the 1990s, there was a growing concern that a number of policies and laws relating to natural resource and environmental protection were outmoded and not in conformity with global standards. This led to the publication of the National Environmental Management Programme in 1995. The Programme placed emphasis on principles of sustainable development in environmental management.

In 1997, the Environmental Law No. 20/97 of 1 October 1997 was enacted and forms the foundation for all legislative instruments on environmental protection. According to its preamble, the enactment of the Act was to realise the right of every citizen to live in a balanced environment as stated under the Constitution. Thus, the realisation of the right requires that the environment is managed correctly and conditions favourable to the health and wellbeing of the people created. In this pursuance, the Act aims to preserve natural resources in a sustainable manner and promote the socio-economic and cultural development of communities.

In accordance with article 2, the objective of the Act is to prescribe the legal basis for the sustainable utilisation and management of the environment. Under article 4 of the Act, in considering the constitutional provision for ‘an ecologically balanced environment’ for all citizens, establishes basic environmental principles— rational utilisation and management of the environment to improve the quality of life for all citizens; precautionary principle; recognition of traditional and local knowledge; public participation; and equitable access to natural resources by everyone.

Article 5 places the responsibility on the government to prepare and implement the Programme. For this purpose, the National Council for Sustainable Development has been established to ‘guarantee an effective, correct co-ordination and integration of the environmental management principles and activities in the Nation’s development process.’<sup>777</sup> Considering that environmental degradation affects everyone, and as such, there is

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<sup>776</sup> Article 38(2).

<sup>777</sup> Article 5(2).

established at the local level, services that are responsible for the implementation of the law. The rationale for such services is to guarantee the co-ordination and decentralised implementation of environmental activities. One of the challenges under the EMA is the absence of coordination between the ZEMA and the local authority. This has contributed to the failure by ZEMA to address pollution emanating from mining activities. It is suggested that a similar provision under the EMA be adopted as this would empower the local authorities to complement the work of ZEMA, in so far as controlling mining pollution is concerned.

The lack of understanding by the community of environmental issues is a challenge that can lead to their failure to properly participate in the governance of natural resources. As discussed in Chapter 4, where an EIA is done and a public hearing held, most communities do not understand the process or aspects contained in the documents before them. This situation has been addressed under the Environmental Law which grants every person the right to environmental education. According to article 20, the government is obliged to establish mechanisms and programmes aimed at environmental education. The rationale is to allow necessary community participation. This is different under the EMA whose section 88 only requires the Director General of ZEMA to 'take measures for the integration of environment matters in schools, colleges and institutions of higher learning.' This has restricted environmental education to formal learning institutions as opposed to communities. Although ZEMA is expected to 'carry out public information and education campaigns in the field of environment', this is not enough. It is asserted that the public does not have a right to environmental education under the EMA.

### 3. Constitution

The Constitution of Mozambique, although it does not use the terms 'right to a healthy and unpolluted environment' or 'right to a clean environment', it enshrines the right for all citizens to 'live in a balanced environment.' The use of 'balanced environment' would be construed to mean an environment that is not polluted by activities that happen on it. This Constitution, just like that of Angola, places a duty on the citizens to defend the environment.<sup>778</sup> In article 90(2), the State and the local authorities, with collaboration from associations for environmental protection, are to adopt policies to protect the environment and promote the rational use of all natural resources. This provision is novel among SADC countries' Constitutions as it obliges

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<sup>778</sup> Article 90(1).

the State to collaborate with 'associations for environmental protection' in developing policies on protection of the environment.

In article 117(1), the State is obligated to undertake efforts to guarantee the ecological balance and the conservation and preservation of the environment with the view to enhancing its citizens' quality of life. Thus, in guaranteeing the right to the environment, the State shall adopt policies aimed at: (a) preventing and controlling pollution and erosion; (b) integrating environmental objectives with sectoral policies; (c) promoting the integration of environmental values into educational policies and programmes; (d) guaranteeing the rational utilisation of natural resources; (e) promoting territorial ordinance and balanced socio-economic development.<sup>779</sup>

### **5.2.6 Namibia**

Namibia's mining sector accounts for 25% of the country's economy and contributes the most revenue. In terms of mining, diamonds and uranium are the most mined minerals which accounted for over N\$25 billion in terms of revenue in 2016. In 2009, with the aim to govern mining rights, six mineral resources have been deemed strategic for Namibia— diamonds, gold, coal, uranium, copper, and rare earth minerals. The sector has provided direct employment which was estimated in 2015 to be at 19 000. It has also provided indirectly contributed to the livelihood of about 100 000 people.

Namibia's mining sector is regulated by the Diamond Act of 1999; the Minerals (Prospecting and Mining) Act of 1992; and the Minerals Development Fund of Namibia Act of 1996.

#### **1. Minerals (Prospecting and Mining) Act**

The Minerals Act in section 91(f) requires that any application for a mining license includes:

- (i) the condition of, and any existing damage to, the environment in the area to which the application relates;

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<sup>779</sup> Article 117(2).



- (ii) an estimate of the effect which the proposed prospecting operations and mining operations may have on the environment and the proposed steps to be taken in order to minimise or prevent such effect; and
- (iii) the manner in which it is intended to prevent pollution, to deal with any waste, to safeguard the mineral resources, to reclaim and rehabilitate land disturbed by way of the prospecting operations and mining operations and to minimise the effect of such operations on land adjoining the mining area.

This provision requires any application made for a mining licence to contain any existing damage, an estimate of environmental effect, and pollution prevention measures. The Act does not contain provisions that forbid pollution arising from mining activities neither does it require that mining companies adhere to sustainable mining practices. It may well be said that this Act is not better than the MMDA in terms of environmental protection. Having been enacted in 1992, the Act needs to be revised to align it with sustainable development principles. The Mineral Policy of Namibia recognises that 'there is little effective environmental management within the Namibian mining industry' and in order to address the issue, the government has committed itself to 'enact exploration and mining legislation benchmarked against the environmental global best practice.'<sup>780</sup>

## 2. Environmental Management Act, 2007

The principal legislation on environmental issues is the Environmental Management Act, 2007 which has been enacted to: promote the sustainable management of the environment; establish the Sustainable Development Advisory Council; provide for the appointment of the Environmental Commissioner; and to provide for a process of assessment and control of activities which may have significant effects on the environment.<sup>781</sup>

The Environmental Management Act, 2007 is similar to the EMA in many respects. However, in some, the Act contains some provisions that are seemingly more progressive than the EMA. Section 50(3) of the Environmental Management Act, 2007 provides:

The Minister may consider and determine the appeal or may appoint an appeal panel consisting of persons who have knowledge of, and are experienced, in environmental matters to advise the Minister on the appeal.

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<sup>780</sup> Ministry of Mines and Energy 'Minerals Policy of Namibia' (2013) 24–25.

<sup>781</sup> Preamble of the Act.

This provision gives the Minister discretion in the manner in which an appeal may be considered and determined. The Minister may either determine the appeal or appoint a panel comprising of persons who have the knowledge and are experienced in environmental matters. This is unlike section 115(2) of the EMA which has reposed power in the Minister without requiring him to establish a panel of experts. Such a provision, section 50(3), ensures that environmental issues are resolved by persons that are well vested with such knowledge and expertise. If such a provision was present under the EMA, it would ensure better protection of the environment as well as remove political reasons as a basis for allowing an appeal, as was the case in the Lower Zambezi matter.

### 3. Constitution

The Constitution of Namibia is devoid of an explicit provision that encapsulates the right to a clean and healthy environment. Notwithstanding the absence of such a right, the Constitution does, however, contain a clause relating to the protection of the environment. Article 95(l) stipulates:

The State shall actively promote and maintain the welfare of the people by adopting, inter alia, policies aimed at the following:

...

(l) maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilisation of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future.

Article 95 simply requires the State to develop environmental policies and laws. It is asserted that the Constitution merely sets the framework for environmental protection and does not confer the right on a person to enjoy an environment that is clean and healthy.

#### 5.2.7 South Africa

The mining sector has, for many years, attracted valuable FDI to South Africa. The impact of the FDI received could be seen in the contribution of R18 million to national treasury and

employment of a total of 495 568 people in 2014.<sup>782</sup> Although the country is endowed with many mineral resources, the major ones are: Gold, Coal, Platinum, Palladium, and Diamonds.<sup>783</sup> Extraction and beneficiation of mineral resources require that proper mechanisms are put in place. With the emphasis placed on the sustainable use and exploitation of mineral resources, South Africa has enacted the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA); and the National Environmental Management Act (NEMA) of 1998.

### 1. Mineral and Petroleum Resources Development Act

The MPRDA was enacted in 2002 to redress the gross inequality between the white and black South Africans. This inequality placed about 87% of the land and the mineral resources in the hands of 13% of the population being whites while the overwhelming majority remained in abject poverty and unemployment.<sup>784</sup> Among its numerous objectives, the Act ensures that the countries mineral and petroleum resources are developed in an orderly and ecologically sustainable manner and that the holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating.<sup>785</sup>

The Act requires that mineral resources are sustainably developed within the context of the NEMA.<sup>786</sup> This requirement, in essence, creates an interplay between the MPRDA and the NEMA. This is exemplified by the consistent reference to NEMA by the MPRDA. The Act also creates a connection with the Constitution.<sup>787</sup> This is a novel feature which is absent under the MMDA. In fact, the link between the MMDA and EMA is only to the extent that an EIA is required to be completed in before mining operations can be carried out.<sup>788</sup> Further, unlike the MPRDA which permits the applicability of the NEMA, the MMDA does not contain such a provision neither does the EMA. It is posited that: (b) the EMA has been drafted in a general

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<sup>782</sup> <http://www.chamberofmines.org.za/sa-mining> (accessed 2 March 2016).

<sup>783</sup> <http://www.gov.za/about-sa/minerals> (accessed 2 March 2016).

<sup>784</sup> *Agri South Africa v Minister for Minerals and Energy (Afriform, Afrisake, Centre for Applied Legal Studies and Floris Johannes Pool, amicus curiae)* [2013] ZACC 9, par. 1.

<sup>785</sup> Sec. 2, MPRDA.

<sup>786</sup> Sec. 37 of the MPRDA provides thus: '(1) The principles set out in section 2 of the National Environmental Management Act, 1998 (Act No. 107 of 1998)– (a) apply to all prospecting and mining operations, as the case may be, and any matter or activity relating to such operation; and (b) serve as guidelines for the interpretation, administration and implementation of the environmental requirements of this Act. (2) Any prospecting or mining operation must be conducted in accordance with generally accepted principles of sustainable development by integrating social, economic and environmental factors into the planning and implementation of prospecting and mining projects in order to ensure that exploitation of mineral resources serves present and future generations.'

<sup>787</sup> Sec. 2(h) of the MPRDA lays down the objective of the Act as to 'Give effect to section 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development.'

<sup>788</sup> Sec. 31(1)(c) & 41(a).

manner; and (b) the MMDA, although intended to give more protection to the environment than its predecessor, it is still lacking in this respect.

It is doubtless that mining activities are polluting in nature and to address the pollution caused, requires a lot of financial resources. The MMDA requires an applicant for a mining licence to include an investment and financial plan in the application and the Committee, in considering such an application, takes into account the financial resources and technical ability.<sup>789</sup> In respect of large-scale mining, the Committee further considers the compatibility of the financing plan to the programme of mining operations.<sup>790</sup> The only flaw in these requirements is the absence of the requirement that the entity carrying out large scale mining should make available funds for environmental rehabilitation. This is unlike the MPRDA which obliges the Minister to rehabilitate the environment using the funds provided by the holder of a mining right.<sup>791</sup> Where the holder does not make available sufficient funds for exploration and production work, exploration or production activities may not commence.<sup>792</sup> The provision for financial requirements allows for rehabilitation or 'management' of adverse effects caused by the environment. Although some mining companies operating in Zambia would include it under their budgets, they are not compelled to do so by the Act.

It was discussed in chapter 4 that companies have corporate policies or standards that attempt to guide their mining activities. Generally, it was found that these policies include 'social policy or charter' which requires mining companies to carry out CSR activities in areas where they operate. An assessment of the MMDA has revealed that the Act does not contain an explicit provision on CSR. The MPRDA has, as its objective, to 'ensure that holder of mining and production rights contribute towards the socio-economic development of the areas in which they are operating.'<sup>793</sup> Although the Act does not clearly state how this objective is to be achieved, it is left to the industry to adopt the spirit of the Act in a meaningful way. Section 100(1)(b) requires the Minister to 'develop a code of good practice for the minerals industry in the Republic' and develop a Charter for the realisation of the objectives of the State. According to subsection 2(b) of section 100, the Charter must set out, amongst others 'how the

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<sup>789</sup> Sec. 22(1)(a).

<sup>790</sup> Sec. 31(1)(f).

<sup>791</sup> Sec. 46, as amended by Act No. 49 of 2008, provides: '(1) If the Minister directs that measures...must be taken to prevent pollution or ecological degradation of the environment, to address any contravention in the environmental authorisation or to rehabilitate dangerous health or safety occurrences...the Minister in consultation with the Minister of Environmental Affairs and Tourism may instruct the Regional Manager concerned to take the necessary measures to prevent pollution or ecological degradation of the environment or to rehabilitate dangerous health and social occurrences or to make an area safe. (2) The measures contemplated in subsection (1) must be funded from financial provision made by the holder of the relevant right, permit....'

<sup>792</sup> Sec. 89.

<sup>793</sup> Sec. 2(i).

objects referred to in section 2(c), (d), (e), (f) and (i) can be achieved.<sup>794</sup> The contents of the Charter are, among others, to ensure that holder of mining and production rights contribute towards the socio-economic development of the areas in which they are operating. These provisions envisage a socially responsible mining industry while recognising the rationale for business to pursue profit and economic growth and development pathway.<sup>795</sup>

The MPRDA obliges an applicant for mining rights to conduct an EIA and prepare an EMP, which must be approved before a mining right is granted.<sup>796</sup> This means that it is mandatory that mineral exploration requires prior environmental authorisation. Thus, any person who wishes to apply to the Minister for a mining right must simultaneously apply for an environmental authorisation.<sup>797</sup> This requirement is buttressed by section 37 which requires that all environmental requirements provided for by the MPRDA are implemented in terms of the NEMA. This also means that the provisions of the NEMA are applicable to all mining activities.<sup>798</sup> The responsibility to implement the environmental provisions of the NEMA, in so far as they relate to prospecting, mining, exploration, production or activities incidental thereto on a prospecting, mining, exploration or production area is placed on the Minister of Minerals and Energy.<sup>799</sup> Further, an environmental authorisation issued by the Minister shall be a condition prior to the issuing of a permit or the granting of a right in terms of the MPRDA.<sup>800</sup> Under the MMDA, prior approval from ZEMA is not a requirement for assigning a mining right.<sup>801</sup> In fact, what is prohibited is exploration, mining or mineral processing activities where there is no prior written approval.<sup>802</sup> Thus, until ZEMA has issued a decision letter, mining operations must not be commenced.<sup>803</sup> It is suggested that the MMDA must make obtaining of

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<sup>794</sup> Sec. 100(2), cited above, is as was amended by Act 49 of 2013, which came into effect in 2013.

<sup>795</sup> AJ Diale 'Corporate social responsibility in the South African mining industry: necessity, conformity or convenience?' (2014) 2 *International Journal of Business and Economic Development* 120.

<sup>796</sup> Sec. 5(a) forbids any person from prospecting for or remove, mine, conduct technical co-operation operations, reconnaissance operations, explore for and produce any mineral or commence any work without an environmental authorisation.

<sup>797</sup> Sec. 22(a).

<sup>798</sup> Sec. 37(1)(a)(b).

<sup>799</sup> Sec. 38A(1).

<sup>800</sup> Sec. 38A (2). This provision is supported by section 24N of the NEMA which obliges the Minister responsible for mineral resources or an MEC or identified competent authority to require the submission of an environmental management programme before considering an application for an environmental authorisation.

<sup>801</sup> Sec. 12(1) provides: 'A person shall not undertake exploration, mining or mineral processing activities without obtaining the prior written approval of the environmental impact assessment relating to the exploration, mining or mineral processing operations by the Zambia Environmental Management Agency as provided under section twenty-nine of the Environmental Management Act, 2011.'

<sup>802</sup> Sec. 12(2).

<sup>803</sup> This was also observed in the case of *Zambia Community Based Natural Resources Management Forum and Others v Attorney General and Mwembeshi Resources Limited* in which Judge Mubanga Kondolo stated that, 'what was forbidden was to commence mining operations before the EIA.' – *Zambia Community Based Natural Resources Management Forum, Zambia Institute of Environment Management, Zambia Climate Change Network, Chalimbana River Water Conservation Trust, Green Living Movement, David Ngwenyama v Attorney General & Mwembeshi Resources Limited* [2014] HP/A/006, 15.

environmental authorisation a requirement before mining rights can be assigned. This would also deter political interference in the process as was the case in the Mwembeshi Resources issue.

## 2. National Environmental Management Act

The NEMA, enacted in 1998, is the principal legislation on environmental protection. The NEMA bears the purpose of ensuring that every South African citizen has the right to an environment that is not harmful to his or her health or well-being so as to protect and preserve it for the benefit of present and future generations. The enactment of the NEMA, just like the MPRDA, was to give effect to Section 24 of the Constitution of South Africa.<sup>804</sup>

Under this Act, provision has been made for enforcement mechanisms in the event where a person suffers harm from the degradation of the environment due to mining activities. Section 32(1) establishes preconditions that must be satisfied in order to enforce environmental provisions: *first*, it must be a person or groups of persons, a natural person or juristic person; *second*, there must be a breach or threat thereof of any provision under the NEMA; and *third*, the person commencing action may do so in that person's own interest, on behalf of a person who may not institute proceedings or a group of affected person, or in the public interest or protecting the environment. In accordance with section 32(1), the Court may, under section 32(2), decide against awarding costs where a person(s) fail to secure the relief sought.<sup>805</sup> The rationale is to discourage costs being awarded against an unsuccessful person or public interest group where it acted reasonably and out of a public concern or in the interest of protecting the environment. In comparison, with regard to enforcement, section 109 of the EMA is devoid of clarity on the issue of standing in the event that there is a breach of a provision under the EMA.<sup>806</sup> As has been observed under chapter 4, the issue of standing is critical and

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<sup>804</sup> Sec. 24 of the Constitution provides: 'Everyone has the rights to: (a) an environment that is not harmful to their health or well-being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that— (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.'

<sup>805</sup> Sec. 32(2) of NEMA provides: 'A court may decide not to award costs against a person who, or group of persons which, fails to secure the relief sought in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment or the use of natural resources, if the court is of the opinion that the person or group of persons acted reasonably out of a concern for the public interest or in the interest of protecting the environment and had made due efforts to use other means reasonably available for obtaining the relief sought.'

<sup>806</sup> Sec. 109: '(1) A person may, in writing, request the Director-General to investigate an alleged contravention of this Act. (2) A court shall not award any costs or damages against a person who initiates a prosecution after informing the Director-General in accordance with this section unless the court finds that the primary motivation

cases have not been properly handled when there exists the lack thereof. It is suggested that a provision similar to section 32 of the NEMA be included under the EMA.

Under the NEMA of 1998, the Minister responsible for environmental matters was the competent authority on all environmental issues, including mining.<sup>807</sup> However, following the amendment of the Act in 2014, the responsibility for environmental matters that pertain to mining lies with the Minister responsible for mining.<sup>808</sup> In the opinion of Yawitch, the decision to do so was to: first, improve efficiency and effectiveness of the system; second, allow for tools other than EIA; third, improve cooperation and coordination between government departments; and fourth, integration and alignment of permitting processes.<sup>809</sup> Most specifically, amendments to section 24C were aimed at resolving the confusion that existed in terms of whether the Minister or MEC would be the competent authority in relation to activities.<sup>810</sup> In comparison with the EMA, the Mining Licensing Committee, which is the competent authority on granting of mining rights, is detached from the provisions of the EMA. The Committee has no authority to deal with environmental issues as this role is within the purview of the Agency as provided for under the EMA.<sup>811</sup> The effect of this is the creation of inefficiency and confusion especially in North-western province where mines have carried on operations without approval from ZEMA. Further, with the wide mandate that the Agency has under the EMA, it has not effectively been able to monitor operations of mining companies. It

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for the prosecution was not a concern for the public interest or for the enhancement, protection and conservation of the environment.

<sup>807</sup> Sec. 24C of NEMA provides: '(1) When listing or specifying activities in terms of sec. 24(2) the Minister, or an MEC with the concurrence of the Minister, must identify the competent authority responsible for granting environmental authorisations in respect of those activities. (2) The Minister must be identified as the competent authority in terms of subsection (1), unless otherwise agreed to....'

<sup>808</sup> The preamble of NEMA Amendment Act No. 25 of 2014, states, as the objective that necessitated the amendment as *inter alia*: '...to provide for the Minister responsible for mineral resources to be the competent authority for environmental matters in so far as they relate to prospecting, exploration, mining or production of mineral and petroleum resources; to empower the Minister to take an environmental decision in so far as it relates to prospecting, exploration, mining or production instead of the Minister responsible for mineral resources under certain circumstances....' Section 24C provides: '(2A) The Minister responsible for mineral resources must be identified as the competent authority in terms of subsection (1) where the listed or specified activity constitutes prospecting, mining, exploration, production or a related activity occurring within a prospecting, mining, exploration or production area is directly related to— (a) prospecting or exploration of a mineral or petroleum resource; or (b) extraction and primary processing of a mineral or petroleum resource.'

<sup>809</sup> J Yawitch 'Proposed amendments to the National Environmental Management Act, 1998 (NEMA)' Department for Environmental Affairs and Tourism, October 2007. Information available on: <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2007/071010nema.ppt> (accessed 28 April 2016).

<sup>810</sup> As above. The other reasons were that: (1) clarity was also required in terms of activities affecting more than one province; (2) integration and alignment of permitting processes are hindered where the Minister is the competent authority for licensing in terms of a specific environmental management act, such as the Air Quality Act, and the MEC the competent authority for environmental authorisations for the same activity; and, (3) the amendments stipulate in detail when the Minister will be the competent authority and clarify cross boundary activities.

<sup>811</sup> Sec. 3.

is posited that, as a solution, environmental matters relating to prospecting, exploration, or mining, should be placed within the domain of the Committee and not ZEMA.

### 3. Constitution

The Constitution of South Africa was approved by the Constitution Court on 4 December 1996 and is the supreme law of the land.<sup>812</sup> Section 24 of the Constitution guarantees the enjoyment of every person of the right to a clean environment. It states:

Everyone has the right:

- (i) to an environment that is not harmful to their health or wellbeing; and
- (ii) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:
  - (a) prevent pollution and ecological degradation;
  - (b) promote conservation; and
  - (c) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

It is argued from the wording of section 24 that two elements must be satisfied: first, subsection (a) guarantees to everyone the right to live in an environment that is not harmful while subsection (b) places an explicit obligation on the state to take certain measures aimed at realising the proclamation made under subsection (a); and second, subsection (b) also places a negative obligation on the state to abstain from measures that may cause environmental degradation or that may generally impair the right guaranteed in subsection (a).<sup>813</sup> Kotzé opines that section 24 has a dualistic character in that the right can be divided into a traditional fundamental right and a socio-economic right that imposes a duty on the government to protect the environment.<sup>814</sup>

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<sup>812</sup> Article 2.

<sup>813</sup> LA Feris & D Tladi 'Environmental rights' D Brand & CH Heyns (eds.) *Socio-economic rights in South Africa* (2005) 257.

<sup>814</sup> LJ Kotzé 'The judiciary, the environmental right and the quest for sustainability in South Africa: a critical reflection' (2007) 16 *RECIEL* 3 301.



Under section 24(b) the State is required to guarantee the right 'through reasonable legislative and other measures'. Regarding this provision, Yacoob J emphasised mere legislation is not enough and as such the 'State is obliged to act to achieve the intended results, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the Executive [Authority].'<sup>815</sup> Whilst the meaning of 'legislative measures' is clear, the same may not be said about 'other measures'. These may be understood to mean, all measures in that facilitate the proper management of the environment such as protection of natural resources, control of pollution, enforcement of environmental laws and regulations, and development of necessary policies. The only requirement is that such measures must be reasonable.<sup>816</sup>

The Constitutional Court in *HTF Developers (PTY) Ltd v Minister of Environmental Affairs and Tourism and others* had an opportunity to examine the meaning of section 24. Murphy J succinctly said:

Section 24 of the Constitution, as outlined above, contains two components. Section 24(a) entrenches the fundamental right to an environment not harmful to health or well-being, whereas section 24(b) is more in the nature of a directive principle, having the character of a so-called second generation right imposing a constitutional imperative on the state to secure the environmental rights by reasonable legislation and other measures. Despite its aspirational form, or perhaps because of it, section 24(b) gives content to the entrenched right envisaged by specifically identifying the objects of regulation, namely: the prevention of pollution and environmental degradation; the promotion of conservation; and the securing of ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.<sup>817</sup>

Deciphering section 24 shows that the scope of the right is extensive as it does not restrict itself to protection against conduct harmful to health but seeks also to promote conservation and ecologically sustainable development by ensuring an environment beneficial to a person's 'well-being.'<sup>818</sup> Thus, the environment can be protected by securing 'ecologically

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<sup>815</sup> *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 CC, par. 68 B-D

<sup>816</sup> According to the court in Yacoob J, 'to be reasonable, measures cannot leave out of account the degree and extent of denial of the right they endeavour to realise.' In the mind of the court, the measures should be targeted at those whose ability to enjoy all rights is most in peril, but if such measures 'fail to respond to the needs of the most desperate, they may not pass the test.' As above, par. 44

<sup>817</sup> *HTF Developers (PTY) Ltd v Minister of Environmental Affairs and Tourism, Member of Executive Council of the Department of Agriculture, Conservation and Environment, Dr ST Cornelius & City of Tshwane Metropolitan Municipality* [2006] ZAGPHC 132, par. 17.

<sup>818</sup> The term 'well-being' is open-ended and manifestly is incapable of precise definition. The Constitutional Court in *Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd T/A Pelts Products* 2004 (2) SA 393 (E) 415D could not define the term but simply stated, 'One should not be obliged to work in an environment of stench and, in my view, to be in an environment contaminated by H2S is adverse to one's "well-being".' However, Prof Jan Glazewski explains that 'In the environmental context, the potential ambit of a right to "well-being" is exciting but

sustainable development and use of natural resources while promoting justifiable economic and social development'.<sup>819</sup> It is plausible to argue that, the Constitution, recognises the interrelationship between the protection of the environment and development by contemplating the integration of environmental protection and socio-economic development. In ***Fuel Retailers Association of Southern Africa v Director-General Environmental Management & others***, Ngcobo J commenting on the intrinsic connection between environment and development said:

What is immediately apparent from section 24 is the explicit recognition of the obligation to promote justifiable “economic and social development”. Economic and social development is essential to the well-being of human beings. This Court has recognised that socio-economic rights that are set out in the Constitution are indeed vital to the enjoyment of other human rights guaranteed in the Constitution. But development cannot subsist upon a deteriorating environmental base. Unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development. Promotion of development requires the protection of the environment. Yet the environment cannot be protected if development does not pay attention to the costs of environmental destruction.<sup>820</sup>

It is apparent from the comment of the court that environment and development are inescapably connected. Despite this connection, the realisation of the right under section 24 is progressive. The purpose is to ensure that the State continues to take reasonable measures, legislative or otherwise, progressively in order to achieve the realisation of the right. In instances where the State is challenged as to its policies relating to these rights, it must explain why the policy is reasonable disclosing what it has done to formulate the policy, its investigation and research, the alternatives considered, and the reasons why the option underlying the policy was selected.

The Constitution of Zambia does not guarantee the right to an environment that is not harmful to citizen’s health. Adopting a similar provision (section 24) would ensure that a

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potentially limitless. The words nevertheless encompass the essence of environmental concern, namely a sense of environmental integrity; a sense that we ought to utilise the environment in a morally responsible and ethical manner. If we abuse the environment we feel a sense of revulsion akin to the position where a beautiful and unique landscape is destroyed, or an animal is cruelly treated.’ See: J Glazewski *Environmental law in South Africa* (2000) 86.

<sup>819</sup> Sachs J in his dissenting opinion in *Fuel Retailers Association of SA (Pty) Ltd v Director-General Environmental Management Mpumalanga & Others* 2007 (10) BCLR 1059, 1098–1099 said that ‘Sustainable development presupposes accommodation, reconciliation and (in some instances) integration between economic development, social development and environmental protection. It does not envisage social, economic and environmental sustainability as proceeding along three separate tracks, each of which has to be weighed separately and then somehow all brought together in a global analysis. The essence of sustainable development is the balanced integration of socio-economic development and environmental priorities and norms.’

<sup>820</sup> *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment Mpumalanga Province & others* 2007 (10) BCLR 1059, par. 44.

balance is struck between economic development brought by FDI on the one hand, and environment and human rights protection on the other. In its current state, there is no guarantee of such a right.

#### 5.2.8 United Republic of Tanzania

Tanzania is predominantly an agricultural economy. The agriculture sector represents 46% of the country's GDP with principal cash crops including cotton lint, cashew nuts, tobacco, coffee and tea.<sup>821</sup> Besides agriculture, the country is also endowed with mineral resources. These mineral resources include: metals such as copper, cobalt, gold, iron ore, nickel, platinum, silver, and tin; gemstones such as alexandrite, diamond, emerald, garnet, ruby, sapphire, and tanzanite; industrial minerals such as bentonite, diatomite, gypsum, kaolin, limestone, phosphate, salt, soda ash, salt, phosphate, and vermiculite; and energy minerals such as coal and uranium.<sup>822</sup>

The mining sector plays a significant part in Tanzania's economy. Besides creation of jobs, business opportunities for the local communities, improvement of infrastructure, extensive CSR programmes, and support of international investor relationships, the sector has also contributed positively to the country's GDP. The statistics show that the sector contributes 2.8% each year.<sup>823</sup> However, in 2014, the sector contributed 3.7% to the country's GDP with USD 1.78bn.<sup>824</sup>

##### 1. Mining Act

In 2009, the government of Tanzania developed the Mineral Policy whose objective with regard to environment as to 'promote best practices for health, safety and environmental management in mining areas.' Thus, the role of the government is to ensure sustainable mining activities through the strengthening of monitoring and regulation of the sector for the purpose of reducing or eliminating the adverse effects of mining activities on the environment.<sup>825</sup>

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<sup>821</sup> <http://www.sadc.int/member-states/tanzania/> (accessed 20 April 2017).

<sup>822</sup> <https://mem.go.tz/mineral-sector/> (accessed 19 April 2017).

<sup>823</sup> <http://www.tcme.or.tz/mining-in-tanzania/industry-overview/> (accessed 19 April 2017).

<sup>824</sup> <http://www.tanzaniainvest.com/mining> (accessed 19 April 2017).

<sup>825</sup> Ministry of Energy and Minerals *The Mineral Policy of Tanzania* (2009) 23.

The Mineral Policy was followed by the enactment of the Mining Act in 2010. According to its preamble, the objective of the Act is to 'regulate the law relating to prospecting for minerals, mining, processing and dealing in minerals.'

The Act requires the Minister to conclude a Development Agreement with the applicant or holder of mineral rights. The Agreement shall contain a provision relating to environmental matters.<sup>826</sup> Where a person applies for a retention licence, such an application must be accompanied by studies relating to the impact of mining operations for the recovery of mineral deposit on the environment.<sup>827</sup> An application for a mining licence must include a feasibility study setting out the proposed programme of mining operations including such measures as the applicant proposes to take in relation to any adverse impacts on the environment.<sup>828</sup> Similarly, an application for a special mining licence or its renewal must be accompanied by an applicant's certificate issued under the Environment Management Act, 2004.<sup>829</sup> This provision makes it clear that environmental issues relating to mining are dealt under the Environment Management Act, 2004 and not the Mining Act. In terms of comparison, the Mining Act does not contain provisions that may be deemed to be more elaborate or better, from which lessons may be drawn by Zambia in refining its MMDA.

## 2. Environmental Management Act, 2004

The Environmental Management Act was passed by the National Assembly in 2004. According to its preamble, the Act is aimed at providing 'legal and institutional framework for sustainable management of the environment' as well as 'implementation of international instruments on the environment.' The Act, like the EMA, also grants the right to a clean, safe and healthy environment for every person living in Tanzania.<sup>830</sup>

### a. *Economic instruments and financial incentives*

The Act obliges the Director of Environment to periodically prepare proposals of economic instruments and financial incentives.<sup>831</sup> The proposals prepared by the Director are to be forwarded to the Minister of Finance to make regulations. Generally, the regulations made by

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<sup>826</sup> Sec. 10(4)(c).

<sup>827</sup> Sec. 37(2)(b).

<sup>828</sup> Sec. 49(2)(d)(i).

<sup>829</sup> Secs. 41(4)(e) & 45(2)(e).

<sup>830</sup> Sec. 4.

<sup>831</sup> Sec. 80(1).

the Minister are 'designed to influence the behaviour of economic agents in order to ensure sustainable use and protection of biophysical resources.'<sup>832</sup> More specifically, the regulations require individuals or companies, when making decisions about production, consumption and investment, to consider the environmental consequences. Individuals or companies are also required to adopt measures to internalise environmental costs without relying on the pricing mechanisms.<sup>833</sup> The Minister may also prescribe further incentives and financial measures for the protection of the environment i.e. effluent charges, user charges, product charges, and sales and excise taxes.<sup>834</sup> The rationale for such measures is to minimise environmental damage. However, an examination of the EMA shows that it is devoid of such provisions, which if they were present, would enhance protection of the environment.

*b. Right to environmental information*

In environmental management, it is imperative that citizens have access to environmental information, especially where an EIA is being conducted. In chapter 4, it was found that citizens are not able to fully participate as they do not have an understanding of environmental matters. This is largely due to the lack of environmental information. Under the EMA, the public can access informational documents held by ZEMA's registry.<sup>835</sup> However, the public cannot request for such information as of right. This situation is different under Tanzania's Act which affords every citizen the 'freedom of access to publicly held information' concerning to the state of the environment and the threats to it.<sup>836</sup> It is asserted that the EMA should adopt such a provision. This will allow citizens, who have a right to a clean, safe and healthy environment, to fully participate as they would have the information required. This would, in turn, enhance the protection of the environment.

*c. Environmental Appeals Tribunal*

In Part XVII, the Act establishes the Environmental Appeals Tribunal as an appellate body which exercises jurisdiction where any person is aggrieved by: (a) the decision of the Minister; (b) imposition or failure to impose any condition under the Act; and (c) approval or

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<sup>832</sup> Sec. 80(4).

<sup>833</sup> Sec. 80(2).

<sup>834</sup> Sec. 80(3).

<sup>835</sup> Sec. 90(3).

<sup>836</sup> Sec. 172(1).

disapproval of an EIA.<sup>837</sup> Section 204(1) states that the Tribunal shall consist of five members namely:

- (i) a Chairman who shall be appointed by the President from amongst the persons qualified to be appointed a Judge;
- (ii) an advocate of the High Court or recommended by the Tanganyika Law Society;
- (iii) a person with high academic qualifications and experience in environmental law; and
- (iv) two other members who have demonstrated exemplary professional competence in the field of environmental management.

It is clear from the provisions that the persons that serve under the Tribunal are those that are qualified and possess experience and competence in the field of environmental management. An assessment of section 204 shows that, while the Chairman is appointed by the President, the others are appointed by the Minister.<sup>838</sup> This raises questions about the independence of the Tribunal, especially that some of the appeals might be the decision of the Minister. However, the critical issue is the composition rather than the appointment which in this case can be said to be balanced in that, it has not only persons with a law background but also other fields.

In the case of Zambia, there is no Tribunal or specialised body established by law to deal with environmental issues arising. A person who is aggrieved with a decision made ZEMA may apply to the Board for a review.<sup>839</sup> If not satisfied with the decision of the Board, they can appeal to the Minister who shall consider and determine the review application.<sup>840</sup> This situation places environmental issues in the realm of political convenience rather than environmental protection as was the case in the issue of Lower Zambezi Case.<sup>841</sup> It is suggested that, in the absence of an environmental court, a Tribunal be established under the EMA to act as an appellate body to adjudicate upon environmental matters arising.

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<sup>837</sup> Sec. 206(2).

<sup>838</sup> Sec. 204(2).

<sup>839</sup> Sec. 112(1).

<sup>840</sup> Secs. 115(1) & 116(1).

<sup>841</sup> The EMA's section 115 and the matter relating to Lower Zambezi has been expansively discussed under Chapter 4 of the Thesis.

### 3. Constitution

The Constitution of Tanzania was revised in 2005 following the 14<sup>th</sup> amendment. There is no mention of the right to a clean environment under the Constitution, however, the court has pronounced that the 'right to live and to the protection of his life' is an all embracing right which includes protection from environmental degradation.<sup>842</sup> In ***Festo Balegele v Dar es Salaam City Council***, the High Court stated that a person was entitled to a healthy environment and therefore, the decision by the Council to locate the garbage dump near the residential areas was a violation of the rights to a healthy environment.<sup>843</sup> The lack of explicitness has been complemented by the liberal interpretation of the right to life by the court.

#### 5.2.9 Zimbabwe

Zimbabwe's mining industry contributes nearly 8% of the country's total GDP. The most minerals mined include: gold, asbestos, chromite, coal, and base metals.<sup>844</sup> In terms of regulation of the mining sector, the principal legislation on mining is the Mines and Minerals Act Chapter 21:05.<sup>845</sup> According to this Act, all minerals are vested in the president. In order to acquire the rights to extract mineral deposits, an application to the Mining Commissioner must be made. Mining activity is open companies and individuals that are both local and foreign.

##### 1. Mines and Minerals Act

The Act provides the legal framework for investment in the mining sector and is administered by the Ministry of Mines through the Mining Administration Board. It was enacted in 1961 and several amendments have been made since then. In relation to environmental protection, the Act requires completion of a report on the anticipated impact of mining operations on the environment before a special mining licence can be granted.<sup>846</sup>

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<sup>842</sup> Article 14 provides: 'Every person has the right to live and to the protection of his life by the society in accordance with the law.'

<sup>843</sup> *Festo Balegele v Dar es Salaam City Council* Misc. Civil Case No. 90 of 1991, High Court of Tanzania, Dar es Salaam.

<sup>844</sup> <http://mines.gov.zw/> (accessed 23 March 2017).

<sup>845</sup> Besides this Act, there are other Acts and Regulations that draw their existence from the Mines and Minerals Act— Explosives Regulations, Mining (General) Regulations, Mining (Management and Safety) Regulations, Mining (Health and Sanitation) Regulations, Mines and Minerals (Custom Milling Plants) Regulations, Gold Trade Act, Precious Stones Trade Act, Environmental Management Act, Environmental Regulations, Forestry Act, Water Act, and Zimbabwe National Water Authority Act.

<sup>846</sup> Sec. 158(3)(vii).

In 2015, the Government commenced the process of reviewing the Act to align it with recent developments in the SADC region. The review is aimed at simplifying the Act as well as providing for a computerised cadastre unit to manage mining titles. With respect to the protection of the environment from the effects of mining activities, the review has fortified environmental protection provisions. An assessment of the Bill shows that, in its current form, it is quiet similar to the MMDA. The provisions of the Bill, just like the MMDA, require completion of an EIA before the grant of a mineral right or title. Section 257C requires the Cadastre Registrar to consider the need to conserve the natural resources before granting a mineral right or title and shall for this purpose, require completion of an EIA. The granting a mineral right or title shall include conditions relating to: (a) prevention, limitation or treatment of pollution; and (b) minimisation of effects of mining on adjoining or neighbouring areas and its inhabitants.<sup>847</sup>

## 2. Environment Management Act

The Environmental Management Act, Chapter 20:27 is the main legislation on ‘sustainable management of natural resources and protection of the environment.’ According to its preamble, the Act provides for the prevention of pollution and environmental degradation; preparation of a National Environmental Plan; and the establishment of an Environmental Management Agency and an Environment Fund.

The Act establishes the National Environmental Council as a decision-making body.<sup>848</sup> Section 7 states that the Council shall consist of: (a) the Permanent Secretaries in the Ministries<sup>849</sup>; (b) two representatives of universities; (c) two representatives of specialised research institutions; (d) three representatives of the business community; (e) two representatives of local NGOs active in the environmental field; (f) the Director-General, who shall be the secretary of the Council; and (g) such other members as may be co-opted by the Council with the approval of the Minister. These persons are appointed by the Minister subject to consultation with relevant bodies or institutions where such persons are affiliated or representing.

The Council is similar to the Board established under the EMA whose members are: (a) one representative each from the Ministries responsible for— environment and natural

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<sup>847</sup> Sec. 257D.

<sup>848</sup> Sec. 8.

<sup>849</sup> The ministries referred to are: Agriculture, Education, Energy, Environment, Forestry, Mining, Finance, Health, Industry, Water resources, Justice, Local Government, and Tourism.



resources; health; mines and minerals development; local government; agriculture; energy and water development; and national planning; (b) a representative of the Attorney-General; (c) a representative of the Zambia Association of Chambers of Commerce and Industry; (d) one person representing NGOs dealing with environmental management; (e) one person from an institution involved in scientific and industrial research; and (f) two other persons.<sup>850</sup>

It is clear that under the EMA that the Board has five persons that are not from government or any of its agencies. In comparison with Zimbabwe, the Council has nine persons that the Minister may appoint, which persons are from outside government or any of its agency. These persons represent different institutions or entities. The advantage of having such persons is to create a body that has the ability to act or decide outside the realm of politics. It is asserted that the 'quota' allocated to persons outside government or its agencies under the EMA must be increased to include other entities such as Zambia Chamber of Mines. The reason is that most of the biggest challenge that is faced by authorities is mining pollution. As an association of mining companies, it would be beneficial if they are co-opted onto the Board of ZEMA.

The Environmental Management Act establishes a body, Environmental Management Agency, whose functions, inter alia, includes making 'model by-laws and to establish measures for the management of the environment within the jurisdiction of the local authorities.'<sup>851</sup> This provision allows the Agency to develop bye-laws aimed at better management of the environment that is within a local authority's control. The relevance of such a provision lies in the fact that environmental matters, though in the purview of the Agency, breaches may lie within the jurisdiction of local authorities, who may be better placed to address them. Thus, it is only prudent that such bye-laws are developed. Under the EMA, a similar provision is absent. Under chapter 4, the research undertaken revealed ZEMA has to cover mining environmental issues within a local authority's jurisdiction. The local authorities are not well engaged in the control of mining pollution despite the requirement that ZEMA liaises with them. It is asserted that the EMA must be amended to allow ZEMA to make bye-laws that are aimed at better environmental management.

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<sup>850</sup> Sec. 11(1).

<sup>851</sup> Sec. 9(1)(viii).

### 3. Constitution

Approved by Parliament on 9 May 2013, the Constitution of Zimbabwe Amendment Act No. 20 of 2013 entered into force on 22 May 2013. It repealed the Independence Constitution of 1980.

The Constitution guarantees the right of every person to an environment that is not harmful to their health or wellbeing. Accordingly, section 73 provides:

1. Every person has the right –
  - a. to an environment that is not harmful to their health or well-being; and
  - b. to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that –
    - i. prevent pollution and ecological degradation;
    - ii. promote conservation; and
    - iii. secure ecologically sustainable development and use of natural resources while promoting economic and social development.
2. The State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realisation of the rights set out in this section.

Section 73(1) grants every person the right to an environment that is not harmful to their health or wellbeing— a right to a clean environment. It also protects the right for generations yet unborn. The State is required to protect the right through reasonable legislative and other measures that are aimed at preventing pollution, promoting conservations, and securing the sustainable use of natural resources. The attainment of this right is progressive as it depends on the availability of financial resources. It is noted that this provision is similar to section 24 of the South African Constitution.

### 5.3 Conclusion

The chapter interrogated the mining and environmental legislation of SADC Member States with a view to ascertain the best practices of SADC Member States from which Zambia could learn and adopt.

The thesis finds that a number of SADC Member States have legislation on mining and environmental protection. While some legislations, in comparison with Zambia's are inferior, others have superiority for example, Mining Code of Angola requires mining companies to adopt environmental rules of conduct; Botswana's Mining and Minerals Act obliges mining companies to adhere to good international mining practices; and DRC's Mining Code empowers the President to declare certain areas off limits for mining. There are some countries that have intertwined mining and environmental legislation, for example, South Africa. Some SADC Member States have, in recognition that the environment can be degraded by numerous activities, for example, mining, enshrined in their constitutions, the right to a clean, healthy, safe or balanced environment, for example, Angola, DRC, Malawi, Mozambique, South Africa, and Zimbabwe. Tanzania's environmental legislation has included economic instruments and incentives that are designed to enhancing environmental protection. Further, there is also established an appeals tribunal to address issues arising from actions or inactions of the Minister.

It is concluded that there are a number of best practices that Zambia can adopt from other SADC countries. The benefit for doing so is to create a balance between FDI in the mining sector, environmental protection, and human rights.

## Chapter 6

### Summary, conclusions and recommendations

#### 6.1 Summary of thesis

Mining activities, despite the numerous benefits (economic or social), may lead to degradation of the environment. In light of this, the thesis sought to investigate the effectiveness of Zambia's legal, policy and institutional framework in addressing the adverse effects of mining activities on the environment and human rights. It has been revealed in this thesis that mining activities pose a negative impact on the environment and consequently affects the right of persons to enjoy the use of an unpolluted environment. Internationally, standards have been developed to ensure minimisation of the effects of mining activities on the environment, however, these are merely prescriptive and as such, not legally binding. Domestically, legally binding standards have been laid down under numerous instruments such as the EMA and the regulations thereof. Notwithstanding such instruments, the curtailing of environmentally degrading mining activities are far from being addressed. The institutions that have been established under various pieces of legislation to address pollution emanating from mining activities have not performed as mandated. Their failure to perform arises from numerous reasons but principally two: first, the frailties, insufficiency, unclear and inadequate legal provisions; and second, the institutional capacity to operate— low and inadequately skilled manpower, lack of proper equipment, and political interference in the operations of such institutions. A culmination of these issues has led to continued pollution and litigation by NGOs, either on their own behalf, the communities, or the environment. In most instances where polluting mining companies have come before the courts of law, the courts have seemingly taken a different view— prioritisation of mining activities under the guise of economic development over environmental protection and the right of citizens to live in an environment that is safe, clean and healthy.

It is reiterated that the framework for FDI has not fully accommodated environmental protection. Although the framework contains lurid references to environmental protection, these are inadequate to address pollution arising from mining activities. This presents a challenge in redressing the imbalance that exists between FDI promotion in the mining sector, environmental protection, and human rights. In an attempt to redress this imbalance, it is argued that the mining and environmental legislation from most SADC Member States could present a solution. The legislation, not all, of some Member States, contain provisions that have embraced

international practices from which Zambia can learn. Therefore, it remains for Zambia's legislation to adopt some of the best practices that these present.

The key findings are:

1. Though FDI, environmental protection, and human rights have similar objectives (generally to better the lives of people), these are not intertwined and as such, this has led to their being mutually exclusive rather than supportive.
2. The international, regional and domestic standards, developed as a benchmark for environmental protection, have not adequately remedied environmental degradation arising from mining activities something attributed to the nature of the standards– their non-binding nature and the manner in which the legislation is phrased.
3. The institutions or bodies that have been mandated to ensure accountability of mining companies, with regard to the negative effect of their activities on the environment, have not performed as required under the law. Even though some spirited NGOs have taken erring mining companies on, their efforts have been limited due to certain internal factors. However, in recent times, communities have taken legal action against erring mining companies.
4. There are certain best practices that Zambia could adopt from other SADC Member States' legislation in order for it to redress the challenge faced today.

## **6.2 Findings and conclusions**

The thesis has made the following findings and specific conclusions in each chapter:

In **Chapter 2**, the aim was to establish the existence of a link, or the extent thereof, between FDI, environmental protection, and human rights in Zambia's domestic framework, as well as to develop a conceptual framework. The thesis has found that the Constitution, EMA, MMDA and ZDA Acts contain provisions that require protection of the environment. However, with exception to the EMA, the MMDA and ZDA only make lurid references to environmental protection, within prescribed limits. The Constitution, though it contains provisions that protect

the environment, it does not enshrine the right to a clean, safe, and healthy environment as a human right.

It is concluded that there is recognition of the need to protect the environment under the domestic framework for FDI, environmental protection, and human rights. What however seems to be the problem is that such recognition on its own is not enough considering that these pieces of legislation are not interwoven.

**Chapter 3**, with a view to assessing the extent to which the environment is protected from the effects of mining activities under the domestic framework, interrogated the international and regional standards that have been developed as a benchmark for environmental protection. It has been established that: (a) there is no comprehensive treaty or convention on standards applicable to mining activities. The common aspect of these instruments is their intention—prescribing sustainable mining practices; (b) there are mechanisms provided for under the EMA whose aim is to ensure compliance by mining companies—Environmental Impact Assessment; environmental audits; licensing; and environmental monitoring; and (c) corporations are also required under international guidelines to develop policies that are aimed at ensuring environmental sustainability during mining activities.

It is concluded that the international standards on mining and environmental are not enforceable, directly applicable, or binding on Zambia. Although they have, to some extent, influenced the manner in which the law has developed (i.e. EMA and MMDA), they are merely a guide for best practices. Also, notwithstanding the elaborate nature of the mechanisms prescribed under the EMA, these are flawed in the manner in which they have been phrased. Further, there is no corresponding compliance on the part of most mining companies. It is further concluded that the policies developed or adopted by corporations, by and large, though instructive and lucid, are voluntary in nature and only of moral persuasion. Ultimately, the framework, domestic or international, has not effectively addressed the effects of mining activities on the environment.

**Chapter 4** critically assessed the effectiveness of institutions that have been put in place to ensure accountability of the mining companies with respect to the adverse effects of their activities on the environment and human rights. The thesis found that ZEMA and MSD have been established to ensure that mining companies comply with their environmental obligations and where mining activities lead to pollution, such are remedied. However, the two institutions

have not performed their role effectively. For example, ZEMA is faced with institutional deficiencies arising from carrying out independent sample testing, incapacity to monitor mining companies, limited territorial coverage, inadequate funding and political interference. The MSD's effective operations are also affected by limited technical capacity, erratic funding for its operations, and weak operational policies. This has led the MSD to fail to administer the EPF effectively, a situation which has exacerbated the failure of the mining companies to make contributions to the EPF.

It was also found that the HRC, whose function is to protect human rights guaranteed under the Constitution's Bill of Rights, has not performed its role accordingly. This is due to the fact that, the HRC is underfunded, its orders not legally binding, and its recommendations are unenforceable. Further, considering that a clean environment is not a human right under the domestic framework, it is difficult for HRC to act, even in instances of clear violation.

It was further found that there have been certain NGOs— CBE and ZIEM —that have taken a keen interest in ensuring the enforcement of environmental provisions against erring mining companies. The two NGOs, though they have been active in carrying out public interest litigation, are however affected by insufficient funding for their operations which has in turn had a negative effect on their ability to gather the evidence required. Also, most of the matters that have been brought by these organisations before the courts of law have not been resolved in their favour— the courts have maintained that these organisations have either lacked locus standing or not presented an arguable case.

The thesis made a further finding that, though the courts are endowed with the authority of enforcing the law, they have not satisfactorily done this. It is clear from the cases analysed herein that the interpretation adopted by the courts do not, in most instances, reflect international practices. This is because the interpretation of the environmental law by judges is based on either the knowledge that they gained in their former schooling or their limited appreciation of the field.

It is concluded that: (a) there is a lack of proper enforcement of environmental provisions against erring mining companies and this arises due to numerous challenges that institutions responsible for doing so face. This has consequentially led these companies to continue conducting their activities with great impunity; (b) the role that the Commission plays in the conservation of the environment is limited given its lack of constitutional mandate; and

(c) the court has not carried out its role as the vanguard for environmental and human rights protection. In fact, its interpretation suggests that the court has taken a rather lax approach, which has seen environmental degradation by mining companies go unremedied.

**Chapter 5** discussed the mining and environmental legislation of SADC Member States. The aim was to ascertain the best practices of SADC Member States from which Zambia could learn and adopt. The thesis found that most SADC Member States have legislation on mining, environmental protection, and human rights. It also found that some legislation of SADC Member States, in comparison with Zambia, have provisions that reflect best practices and standards which Zambia could adopt. For instance, Angola's Mining Code has a provision which requires mining companies to adopt environmental rules of conduct. Botswana's Mining and Minerals Act obliges mining companies to adhere to good international mining practices while DRC's Mining Code empowers the President to declare certain areas off limits for mining. As for South Africa, its mining and environmental legislations are intertwined.

With respect to environmental legislation, while most SADC Member States' laws are similar, there are, however, some differences. Tanzania's environmental legislation has included economic instruments and incentives that are designed to enhance environmental protection. It has also established an appeals tribunal to address issues arising from actions or inactions of the Minister. With respect to Malawi, unlike Zambia, there is a Technical Committee established to examine any scientific issue referred to it by the Minister. In the case of Namibia, the Minister may, either hear and determine an appeal, or appoint an appellate panel of persons who have the knowledge or are experienced in environmental issues. Under South Africa's environmental legislation, the competent authority on environmental issues in the mining sector is the Minister responsible for mining. In terms of national constitutions, some SADC Member States (Angola, DRC, Malawi, Mozambique, South Africa, and Zimbabwe), in recognition that the environment can be degraded by mining activities, have enshrined in their constitutions, the right to a clean, healthy, safe or balanced environment.

It is concluded that the legislation of some SADC Member States' enunciates the best practices and standards. As highlighted above, these practices, if adopted, would remedy the imbalance that exists between mining and environmental legislation.



### **6.3 Recommendations**

In light of the above mentioned findings, the following recommendations are made:

#### **1. Environmental appeals tribunal**

Mining companies appear to act with impunity given their political connections which result in interference in the autonomous operations of relevant authorities by politicians. In order to avert this situation, it is recommended that a tribunal must be created under the EMA to deal with issues or appeals relating to the environment. The tribunal, once established, must replace the office of the Minister, which acts as an appellate body under the EMA.

#### **2. Binding corporate policies**

The mining companies develop policies that are voluntary in nature. In order to ensure that such policies are effective, the recommendation made is that the MMDA must be amended to include a provision that compels mining companies to adopt policies that legally bind the company. Such a provision, if included, should be enforceable, in the event of a breach. This will inevitably place a legally recognised responsibility on the mining companies to act in an acceptable manner.

#### **3. Environmental control budget**

Although mining companies maintain budgets for environmental control, there is no legal requirement to avail these to the relevant authorities or divulging the funds committed to this cause. It is recommended that the regulatory framework is amended to include a requirement that compels any mining developer or operator to avail ZEMA their annual budget for handling adverse environmental impact resulting from mining activities. Where ZEMA finds the budget to be insufficient, a mining developer or operator would be obliged to raise it. This would give an indication as to whether the developer or operator is capable of handling negative impacts resulting from their mining activities. This would further compel the operator or developer to adopt environmentally sustainable ways of conducting mining activities.

#### 4. Strengthening the capacity of the Agency

Arising from the discussion in Chapter 4, to guarantee that the ZEMA performs its functions to the fullest, it is recommended that the institutional capacity of the Agency be strengthened. The manpower, besides being increased, should be technically enhanced. This means that there should be training of inspectors in relevant specialised educational programmes as well as empowering of local authorities to carry out inspections done by ZEMA. Furthermore, there must be ZEMA presence in more provinces and funding increased so as to enable the Agency to function more effectively.

#### 5. Environmental Protection Fund

The MSD has not effectively managed the EPF. This has resulted in non-compliance by the mining companies and even in instances where mining companies comply, the use of the funds is hardly known. It is recommended that, instead of an affected person waiting until the mine closes before they can recover, the regulations or provisions that have been enacted pursuant to the EPF must be amended to allow persons to recover compensation under the EPF. This would enhance the protection of the environment through public interest litigation.

#### 6. Enhancing the role of Human Rights Commission

The HRC could play an integral part in ensuring that environmental regulations are complied with by mining companies. It is recommended that the HRC be adequately funded in order for it to carry out its responsibilities effectively. Whereas legislative reforms requiring the Commission to issue binding or enforceable orders may be far-fetched, it is also recommended that the Commission must undertake numerous activities and research aimed at addressing environmental degradation arising from mining activities. This would place environmental issues in the public domain which would also lead to moral persuasion to those institutions that are responsible for legal reform.

#### 7. Right to a clean, safe and healthy environment

The right to a clean, safe, and healthy environment is not enshrined as a fundamental human right under the Constitution. It is therefore recommended that the right is enshrined. This will not only remove ambiguity but is also good practice that underscores the growing importance of

human rights at both regional and international levels. Such a right should be capable of being enforced against mining companies in light of the vertical application of the Bill of Rights.

#### 8. Training of judges

The role of the court is imperative in environmental issues and as such, there is a need for the judges to appreciate the delicacy of these issues which are intertwined with human rights. In light of this, it is recommended that specialised training for judges in Environmental Law is conducted on a regular basis. This would enhance their knowledge which would, in turn, further their interpretation of Environmental Law and its principles.

#### 9. Establishing land and environment division under the High Court

Given the issues espoused in Chapter 4, the ideal situation would be to recommend that a Land and Environment Court be established. However, owing to financial implications and practicability, establishing a separate and specialised division under the High Court would suffice. The judges of this court must be persons that are specialised in the field of environmental law (this is the practice in other African states such as Ghana and Kenya). The divisional court, if established, should address land and environmental claims, develop and implement environmental legislative provisions to ensure that breaches by mining companies are ameliorated. This would make mining companies accountable. The decisions of such a court will undoubtedly hasten the development of the environmental jurisprudence while deepening the courts' knowledge and appreciation of environmental rights claims by those affected. The appeals from such a court would lie to the Constitutional Court which shall be the final court of appeal.

#### 10. Adoption of best practices and standards

It is noted that provisions of certain frameworks of some countries demonstrate international best practices. It is recommended that such should be adopted in order to enhance Zambia's mining and environmental framework. In particular, the MMDA must oblige mining companies to adopt environmental rules of conduct, adhere to good international mining practices, and declare certain areas off-limits for mining. As for the environmental legislation, the EMA must include economic instruments and incentives for fostering environmental protection, establish an

appeals tribunal and technical committee, and divest itself of handling issues relating to mining.

#### **6.4 Further research**

The following proposals for further research are made:

##### **1. Small-scale and artisanal mining**

Most studies that have been conducted on issues pertaining to the effects of mining activities on the environment have primarily focussed on large scale mining. In future, research must be extended to small scale and artisanal mining. Although these may be viewed as causing minimal environmental damage, they may collectively cause significant damage where there is an increase in the number of activities.

##### **2. Mineral resource benefits sharing**

Mineral resources are mostly found in communities which are in far places– traditional lands. Thus, studies could be conducted on the role of traditional leaders and communities in ensuring sustainable mining practices with emphasis on community-based resource sharing mechanisms.

##### **3. Role of the courts in environmental protection**

The role of the courts in ensuring environmental protection is invaluable as it also ultimately helps to protect human beings' right to life and health. Future research can be done on judicial enforcement of the right to a clean, safe, and healthy environment. Such a research could also encompass aspects of judicial appointment, independence, and political interference in the extraction of mineral resources.

##### **4. Regional perspectives on mining and environment**

On a regional basis, a study could be undertaken with a specific focus on the manner in which SADC Member States have dealt with promotion of FDI in their mining sectors and the protection of the environment and human rights. Such a study, once conducted, would bring out

numerous aspects, including the efforts done towards attaining harmonisation as required under SADC's mining and environmental instruments.

## Bibliography

Affolder, N 'Beyond law as tools: foreign investment projects and the contractualisation of environmental protection' in Dupuy, PM and Viñuales, JE (eds.) *Harnessing foreign investment to promote environmental protection: incentives and safeguards* (Cambridge University Press: Cambridge 2013)

Ajayi, IS 'Determinants of foreign direct investment in Africa: a survey of the evidence' Ajayi, IS (ed) *Foreign direct investment in sub-Saharan Africa: origins, targets, impact and potential* African Economic Research Consortium: Nairobi 2006

Alfaro, L 'Foreign direct investment and growth: does the sector matter?' Harvard Business School, 2003

Alfredsson, G and Ovsiook, A 'Human rights and the environment' (1991) *60 Nordic Journal of International Law* 2 22

Aliyu, MU 'Foreign direct investment and the environment: pollution haven hypothesis revisited' 8th Annual Conference on Global Economic Analysis, Lübeck, Germany, June 9-11, 2005

Amechi, PE 'Enhancing environmental protection and socio-economic development in Africa: a fresh look at the right to a general satisfactory environment under the African Charter on Human and Peoples' Rights' (2005) *5 Law, Environment and Development Journal* 62

African Development Bank Group *Botswana's mineral revenues, expenditure and savings policy: a case study* (ADB: Abidjan 2016)

African Union *Africa Mining Vision* (UNECA: Nairobi 2009)

Aristidis, B 'The determinants of FDI in transition countries; incentives and barriers based on a questionnaire research: the case of Bulgaria, 1989-2000' 2003

Arnold, DG 'Transnational corporations and the duty to respect basic human rights' (2000) *20 Business Ethics Quarterly* 3

Asteriti, A 'Waiting for the environmentalists: environmental language in investment treaties' Hofmann, R and Tams, CJ (eds.) *International investment law and others* (Baden-Baden: Nomos 2012)

Atapattu, S 'The right to a healthy life or the right to die polluted? The emergence of a human right to a healthy environment under international law' (2002) 16 *Tulane Environmental Law Journal* 74

Aucoin, L 'Environmental audits: a multi-stakeholder perspective' unpublished LLM thesis, University of British Columbia, 1993

Auditor General's Report on the 'Management of environmental degradation caused by mining activities in Zambia' 2014

Augenstein, D 'Study of the legal framework on human rights and the environment applicable to European enterprises operating outside the European Union' University of Edinburgh 2014

Austrian Development Agency '*Human rights manual: guidelines for implementing a human rights based approach in ADC*' (Austrian Development Agency: Vienna 2010)

Backer, LC 'On the evolution of the United Nations 'protect-respect-remedy' project: the state, the corporation and human rights in a global governance context' (2010) 9 *Santa Clara Journal of International Law* 2 141

Balasubramanyam, VN, Salisu, M and Sapsford, D 'Foreign direct investment and growth in EP and IS countries' (1996) 106 *The Economic Journal* 434 92 – 105

Barrick Gold Corporation 'Human Rights Compliance Program' 2011

Barton, JH and Fisher, BS *International trade and investment: regulating international business*' (Little: Brown and Company 1986)

Bekhechi, M 'Legal and regulatory framework for environmental impact assessment in African countries' in Chaytor, B and Gray, KR *International environmental law and policy in Africa* (Springer Science+Business Media: New York 2003)

Bekhechi, M and Mercier, JR 'The legal and regulatory framework for environmental impact assessments: a study of selected countries in sub-Saharan Africa' in World Bank Group *Law, Justice and Development Series* (World Bank: Washington 2002)

Bell, S and McGillivray, D *Environmental law* 7th edition (Oxford University Press: Oxford 2008)

Bench Marks Foundation 'Corporate social responsibility and the mining sector in southern Africa: a focus on mining in Malawi, South Africa and Zambia' June 2008

Benjamin, AH 'The Role of Judges in the Decision making Process Pertaining to Environmental Sustainability, Justice, Governance and Law' UNEP *Advancing Justice, Governance and Law for Environmental Sustainability* 2012

Bentham, J *Of laws in general* (Athlone Press: London 1970)

Birdwell, N and Wheeler, D 'Trade policy and industrial pollution in Latin America: where are the pollutions havens?' (1993) 2 *Journal Environmental Development* 137 – 149

Birnie, P, and Boyle, A *International law and the environment* 2nd edition (Oxford University Press: Oxford 2002)

Birnie, P, Boyle, A, and Redgwell, C *International law and the environment* 3rd edition (Oxford University Press: Oxford 2009)

Boocock, CN 'Environmental impacts of foreign direct investment in the mining sector in sub-Saharan Africa' Organisation for Economic Cooperation and Development *Foreign direct investment and the environment: lessons from the mining sector* (OECD Publishing: Paris 2002)

Borensztein, E, De Gregorio, J and Lee, JW 'How does foreign direct affect economic growth?' (1998) 45 *Journal of International Economics* 115 – 135

Borrmann, C 'Methodological problems of FDI statistics in accession countries and EU countries' Hamburgisches Welt-Wirtschafts-Archiv (HWWA) Report 2003



Bosek, JK 'Implementing environmental rights in Kenya's new constitutional order: prospects and potential challenges' (2014) *14 African Human Rights Law Journal* 500

Boyd, DR 'The environmental rights revolution: constitutions, human rights, and the environment' unpublished PhD thesis, University of British Columbia, 2010

Brabandere, ED 'Human rights considerations in international investment arbitration' in Fitzmaurice, M and Merkouris, P (eds.) *The interpretation and application of the European convention on human rights: legal and practical implications* (Martinus Nijhoff Publishers: Leiden/Boston 2012)

Bruch, C, Coker, W and Van, AC *Breathing life into fundamental principles: implementing constitutional environmental protections in Africa* (World Resources Institute: Washington DC 2001)

Burchi, S 'Balancing development and environmental conservation and protection of the water resource base – the "greening" of water laws' International Environmental Law Research Centre (IELRC): Geneva 2007

Burke, E *Reflections on the Revolution in France* (Penguin Books: New York 1986)

Buthe, T and Milner, HV 'The politics of foreign direct investment into developing countries: increasing FDI through international trade agreements?' *52 American Journal of Political Science* 4 743

Callinicos, A *Social theory: a historical introduction* (New York University Press: New York 1999)

Campbell, D, Fiebig, M, Mailloux, M, Mwanza, H, Mwitwa, J and Sieber, S 'Zambia Environmental Threats and Opportunities Assessment Report' IRG: Lusaka, 2011

Carson, R *Silent springs* (Riverside Press: Cambridge 1962)

Cassel, J 'Enforcing environmental human rights: selected strategies of US NGOs' (2008) 6 *North-western Journal of International Human Rights* 1 107

Chisanga, P 'Environmental degradation in the extractive and other industries in Africa' ActionAid Zambia, 2013

Copeland, BR and Taylor, MS *Trade and the environment: theory and evidence* (Princeton University Press: Princeton 2003)

*Concise Oxford Dictionary* 10th edition (Oxford University Press: Oxford 1999)

Cullet, P 'Definition of an environmental right in a human rights context' (1995) 13 *Netherlands Quarterly of Human Rights* 27

Cranston, M *Human rights today* (Hondon: Ampersand 1962)

Deva, S 'Guiding principles on business and human rights: implications for companies' (2012) 9 *European Company Law* 2 103

Diepeveen, R; Levashova, Y; and Lambooy, T 'Bridging the gap between international investment law and the environment' (2014) 30 *Utrecht Journal of International and European Law* 78 145-160

Dugard, J *International law: a South African perspective* 3rd edition (Juta: Cape Town 2005)

du Plessis, W and du Plessis, A 'Striking the sustainability balance in South Africa' Faure, M and du Plessis, W (eds.) *The balancing of interests in environmental law in Africa* (PULP: Pretoria 2011)

Eleutheriades, PZ *Legal rights* (Oxford University Press: Oxford 2008)

Eskeland, GS, & Harrison, AE 'Moving to greener pastures? Multinationals and the pollution haven hypothesis' working paper 1744, World Bank: Washington DC

Evans, R 'Dependent development – the alliance of multinational, state and local capital in Brazil' 1979

Extractive Industries Transparency Initiative *The EITI Standard* (International Secretariat: Oslo 2016)

Fabre, C 'Constitutionalising social rights' (1998) 6 *Journal of Political Philosophy* 263

Faure, M and du Plessis, W (eds.) *Balancing of interests in environmental law in Africa* (PULP: Pretoria 2011)

Feeney, P 'The limitations of corporate social responsibility on Zambia's Copperbelt' 2001. Available at: [www.reports-and-materials.org](http://www.reports-and-materials.org) (accessed 23 February 2016)

Feris, LA and Tladi, D 'Environmental rights' Brand, D and Heyns, CH (eds.) *Socio-economic rights in South Africa* (PULP: Pretoria 2005)

First Quantum Minerals 'Environmental Policy' 9 December 2013

First Quantum Minerals 'Social Policy' 9 December 2013

Frick, C *Direct foreign investment and the environment: African mining sector* (OECD: Paris 2002)

Fru, VN *The international law on foreign investments and host economies in sub-Saharan Africa: Cameroon, Nigeria and Kenya* (Transaction Printed: London 2010)

Fulton, S and Benjamin, JA 'Foundations of sustainability' UNEP *Advancing Justice, Governance and Law for Environmental Sustainability* 2012

Gao, T 'Foreign direct investment and growth under economic integration' (2005) 67 *Journal of International Economics* 157 – 174

Garner, EL 'The case for an international mining law' 2004 10

Gellers, JC 'Constitutional environmental rights: a quantitative analysis of intra-regional influences' International Studies Association Convention, San Diego, CA April 2012

Glazewski, J *Environmental law in South Africa* (Butterworths: Durban 2000)

Glencore 'Code of Conduct' 2013

Gorg, H and Strobl, E 'Multinational companies and indigenous development: an empirical analysis' (2002) *46 European Economic Review* 1305 – 1322

Government of the Republic of Zambia and Konkola Copper Mines PLC 'Development Agreement' of 31 March 2000

Government of the Republic of Zambia and Mopani Copper Mines PLC 'Environmental Liabilities Agreement' of 31 March 2000

Government of the Republic of Zambia and Mopani Copper Mines PLC 'Mufulira Mine, Smelter and Refinery and Nkana Mines, Concentrator and Cobalt Plant Development Agreement' of 31 March 2000

Government of the Republic of Zambia 'National Report: United Nations Conference on Sustainable Development' June 2012

Government of Malawi 'Mines and Minerals Policy' 2015

Gray, KR 'Foreign direct investment and environmental impacts- is the debate over?' (2002) *11 RECIEL* 3

Greenway, D, Sousa, N and Wakelin, K 'Do domestic firms learn to export from multinationals?' Leverhulme Centre Research Paper No. 37, 2001, University of Nottingham

Haller, G *Menschenrechte ohne Demokratie? Der Weg der Versöhnung von Freiheit und Gleichheit* (Bpb Bundeszentrale für Politische Bildung: Bonn 2013)

Hassaballa, H 'Environment and foreign direct investment: policy implications for developing countries' (2013) *Journal of Emerging Issues in Economics, Finance and Banking* 77

Hayward, T 'Constitutional environmental rights: a case for political analysis' (2000) 48 *Political Studies* 3 568

He, X 'Incorporating environmental considerations into investment decision-making: the potential role of strategic environmental assessment in foreign direct investment' (UNU-IAS Working Paper No. 121) 2004

Heard, A 'Human rights: chimeras in sheep's clothing' 1997. Available at: <http://www.sfu.ca/~aheard/intro.html> (accessed 14 February 2017)

Human Rights Commission 'State of human rights report in Zambia: human rights & the environment' HRC: Lusaka, 2010

Ikoni, UD 'The application of the precautionary principle in the proof of environmental offences under the Nigerian law: challenges and prospects' (2013) 7 *Journal of Environmental Research and Development* 4 1738

Informal discussion, Citizens for a Better Environment, Wednesday, 29 July 2015

Informal discussion, Green and Justice Organisation, Friday, 3 July 2015

Informal discussion, Kansanshi Copper Mines, Saturday, 28 June 2015

Informal discussion, Konkola Copper Mines, Thursday 2 July 2015

Informal discussion, Lumwana Copper Mines, Friday 24 July 2015

Informal discussion, Mines Safety Department, Friday, 3 July 2015

Informal discussion, Ministry of Lands, Natural Resources and Environment Protection, Thursday, 14 May 2015

Informal discussion, Misenge Technical Services Limited, Thursday, 30 July 2015

Informal discussion, Zambia Development Agency, Monday, 8 June 2015

Informal discussion, Zambia Environmental Management Agency, Head Office, Friday, 22 May 2015

Informal discussion, Zambia Environmental Management Agency, Ndola, Wednesday, 1 July 2015

Informal discussion, Zambia Human Development, Thursday 2 July 2015

Informal discussions, Zambia Institute Environmental Management, Monday, 27 February 2017

International Council on Mining and Metals 'The mining and metals industries: progress in contributing to sustainable development' ICMM Working Paper, 27 February 2002

International Institute for Sustainable Development *Investment treaties & why they matter to sustainable development: questions & answers* 2012

International Finance Corporation Equator Principles III June 2013

International Finance Corporation 'Guidance notes: performance standards on environmental and social sustainability' World Bank: Washington 2012

International Finance Corporation *Performance standards on social & environmental sustainability* (World Bank: Washington DC 2006)

International Monetary Funds *Balance of payment manual: conceptual framework* (5th edition)(IMF Publishing: New York 1993)

International Monetary Fund *Balance of payments and international investment position manual* 6th edition (Washington D.C: International Monetary Fund 2009)

International Standardisation Organisation 'Introduction to ISO 14001' ISO Central Secretariat: Geneva 2015

International Standards Organisation *International standard 26000: guidance on social responsibility* (1st edition) ISO Central Secretariat: Geneva 2010

Jefferis, K 'The role of TNCs in the extractive industry of Botswana' (2009) *18 Transnational Corporations* 74

Jenkins, H and Obara, L 'Corporate social responsibility (CSR) in the mining industry – the risk of community dependency'. Available: <http://pdfsu.com/booklib.php?ref=EbookDig&q=Corporate-Social-Responsibility-CSR-in-the-mining-.pdf> (accessed 23 November 2016)

Johnson, SW 'Hydrologic effects' in Marcus, JJ (ed.) *Mining environmental handbook* (Imperial College Press: London 1997)

Kant, I *Practical philosophy* (Cambridge University Press: Cambridge 1999)

Kaplan, M 'Pollution Haven hypothesis-how does foreign direct investment react to heterogeneous environmental regulation across countries? A critical examination of empirical surveys Referee Report'

Katati, M 'Mining and environmental challenges' paper presentation, Zambia Mining Indaba, 17-19 July 2013

Khan, MA and Khattak, NR 'Effects of economic factors on foreign direct investment inflow: evidence from Pakistan (1971-2005)' (2009) *25 Sarhad Journal of Agriculture* 135

Kidd, M *Environmental law: a South African guide* (Juta Publishing: Cape Town 1997)

Kiss, A and Shelton, D *Manual of European environmental law* (Sweet & Maxwell: London 1993)

Kotzé, LJ 'The judiciary, the environmental right and the quest for sustainability in South Africa: a critical reflection' (2007) *16 RECIEL* 3 301

Larsson, M 'Legal definitions of the environment and of environmental damage' (2009) *Stockholm Institute for Scandinavian Law* 157

Lewis, BM 'The human right to a good environment in international law and the implications of climate change' unpublished PhD thesis, Monash University, 2014

Li, P 'The myth and reality of Chinese investors: a case study of Chinese investment in Zambia's copper industry' South African Institute of International Affairs: Johannesburg 2010

Limpitlaw, D 'Environmental impact assessment of mining by integration of remotely sensed data with historical data' Mine Environmental Engineering Conference II paper presentation, Brunel University, Uxbridge, UK, 29-30 July 1998

Lin, X 'An evaluation of the three periods of China's FDI development: 1978-2000' unpublished PhD thesis, University of Greenwich, 2007

Lindahl, J 'Environmental impacts of mining in Zambia: towards better environmental management and sustainable exploitation of mineral resources' *Geological Survey of Sweden* 2014

Lund-Thomsen, P 'Corporate accountability in South Africa: the role of community mobilizing in environmental governance' (2005) 3 *International Affairs* 81 627-628

Mabey, N and McNally, R *Foreign direct investment and the environment: from pollution havens to sustainable development* (WWF 1999)

Mander, WJ *British idealism: a history* (Oxford University Press: Oxford 2011)

Mares, R 'A gap in the corporate responsibility to respect human rights' (2010) 36 *Monash University Law Review* 3 36

Mason, RP 'Mining waste impacts on stream ecology' in Da Rosa, CD (ed.), *Golden dreams, poisoned streams, how reckless mining pollutes America's waters and how we can stop it* (Mineral Policy Centre: Washington DC 1997)



Mayondi, W 'Mining and CSR in Zambia: a case study of Barrick Gold mine' Unpublished Masters in Development Studies Victoria University 2014

McLeod–Kilmurray, H 'Lowering barriers to judicial enforcement: civil procedure and environmental ethics' in Paddock, L; Qun, D; Kotze, LJ; Markell, DL; Markowitz, KJ; and Zaelke, D *Compliance and enforcement in environmental law: towards more effective implementation* (Edward Elgar: Cheltenham 2011)

McManus, JC 'The theory of the international firm' in Paquet, G (ed.) *The multinational firm and the national state* (Collier-Macmillan: Ontario 1972)

McNamara, N 'The environmental regulation of mining: an international comparison' unpublished PhD dissertation, University of Southern Queensland, 2009

Medalla, EM and Laranzo, DC 'Does trade lead to a race to the bottom in environmental standards? Another look at the issues' Discussion Paper Series No. 23 2005

Mihci, H, Cagatay, S and Koska, O 'The impact of environmental stringency on the foreign direct investment of the OECD countries' (2005) 7 *Journal of Environmental Assessment Policy and Management* 679 – 704.

Ministry of Energy and Minerals 'Mineral Policy of Tanzania' 2009

Minister of Finance 'Ministerial statement on the status of mining taxation' August 2011

Minister of Lands and Natural Resources 'Policy statement on 'management and administration of customary land in Zambia' issued on 13 December 2013

Minister of Mines and Minerals Development 'Ministerial statement presented to the fifth session of the tenth assembly of Parliament' 24 March 2011

Ministry of National Development Planning *Seventh National Development Plan 2017-2021* 2017

Ministry of Mines and Mineral Development 'Mineral Resources Development Policy' 2013

Ministry of Tourism and Arts *National Policy on Environment* 2007

Mishra, PC *Soil pollution and organisms* (APH Publishing: New Delhi 1989)

Mission Report Reactive Monitoring Mission Mana Pools, Sapi and Chewore Safari Areas (Zimbabwe), 9-15 January 2011

Mody, A 'Is FDI integrating the world economy?' (2004) 27 *World Economy* 8 1195 – 1222

Mouton, J *How to succeed in your master's and doctoral studies: A South African guide and resource book* (Pretoria: Van Schaik Publishers 2001)

Mpanga, C 'Critical analysis of the environmental impact assessment (EIA) process relevant to the mining industry in Zambia' unpublished LLB obligatory essay, University of Zambia, 2014

Mubangizi, JC 'Towards a new approach to the classification of human rights with specific reference to the African context' (2004) 4 *African Human Rights Law Journal* 95

Muchlinski, PT *Multinational enterprises and the law* (London: Blackwell Publishers 1995)

Mudenda, F 'General principles of environmental law' presentation, LAZ Seminar, Livingstone, 2006

Munyinda, NS and Habasonda, LM 'Public participation in Zambia: the case of natural resources management' 2013

Mwansa, M 'Mining activities and their effects on public health in Zambia: how adequate are the mechanisms for protection?' unpublished obligatory essay, University of Zambia, 2013

Nachalwe, N 'The Zambian legislation regulating pollution and its effectiveness in pollution control: an analysis' unpublished obligatory essay, University of Zambia, 2001

Neumayer, E 'Pollution havens: an analysis of policy options for dealing with an elusive phenomenon' (2001) 10 *Journal of Environment & Development* 2 147

New York State Energy Research and Development Authority 'Market-based environmental protection mechanisms and the impact on energy production and use' Final Report, October 2011

Ndulo, M 'Mining legislation and mineral development in Zambia' (1986) 19 *Cornell International Law Journal* 33

Ndulo, M *Mining rights in Zambia* (Kenneth Kaunda Foundation: Lusaka 1987)

Ndulo, M 'Legal and regulatory frameworks for resource exploration and extraction-global experience' African Development Bank high-level policy seminar on optimising the benefits of coal & gas in Mozambique, 27 – 28 February 2013, Maputo, Mozambique

Nunnenkamp, P 'To what extent can foreign direct investment help achieve international development goals?' (2004) 27 *World Economy* 5 657 – 677

Odidi, OC 'Reflection on teaching and research on environmental law in African universities' (1988) 18 *Journal of Eastern African Research Development* 132

Organisation for Economic Cooperation and Development 'Benchmark definition of foreign direct investment' 4th edition 2008

Organisation for Economic Co-Operation and Development *Detailed benchmark definition of foreign direct investment* (OECD Publishing: Paris 1996)

Organisation for Economic Co-Operation and Development *Glossary of environment statistics, studies in methods, series F, No. 67* United Nations: New York 1997

Organisation for Economic Cooperation and Development 'Guidelines for multinational enterprises' OECD Publishing: Paris 2011

Organisation for Economic Cooperation and Development *Globalisation and environment: preliminary perspectives* OECD Publishing: Paris 1997

Osei-Hwedie, BZ 'Environmental protection and economic development in Zambia' (1996) *Journal of Social Development in Africa* 62

Ouguerouz, F *African Charter on Human and Peoples' Rights: a comprehensive agenda for human dignity and sustainable democracy in Africa* Kluwer Law International: New York 2003)

Oxfam 'Implications of the extractive industry activities on human rights: the case of Zambia's mining sector' Memorandum submitted to the National Assembly of Zambia: Committee on Legal Affairs, Governance, Human Rights, Gender Matters and Child Affairs, 23 December 2016

Paine, T *The rights of man* (New York: Penguin Books 1985)

Pandey, SK 'Public interest litigation: instrument of environmental protection: an appraisal' (2006) *Journal of Environmental Research and Development* 100

Parliamentary Report of the Committee on Energy, Environment and Tourism for the First Session of the Tenth National Assembly appointed on 8 November 2006

Pathak, P 'Human rights approach to environmental protection' (2014) 7 *OIDA International Journal of Sustainable Development* 18

Pazienza, P *The relationship between FDI and the natural environment: facts, evidence and prospects* (Springer: London 2014)

Rodriguez, V 'Annual report of the inter-American Court of Human Rights' 1988

Ragazzi, G 'Theories of the determinants of direct foreign investment' (1973) 20 *Staff Papers International Monetary Fund* 2 471

Rasche, A "A necessary supplement" – what the united nations global compact is and is not' (2010) 48 *Business and Society* 4 16

Rojas, R 'International capital: a threat to human dignity and life on planet earth' 2001. See: <http://www.rrojasdatabank.org/globalss.doc> (accessed 24 March 2017)

Romson, A *Environmental policy space and international investment law* (Acta Universitatis Stockholmiensis: Stockholm 2012)

Rorty, R 'Human rights, rationality, and sentimentality' in Rorty, R (ed.) *Truth and progress* (Cambridge University Press: Cambridge 1998)

Ruggie, J 'Business and fundamental rights: the state duty to protect and domestic legal reform' South African Institute for Advanced Constitutional, Public, Human Rights and International Law Johannesburg, 3 November 2008

Ruggie, J *Guiding principles on business and human right: Implementing the United Nations "Protect, Respect and Remedy" Framework* (United Nations: Geneva 2011)

Saasa, O *Zambia's Policies towards foreign investment: the case of the mining and non-mining sectors* (Uppsala: Scandinavian Institute of African Studies 1987)

Sakala, JB *The role of the judiciary in the enforcement of human rights in Zambia* (Image Printers: Lusaka 2013)

Sambasivan, M and Fei, NY 'Evaluation of critical success factors of implementation of ISO 14001 using analytic hierarchy process (AHP): a case study from Malaysia' (2008) *16 Journal of Cleaner Production* 1424-1433

Sambo, PT 'A conceptual analysis of environmental justice approaches: procedural environmental justice in the EIA process in South Africa and Zambia' unpublished PhD thesis, University of Manchester, 2012

Sands, P *Principles of international environmental law* 2nd edition (Cambridge University Press: Cambridge 2003)

Sands, P, Peel, J, Fabra, A & Mackenzie, R *Principles of international environmental law* 3rd edition (Cambridge University Press: Cambridge 2012)

Schoemaker, D 'Raising the bar on human rights: what the Ruggie principles mean for responsible investors' 2011

Scheele, F, de Haan, E and Kiezebrink, V *Cobalt blues: environmental pollution and human rights violations in Katanga's copper and cobalt mines* (SOMO: Amsterdam 2016)

Seid, S *Global Regulation of Foreign direct investment* (London: Ashgate Publishers 2002)

Shafi, SM *Environmental pollution* (Atlantic Publishers: New Delhi 2005)

Sharma, D and Bhatnagar, P 'Corporate social responsibility of mining industries' 2014

Shelton, D 'Human rights, environmental rights, and the right to environment' (1991) 28 *Stanford Journal of International Law* 136

Shelton, D and Kiss, A *Judicial handbook on environmental law* (UNEP: Nairobi 2005)

Shue, H *Basic rights: subsistence, affluence, and U.S. foreign policy* 2nd edition (Princeton: Princeton University Press 1996)

Silengo, M 'An integrated framework for environmental management and protection in Zambia' unpublished PhD thesis, University of Salford, 1996

Silwamba, E and Jalasi, J *A practical cross-border insight into mining law: Zambia* 4th edition (ICLG: London 2017)

Simukanga, S, Kawamya, VM, and Masinja, J 'Mining and the environment in Zambia - legal provisions for sustainable development?' A paper presented at the symposium and workshop on higher education for sustainable development in Africa, Cape Town, South Africa, 30–31 August 2010

Simutanyi, N 'Copper mining in Zambia: the developmental legacy of privatisation' Institute for Security Studies Paper No. 165, July 2008

Sornarajah, M *The international law on foreign investment* 3rd edition (Cambridge University Press: Cambridge 2010)

Stebek, EN 'The investment promotion and environment protection balance in Ethiopia's floriculture: the legal regime and global value chain' unpublished PhD thesis, University of Warwick, 2012

Stephan, M and Pfaffmann, E *Detecting the pitfalls of data on foreign direct investment: a guide to scope and limits of FDI-data as an indicator of business activities of transnational corporations* (Centre for International Management and Innovation, University of Hohenheim: Stuttgart 1998)

Stiglitz, JE 'The world bank at the millennium' (1999) 109 *The Economic Journal* 459 577 – 597

Sun, Y 'Africa in China's foreign policy' John L. Thornton China Center and the Africa Growth Initiative at Brookings 2014

Tonnies, S *Der westliche Universalismus. Die Denkwelt der Menschenrechte* (Westdt. Verl: Wiesbaden 2001)

United Nations 'Berlin II guidelines for mining and sustainable development' 2002

United Nations Conference on 'Human environment (identification and control of pollutants of international significance)' DOC.A/CONF.48/8, 7 January 1972

United Nations Conference on Trade and Development 'World Investment Report: investor nationality and policy challenges' (UN: New York 2016)

United Nations Conference on Trade and Development 'World Investment Report: transnational corporations, extractive industries and development' (UN: New York 2007)

United Nations Conference on Trade and Development 'World Investment Report: towards a new generation of investment policies' (UN: New York 2012)

United Nations Document E/CN.4/Sub.2/2003/12/Rev.2 (2003). Approved 13 August 2003, U.N. Sub-Commission on Promotion and Protection of Human Rights resolution 2003/16, U.N. Doc. E/CN.4/Sub.2/2003/L.11 at 52 (2003) 0

United Nations Environmental Programme *Training manual on international environmental law* (UNEP: Nairobi 2015)

United Nations Human Rights Council, 21st session, A/HRC/21/48 (2 July 2012)

Valen–Sendstad, A 'Theories of human rights in relation to understandings of human rights education: the relevance to diversity' unpublished PhD thesis, University of Birmingham, 2010

Van Wagenen, TF *International mining law* (McGraw-Hill: London 1918)

Vinuales, JE *Foreign investment and the environment in international law: an ambiguous relationship* (Cambridge University Press: Cambridge 2010)

Wagner, MJ 'International investment, expropriation and environmental protection' (2010) 29 *Golden Gate University Law Review* 3 468

Wagner, UJ and Timmins, CD 'Agglomeration effects in foreign direct investment and the pollution haven hypothesis' (2009) 43 *Environmental Resource Economics* 231-256

Walter, L 'Theories of universal human rights and the individual's perspective' 25 *Politikon: IAPSS Political Science Journal* 124

Wang, Y 'Unravelling the development of underdevelopment: examining the impact of foreign investment on economic growth across income groups, 1997-2011' unpublished Master of Arts, Lehigh University, 2014

Wheeler, D 'Racing to the bottom? Foreign investment and air quality in developing countries' World Bank Development Research Group, 2000. Available at: <http://infohouse.p2ric.org/ref/22/21758.pdf> (accessed 31 March 2017)



Wilhelm, SKS and Witter, MSD 'Foreign direct investment and its determinants in emerging economies' African Economic Policy Paper No. 9. Available: <http://www.eagerproject.com/discussion9.shtml> (accessed 21 March 2017)

World Bank Guidelines on Extractive Industries

World Trade Organisation *Annual report* (WTO Publications: Geneva 1996)

Xing, Y and Kolstad, CD 'Do lax environmental regulations attract foreign investment?' (2002) *21 Environmental and Resource Economics* 11 – 22

Yawitch, J 'Proposed amendments to the National Environmental Management Act, 1998 (NEMA)' Department for Environmental Affairs and Tourism, October 2007. Available on: <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2007/071010nema.ppt> (accessed 28 April 2016)

Zambia Environmental Management Agency 'Issuance of Environmental protection order to First Quantum Minerals' Press Release of 20 June 2013

Zambia Institute for Environmental Management 'Environmental and social impact assessment for Musakashi river catchment and its tributaries: an independent impact assessment of industrial mining waste pollution in Chambishi' (ZIEM: Lusaka 2013)

Zarsky, L (ed.) *Human rights and the environment: conflicts and norms in a globalizing world* (Earthscan Publications Limited: London 2002)

Zhang, J 'Environmental regulations and foreign direct investment' 2006. Available at: <https://www.nottingham.ac.uk/gep/documents/conferences/2006/postgradconf2006/jingzhang-postgradconf2006.pdf> (accessed 30 March 2017)

Zhang, J 'Foreign direct investment, governance, and the environment in China: regional dimensions' unpublished PhD thesis, University of Birmingham, 2008

## Internet sources

<http://www.oecd.org/investment/globalforum/40311090.pdf> (accessed 27 September 2013)

<http://www.miningwatch.ca/fr/node/7158> (accessed 15 July 2014)

<http://www.minesandcommunities.org/article.php?a=12557> (accessed 10 December 2014)

<http://www.minesandcommunities.org/article.php?a=12557> (accessed 10 December 2014)

[http://www.zccm-ih.com.zm/index.php?option=com\\_content&view=article&id=119&Itemid=73](http://www.zccm-ih.com.zm/index.php?option=com_content&view=article&id=119&Itemid=73) (accessed 9 July 2015)

<http://www.glencore.com/public-positions/supporting-development/zambia/> (accessed 14 July 2015)

<http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Oxfam-Zambia.htm> (accessed 17 July 2015)

<http://www.oecd.org/investment/globalforum/40311090.pdf> (accessed 27 September 2015)

<http://www.investopedia.com/terms/m/mineral-rights.asp#ixzz3g8irsOUw> (accessed 17 October 2015)

<http://www.investopedia.com/terms/a/asset.asp#ixzz3p5y6OFrF> (accessed 20 October 2015)

<http://tandis.odihhr.pl/documents/hre-compendium/en/CD%20SEC%203/HRE%20Package%20for%20Schools%20Tajikistan/HRE%20Package%20Textbook%20Tajistkan%20ENG.pdf> (accessed 10 March 2017)

<https://eiti.org/eiti> (accessed 25 March 2016)

<http://www.africa-union.org/root/au/recs/comesa.htm> (accessed on 1 April 2016)

<http://www.merriam-webster.com/dictionary/right> (accessed 10 May 2016)

<http://plato.stanford.edu/entries/rights/> (accessed 10 May 2016)

[http://aynrandlexicon.com/lexicon/individual\\_rights.html](http://aynrandlexicon.com/lexicon/individual_rights.html) (accessed 10 May 2016)

<http://www.duhaime.org/LegalDictionary/H/HumanRight.aspx> (accessed 10 May 2016)

<http://www.ohchr.org/Documents/Publications/FAQen.pdf> (accessed o 10 May 2016)

<http://www.mcti.gov.zm/index.php/investing-in-zambia/zambian-economy/key-sectors>  
(accessed 17 May 2016)

<http://www.merriam-webster.com/dictionary/theory> (accessed 17 May 2016)

<http://dictionary.cambridge.org/dictionary/english/theory> (accessed 17 May 2016)

<http://www.glencore.com/public-positions/supporting-development/zambia/> (accessed 14  
July 2016)

[https://www.elections.org.zm/results/2016\\_referendum](https://www.elections.org.zm/results/2016_referendum) (accessed 22 August 2016)

<http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx> (accessed 30 September  
2015)

<http://www.first-quantum.com/Our-Business/Our-Products/default.aspx> (accessed 9 October  
2016)

<http://www.first-quantum.com/Our-Company/overview/default.aspx> (accessed 9 October  
2016)

[http://about.comesa.int/index.php?option=com\\_content&view=article&id=95&Itemid=117](http://about.comesa.int/index.php?option=com_content&view=article&id=95&Itemid=117)

(accessed on 11 October 2016).

<http://kcm.co.zm/corporate-profile/company-overview/> (accessed 12 October 2016)

<https://plato.stanford.edu/entries/rights-group/> (accessed 9 December 2016)

<https://www.globalreporting.org/standards/gri-standards-download-center/?g=4d13e53e-e0d4-44e2-9d9c-68e5c7744b9f> (accessed 12 December 2016)

<https://www.globalreporting.org/information/sustainability-reporting/Pages/default.aspx>  
(accessed 12 December 2016)

<http://www.icmm.com/en-gb/members/member-companies> (accessed 12 December 2016)

<https://www.unglobalcompact.org/what-is-gc/mission/principles> (accessed 13 December 2016)

<http://www.zambiaeiti.org/index.php/ct-menu-item-34> (accessed 16 December 2016)

<https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-2> (accessed 17 January 2017)

<http://www.zieminstitute.org/about-us> (accessed 27 February 2017)

<http://www.zieminstitute.org/environmental-management> (accessed 27 February 2017)

<http://ambriefonline.com/mining-in-the-drc-a-palatable-endeavour/> (accessed 31 March 2017)

<http://www.iep.utm.edu/hegelsoc/> (accessed 11 April 2017)

<https://plato.stanford.edu/entries/rights-human/#SocRig> (accessed 11 April 2017)

<http://www.iep.utm.edu/hum-rts/#H2> (accessed 11 April 2017)

<https://mem.go.tz/mineral-sector/> (accessed 19 April 2017)

<http://www.tanzaniainvest.com/mining> (accessed 19 April 2017)

<http://www.tcme.or.tz/mining-in-tanzania/industry-overview/> (accessed 19 April 2017)

<http://www.sadc.int/member-states/tanzania/> (accessed 20 April 2017)

<https://brightkite.com/essay-on/the-foundation-developing-and-significance-of-human-rights>  
(accessed 11 July 2017)

<http://legal-dictionary.thefreedictionary.com/Inalienable+rights> (accessed 11 July 2017)

<http://kcm.co.zm/our-commitment-to-zambia/corporate-social-investments/> (accessed 24 August 2017)

<http://kcm.co.zm/corporate-profile/company-policies/> (accessed 29 August 2017)

<http://www.glencore.com/assets/public-positions/doc/20170330-Mopani-investment-statement.pdf> (accessed 1 September 2017)

<http://www.first-quantum.com/Corporate-Responsibility/Economics/default.aspx> (accessed 1 September 2017)

<http://www.first-quantum.com/Corporate-Responsibility/Social/default.aspx> (accessed 1 September 2017)

<http://www.ohchr.org/EN/Issues/Business/Pages/SRSGTransCorplIndex.aspx> (accessed 25 September 2017)