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Pillar I

Tanzania's Policy & Legal Framework Relevant to the Extractive Sector



2. Pillar I: Tanzania's Policy and Legal Framework Relevant to the Extractive Sector

2.1 Introduction and Link to the UN Guiding Principles on Business and Human Rights

Pillar I of the UNGPs addresses the Government duty to protect against human rights abuse within its territory and/or jurisdiction by business enterprises through effective policies, legislation, regulations and adjudication.¹⁰¹ This includes setting clear expectations for business as well as putting in place the appropriate policy and legal frameworks to implement the corporate responsibility to respect human rights.

This section examines Tanzania's policy and legal framework for the extractive sector. The aim is to assist the Government in considering whether the current framework is fully aligned with its international human rights obligations or whether the existing policies and laws need further adjustments to address any gaps or shortcomings. For companies, it is important to understand whether the policy and legal framework reinforces their own responsibilities to respect human rights or where it may leave gaps or in the worst case scenario, contradicts international human rights standards. Where gaps in the policy and legal framework exist, they present a challenge to a level playing field among companies as these can be filled by good – and bad – practices. The UNGPs set out clear expectations that where national standards conflict with international human rights standards, companies should seek ways to honor the principles of internationally recognized human rights.¹⁰²

2.2 Constitutional Analysis

Under the 1977 Constitution,¹⁰³ the President is the Head of State, the Head of Government, and the Commander in Chief of the armed forces.¹⁰⁴ The legislature is comprised of a unicameral National Assembly,¹⁰⁵ and the judiciary forms a third and separate branch of government.¹⁰⁶ In 2011, the Government launched a process to draft a new constitution for the country¹⁰⁷ but it has still not been approved. The existing Constitution covers the following matters:

- Chapter 1: declares the fundamental principles of state policy and the fundamental rights and duties of the country's citizens.
- Chapters 2-5: cover the three branches of state authority: the Executive, the Legislature and the Judiciary and the distribution of powers and functions among them.
- Chapter 6: Establishes the country's National Human Rights Institution, the CHRAGG, setting out its functions and powers.

- Chapter 7: regulates the finances of the United Republic.
- Chapter 8: establishes the local government authorities of the cities, municipalities and the rural districts.
- Chapter 9: establishes the existence and control of the Armed Forces of the United Republic.¹⁰⁸

The Bill of Rights is contained in Chapter 1 of the Constitution,¹⁰⁹ which includes a number of internationally recognized human rights as set out in the Universal Declaration of Human Rights (UDHR) (see Table 1 below). International human rights that are incorporated into national constitutions enjoy clearer visibility and protection than rights that are not covered in a constitution so it is relevant to understand what human rights are covered in a constitution and which are not. Nonetheless, countries that sign and ratify international human rights conventions accept the obligation of protecting those rights – whether or not they are included in the constitution.¹¹⁰

Article 25 to 28 of the Tanzanian Constitution imposes duties on every individual to respect the rights of others and society. Article 29 covers the right of *“every person in the United Republic has the right to enjoy fundamental human rights and to enjoy the benefits accruing from the fulfillment by every person of this duty to society, as stipulated under Article 12 to 28.”* Article 30 of the Constitution limits the application of these rights subject to law but also allows any person to challenge any law or act/omission, which contravenes his or her right, or the Constitution.

Table 1: International Human Rights from the Universal Declaration of Human Rights (UDHR) that are included in the 1977 Constitution

International Human Right	Article of the UDHR	Relevant Article of the Constitution of the United Republic of Tanzania
The Right to Equality	1 and 2	12
The Right to life	3	14
Equality before the law	6 and 7	13
Access to justice	8	13
Right to property	17	24
Freedom of expression	19	18
Right to participation	21	21
Right to work	23	22
Right to education	26	11
Right to personal freedom	3	15
Right to privacy	12	16

Right to freedom of movement	13	17
Right to freedom of religion	18	19
Person's freedom of association	17 and 20	20

The Tanzania Constitution provides for some of the fundamental human, social, and environmental rights and protections that should underpin the on-going development of Tanzania's extractive industry -- including participation, access to information, land ownership, livelihood, environment, security, and at-risk-groups. Additionally, the Constitution creates institutions charged with the implementation and enforcement of human rights protections, including the court and the national human rights institution.¹¹¹ However, given the date of the current Constitution – 1977 – it does not reflect the progressive protection of human rights and socio-economic rights that characterise some of the more modern African Constitutions – notably Kenya and South Africa.

2.2.1 Thematic Issues Relevant to the Extractive Industry

Community Participation/Engagement, Information & Transparency

The Constitution provides several types of protections for community participation and access to information. First, the Constitution explicitly provides that every person has the right to seek, receive, and disseminate information¹¹² and that every person has the right to be informed of important events and activities.¹¹³ Further, the Constitution explicitly provides that *"[e]very citizen has the right and the freedom to participate fully in the process leading to the decision on matters affecting, him, his well-being or the nation."*¹¹⁴ Finally, the Constitution provides that *"[e]very person has a freedom, to freely and peaceably assemble, associate and cooperate with other persons."*¹¹⁵

Labour Rights

The Constitution also protects a person's right to work,¹¹⁶ entitlement to "just remuneration" for work performed,¹¹⁷ and to access education.¹¹⁸

Land Ownership

All extractive sector activities require access to and use of land. The Constitution explicitly provides that every person has a right to own and protect property.¹¹⁹ Further, no person can be deprived of his property, for any reason, without "fair and adequate" compensation.¹²⁰

In a case involving the right to property, the court of appeal held in the case of Attorney General v. Lohai Akonaay and Joseph Lohai¹²¹ that customary land rights are *"real property protected by the provisions of Article 24 of the Constitution of the United Republic of Tanzania."* The court emphasized that the Constitution prohibits deprivation of a customary land right (also known as deemed right of occupancy)¹²² without fair compensation.¹²³

Based on this precedent, the constitutional right to property should protect communities holding customary land rights in or around existing or potential extractive operations from violation of their land rights without fair compensation.¹²⁴

Livelihoods

The Constitution imposes a duty on the state to ensure that every person earns a livelihood regardless of the persons *"old age, sickness or disability, and in other cases of incapacity"*.¹²⁵

Groups at Risk

The Constitution expressly provides that every person is born free and equal.¹²⁶ The Constitution further provides that *"[a]ll persons are equal before the law and are entitled, without any discrimination, to protection and equality before the law"*¹²⁷ and that *"[n]o person shall be discriminated against by any person or any authority acting under any law or in charge of the functions or business of any state office."*¹²⁸ The Constitution provides an important foundational framework for the protection of all persons as being equal in dignity and value but does not provide for specific protection for women, children, youth, disabled, minorities and marginalized, and the elderly.

Environmental Protection

Apart from fundamental human rights encompassed in the Bill of Rights, the Constitution also contains citizens' duties. One duty, in particular, that is more relevant to the extractive sector appears under Article 27. While the current Constitution leaves much room for improving these protections, it does provide that *"[e]very person has the duty to protect the natural resources."*¹²⁹ The significance of this provision in relation to the extractive sector is twofold. Firstly, it expressly enjoins Tanzanian citizens to participate in the management of the country's natural resources. Secondly, it implies a duty on the Government to create an enabling environment for citizens to take part in natural resources management, including extractives sector activities.

Community and Public Security

Finally, the Constitution provides for a person's right to security.¹³⁰

2.2.2 Challenges around the Implementation of the Bill of Rights

The Basic Rights and Duties Enforcement Act¹³¹ provides the procedures for enforcing rights contained in the Bill of Rights. The law specifies a requirement for a full bench, comprising three judges, to determine a case involving allegations of human rights violations.¹³² In practice, it has been difficult for the understaffed¹³³ judiciary to simultaneously pull three judges away from their already overloaded case dockets to preside over such cases in a timely fashion. Consequently, the law has had the effect of hindering the effective protection of human rights because when compared to other civil or criminal cases, these cases take disproportionately longer to be heard and adjudicated.¹³⁴

In addition, Article 30(4) of the Constitution¹³⁵ provides that the High Court of Tanzania is the first court of instance in adjudicating human rights cases. Unlike lower courts or other quasi-judicial tribunals, it is difficult for a layperson to defend oneself (*propria persona*) at the High Court or the Court of Appeal due to the complexity of the legal procedures and technicalities involved.¹³⁶ To date, no disaggregated data exists on the number of human rights cases filed per year in Tanzania. However, according to a speech by the Chief Justice of Tanzania, a total of 7,857 cases touching on various causes of action were filed at the High Court in 2013 alone.¹³⁷

Another hindrance relates to the inability of communities to access the court due to lack of technical knowhow and financial resources. A report on the implementation of the International Covenant on Civil and Political Rights in Tanzania indicates, for example, that while the majority of Tanzanians live on below \$1/day,¹³⁸ *“preparation of small and simple legal documents by an Advocate say a pleading costs \$500 [and] consultation fees range from a minimum of \$10 and above.”* During the course of this study, twenty-six (26) out of forty-one (41) respondents that were interviewed in Geita district described in exasperation how very difficult it is for them to file court cases or to challenge violation of their human rights by extractive operations without the assistance of volunteer lawyers. One Geita respondent further lamented, *“that [the court of law] is not a place you can just walk to, straight from your house. You need to know the law and you need money to pay for so many things that they tell you to pay the moment you meet the first official.”*

Specifically, the communities depend to a large extent on human rights organisations such as the Lawyers Environmental Action Team (LEAT), the Legal and Human Rights Center (LHRC), and the Tanganyika Law Society as well as some academic institutions such as the Legal Aid Committee of the University of Dar es Salaam, which offer free legal aid. Not only are these legal aid clinics few in number, but they cannot meet the public demands for legal assistance, and they remain heavily donor-dependent.

2.3 Tanzania's International Human Rights Obligations

Tanzania has ratified a number of international human rights treaties. The Government therefore has the duty to respect, protect and fulfil the human rights covered by these treaty obligations.¹³⁹

Table 2: Tanzania's Ratification Status of International Human Rights Obligations¹⁴⁰

Treaty	Signature Date	Ratification Date: Accession date (a) Succession date (d)
CCPR - International Covenant on Civil and Political Rights		11 Jun 1976 (a)
CCPR-OP1 - Optional Protocol to the International Covenant on Civil and Political Rights	-	-

CCPR-OP2-DP - Second Optional Protocol to the International Covenant on Civil and Political Rights aiming to the abolition of the death penalty	-	-
CED - Convention for the Protection of All Persons from Enforced Disappearance	29 Sept 2008	
CEDAW - Convention on the Elimination of All Forms of Discrimination against Women	17 Jul 1980	20 Aug 1985
CERD - International Convention on the Elimination of All Forms of Racial Discrimination		27 Oct 1972 (a)
CESCR - International Covenant on Economic, Social and Cultural Rights		11 Jun 1976 (a)
CRC - Convention on the Rights of the Child	01 Jun 1990	10 Jun 1991
CRC-OP-AC - Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict		11 Nov 2004 (a)
CRC-OP-SC - Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child pornography		24 Apr 2003 (a)
CRPD - Convention on the Rights of Persons with Disabilities	30 Mar 2007	10 Nov 2009
CAT - Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment	-	-
CAT-OP - Optional Protocol of the Convention against Torture	-	-
CMW - International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	-	-

Table 3: Tanzania's Ratification Status of ILO Fundamental Conventions¹⁴¹

Treaty	Signature Date
CCPR - International Covenant on Civil and Political Rights	
CCPR-OP1 - Optional Protocol to the International Covenant on Civil and Political Rights	-
CCPR-OP2-DP - Second Optional Protocol to the International Covenant on Civil and Political Rights aiming to the abolition of the death penalty	-
CED - Convention for the Protection of All Persons from Enforced Disappearance	29 Sept 2008
CEDAW - Convention on the Elimination of All Forms of Discrimination against Women	17 Jul 1980
CERD - International Convention on the Elimination of All Forms of Racial Discrimination	
CESCR - International Covenant on Economic, Social and Cultural Rights	
CRC - Convention on the Rights of the Child	01 Jun 1990
CRC-OP-AC - Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict	
CRC-OP-SC - Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child pornography	
CRPD - Convention on the Rights of Persons with Disabilities	30 Mar 2007
CAT - Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment	-
CAT-OP - Optional Protocol of the Convention against Torture	-
CMW - International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	-

2.3.1 Indigenous People

Tanzania is a multi-ethnic State, with more than 120 ethnic and minority groups. Tanzania was one of the states that supported adoption of the UN Declaration on the Rights of Indigenous Peoples, unlike its neighbor Kenya that abstained.¹⁴² The Tanzanian Government's official position is that *"all people of African descent were indigenous"*.¹⁴³ Nonetheless, the Government recognizes that there are groups that need special protection within the country, including¹⁴⁴ three distinct groups which identify themselves as

indigenous peoples: Harzabe and the pastoralist Barbaig and Maasai.¹⁴⁵ The Government had taken various measures to provide political, social and cultural amenities to such groups in the fields of health, politics, employment and education. These groups have been recognized by the African Commission on Human and People's Rights as having indigenous status.¹⁴⁶ The Legal and Human Rights Centre further identified the Iraque and the Sandawe as self-identifying indigenous peoples.¹⁴⁷

The key issue for the groups on the ground will be how these protections are applied through laws, regulations, contracting, jurisprudence and in particular in practical application in protecting their way of life. This will also play out against the wider and very active discussions globally about the impact of the extractive sector on indigenous peoples' rights (see below).

In Focus:

Indigenous Peoples and the Extractive Sector¹⁴⁸

There has been a long and often contentious history of interaction between extractive companies, governments and indigenous people around extractive operations. The worldwide drive to extract natural resources, with much of the remaining resources on the lands of indigenous peoples, means there are increasing and ever more widespread effects on indigenous peoples' lives. It is not the case that all extractive resource development is incompatible with indigenous people's development; the UN Special Rapporteur on Indigenous Peoples draws attention to alternative business models for the sector.¹⁴⁹

The adoption of international instruments on indigenous people's rights,¹⁵⁰ increasing sensitivity of governments, private sector companies, extractive sector industry associations, IFIs and CSOs, combined with improved environmental and social management processes, has meant that at least in some operations, impacts of extractive operations have been prevented or minimized. As significant as these developments are in bringing improvements, there remains in many countries significant challenges for indigenous peoples in exercising their rights to "*determine priorities and strategies for the development or use of their lands and territories*"¹⁵¹ and for protection of their wider set of rights.

The principles of consultation and free, prior and informed consent (FPIC) are instrumental to rights of participation and self-determination and are part of a wider process of engagement with indigenous peoples on the wider set of rights that may be impacted by extractive operations. FPIC is also part of a wider set of safeguards, including the use of impact assessments, prevention and mitigation measures, benefit-sharing and compensation schemes.¹⁵² The FPIC process envisioned between indigenous peoples, the government and companies seeks to provide an important process to enable indigenous peoples to set their own priorities and strategies for development. Where extractive projects will go ahead subject to FPIC (or within limited

scope of exceptions to FPIC),¹⁵³ the process can set the terms for sustainable relationships between indigenous peoples and extractive companies based on genuine partnerships.

The path to recognition of FPIC and the broader suite of rights of indigenous peoples by governments and extractive companies had been a long and at times fraught discussion both in principle and in practice, but with some significant improvements in the overall recognition of indigenous peoples rights and in particular examples of laws that seek to provide a consent process and wider recognition in company policy and practice.¹⁵⁴ Application of the concept of FPIC by companies, especially where it is not recognized in national law remains challenging on numerous levels.¹⁵⁵ A continuous, open, and meaningful engagement of governments and indigenous communities constitutes the sine qua non for FPIC to fulfill its purpose. The absence of such government-indigenous interaction shifts responsibilities from the government to companies and burdens the FPIC process with demands that often are unrelated to projects impacts or beyond the competencies of companies. Yet there is a worrying trend to unload such responsibilities on companies, weakening the guarantor and arbitration role the government must play. This is an area where continued, collaborative dialogue involving government, the private sector and indigenous peoples is needed to continue to evolve new models that can provide broader benefits to indigenous peoples.

2.3.2 Survey of UN Human Rights Treaty Monitoring Bodies

As part of the research for this Report, concluding observations of various UN treaty monitoring bodies, the UN Human Rights Council periodic review process and regional human rights bodies were analysed to ascertain key human rights concerns around the extractive industry in Tanzania. These included:

- The core international human rights instruments that Tanzania has ratified;¹⁵⁶
- Tanzania's Universal Periodic Review (UPR) at the UN Human Rights Council;¹⁵⁷
- concluding observations of the African Charter on Human and Peoples Rights (ACHPR).¹⁵⁸

The findings of the treaty monitoring bodies on the Convention on the Right of the Child (CRC)¹⁵⁹ and the International Covenant on Civil and Political Rights (ICCPR)¹⁶⁰ contain explicit recommendations with respect to the human rights situation in Tanzania's extractive sector. They indicate that crucial human rights concerns included forced evictions, toxic spillage into drinking water, unfair compensation, and exposure to highly toxic substances such as mercury.¹⁶¹ Other concerns involving the sector included the impacts of toxic chemicals on artisanal miners, the environment and livelihoods of local communities; contamination of water sources; the lack of benefits flowing to local communities from extractive operations; and the negative impacts on families and children, such as the economic exploitation of children for sex and labour and their exposure to harmful substances.¹⁶²

2.4 Policy & Legal Framework for the Extractive Sector

2.4.1 Mining Policy, Law and Institutional Framework

The African Union's Africa Mining Vision (AMV) seeks to integrate Africa's mineral sector into the continent's social and economic development process through six related goals, providing guidance to subsequent government policy in the sector:

- Fostering a transparent and accountable mineral sector, in which resource rents are optimised and utilised to promote broad economic and social development.
- Promoting good governance of the mineral sector, in which countries and citizens participate in mineral assets, and in which there is equity in the distribution of benefits.
- Improving the knowledge, and optimising the benefits, of finite mineral resource endowments at all levels of mining for all minerals.
- Harnessing the potential of small scale mining to improve both rural livelihoods and integrating the rural economy into national development.
- Fostering sustainable development principles based on environmental and socially responsible mining, which is safe, inclusive and appreciated by communities and all stakeholders.
- Building human and institutional capacities towards a knowledge economy that supports innovation, research and development.

This vision seeks to address the common decision-making processes that have tended to favor bi-polar initiatives (government and private sector) while excluding local communities and civil society at large, resulting in local costs associated with mining (such as environmental impacts, and social and cultural disruptions) not being adequately recognized or compensated for.¹⁶³ These parameters should therefore find expression in the mining policies, laws and regulations, which constitute important instruments for these countries to realise the goals of the AMV.

The World Bank noted in a recent report on the Tanzanian mining sector

"notwithstanding the remarkable improvements in terms of tax contributions from the [formal mining] sector—in the form of mining royalties, PAYE, withholding tax, etc.—perception remains that industrial mining in Tanzania has not sufficiently played a role in poverty-alleviation, particularly in the rural areas where mining occurs. Two commissions led by government concluded with a new resolve to intensify efforts to leverage mining for development. Subsequently, the Revised Tanzania's Mining Act was passed in 2010 with new provisions around local content, beneficiation, and increased participation of Tanzanians."¹⁶⁴

In order to improve the socio-economic benefits of mining, the Government has adopted a two-prong approach: (i) improving the linkages of LSM with the local economy and local communities, including through better integration of corporate social responsibility programs and local development planning in mine affected areas; and (ii) encouraging the

formalisation and sustainable development of ASM as a means of boosting local entrepreneurship and employment in mining.¹⁶⁵

The Mineral Policy of Tanzania 2009¹⁶⁶

The Mineral Policy is the main document that articulates the Government's vision for the mining sector, aiming to *"increase the mineral sector's contribution to the GDP and alleviate poverty by integrating the mining industry with the rest of the economy."*¹⁶⁷ The main objective for this policy is to *"increase the mineral sector's contribution to the GDP and alleviate poverty by integrating the mining industry with the rest of the economy."*¹⁶⁸ The 2009 Mineral Policy aimed to strengthen links between the mineral sector and other sectors of the economy, improve the investment climate and maximise benefits from mining.

Policy statements with more relevance to human rights in the extractive sector include commitments to increase participation in mining activities;¹⁶⁹ development of small-scale mining;¹⁷⁰ establishment of land compensation and relocation schemes;¹⁷¹ promotion of relationship building between mining companies and communities surrounding mines;¹⁷² and increased employment training¹⁷³ and public awareness on mining activities.¹⁷⁴ The below paragraphs provide an analysis of the Policy's key human rights provisions.

Government and Citizen Participation in the Mining Sector

The Policy recognises that citizen participation in large-scale mining will increase the amount of benefits that the country is able to retain. One way the Government envisions this happening is through increased investment in local and foreign mining companies that conduct business in Tanzania. However, the Government acknowledges that in order for citizens to participate in large-scale mining, Tanzanians need access to capital to enable them to acquire shares in the mining companies. Accordingly, the Government has committed to facilitate the registration of foreign mining companies in the local stock exchange as a way to enable public participation in medium and large-scale mines. Yet, to date, the minister has yet to implement the necessary regulations that would require company registration, resulting in very few companies having registered in the Dar es Salaam Stock Exchange (DSE).¹⁷⁵

Establishment of Land Compensation and Relocation Schemes

The Policy specifically acknowledges that the establishment of medium and large-scale mines often causes communities to be relocated and their livelihoods to be disrupted. It provides¹⁷⁶ that where relocation is inevitable, the Government must conduct a valuation of the land and properties of the affected communities, and the investor must be responsible for payment of compensation to affected communities for relocation and resettlement. The Policy seeks to ensure transparency and adequacy of compensation rates, as well as proper valuation and prompt payment of compensation. Further, it states that investors will be required to prepare and implement sound relocation and resettlement schemes.¹⁷⁷

Correspondingly, the Government pledges to establish transparent and adequate land compensation, and resettlement schemes. This will require the government to review and harmonize relevant legislation to accommodate land compensation, relocation and resettlement schemes in mining operations as well as require investors to prepare and

implement sound relocation and resettlement schemes. This pledge is reflected in the Mining Act of 2010¹⁷⁸ which provides under section 96 that provisions of the Village Land Act and the Land Act 5 and 4 of 1999 respectively, shall be used to establish the market value of land for compensation, relocation and resettlement.

Promotion of Relationship between Mining Companies and Communities Surrounding Mines

Although it requires mining companies to implement credible corporate social responsibility policies, the Policy states that the Government will only “encourage [them] to involve local communities in setting priorities of community development projects and socio-economic aspects during the lifespan of their projects.”¹⁷⁹

Strengthening Management of Safety, Occupational Health and Environment in Mining Activities

The Policy acknowledges that the Government needs to strengthen regulation, monitoring and enforcement to reduce or eliminate the sector's adverse effects on health and safety, environment, and social issues, including among small-scale miners. The Government commits to strengthen its enforcement capacity, and require mining companies to set aside funds for environmental rehabilitation and mine closure.¹⁸⁰

Promotion of Women and Prohibition of Child Labour in Mining Activities

Recognising that women's participation in mining activities is important in the socio-economic development process, the Policy commits the Government to promote participation of women in mining activities. It also commits to collaboration with stakeholders to strengthen monitoring and enforcement of laws and regulations prohibiting child labour in mining activities.¹⁸¹

Development of Artisanal and Small Scale Mining (ASM)

The Policy provides that the Government's intention is “to support and promote development of small scale mining so as to increase its contribution to the economy.”¹⁸² A recent report by the Ministry of Energy and Minerals indicates that Tanzania has an estimated 500,000 to 1 million artisanal miners¹⁸³ of gold, diamond and tanzanite. ASM is an important sub-sector to the Tanzanian economy. For example, a report by UNEP points out that ASM accounts for 10% of the country's gold production¹⁸⁴ and every individual directly involved in the sector generates three more jobs. Despite this contribution, the ASM sector failed to receive the legal and policy attention it deserved until the Government enacted the Policy Act of 2009 and the Mining Act of 2010.¹⁸⁵

Accordingly, pursuant to the Mining Policy under review, the Government intends to establish a mechanism by which artisanal and small-scale miners can access capital in order to improve their productivity.¹⁸⁶ During the second implementation phase in 2015, the Government issued a total of Tanzanian Shillings 7,194,500,000 (equivalent to USD \$3,331,125) to 111 small-scale miners across different mining zones.¹⁸⁷ According to Government statements, the competitively selected small-scale miners were given funds on the condition that they would use the sums to modernise their mining operations through the adoption of technology.¹⁸⁸

The Mining Act No. 14 of 2010¹⁸⁹

The objective of the Mining Act is to regulate all aspects of the mining lifecycle on mainland Tanzania, including prospecting, mining, and the dealing in minerals.¹⁹⁰ It repeals the previous law dating from 1998 and implements the vision of the Government of Tanzania that wishes to have a strong, vibrant, well-organised private sector with a large and small scale mining industry that is conducted in a safe and environmentally-sound manner. This is important given that the sector contributes over 10% of gross domestic product coupled with a well-developed gemstone lapidary industry all of which provide employment to Tanzanians. As discussed below, the Act contains provisions that can be used to safeguard individuals and communities, as well as the environment against the actual and potential negative impacts of large scale extractive operations.

Primary licenses – for any minerals or mining of gemstones – are issued in areas have been set aside or designated exclusively for the prospecting and mining operations of Tanzanians.¹⁹¹ The law defines “primary mining license” to mean “*a license for small scale mining operations, whose capital investment is less than USD \$100,000 or its equivalent in Tanzanian Shillings.*” However, enforcing licensing requirements on the ASM has been difficult, causing many of them to operate without licenses or to procure them after starting mining operations. The Act seeks to prevent conflicts between small-scale and large-scale miners by giving the Minister power to designate areas specifically for small-scale prospecting and mining operations.¹⁹² But the Act’s attempts to formalize artisanal mining have been criticized for failing to recognize realities on the ground such as the fact that informal leasing and transferring of mining titles are common practice.¹⁹³

Involvement of foreign companies is only permitted through the special mining license which is defined as “*a license for large scale mining operation.*”¹⁹⁴ In particular, the law requires¹⁹⁵ that applications for a special mining license include a proposed plan to deal with the potentially detrimental impacts caused to the communities and individuals within the mining area, including relocation, resettlement and fair compensation for land. The law also requires a proposed plan¹⁹⁶ for the employment and training of Tanzanian citizens as well as a succession plan to phase out expatriate employees, if any, as may be required by the Employment and Labour Relations Act.¹⁹⁷ Additionally, the law requires applicants to submit an environmental certificate,¹⁹⁸ issued in accordance with the Environment Management Act, and a procurement plan¹⁹⁹ for the goods and services available in Tanzania. These requirements oblige large-scale mining companies, which in most cases are comprised of multinational companies (MNCs), to prove their willingness and capacity to honour and uphold property rights, environmental rights, the right to development, and labour rights before they are granted a special mining license.

However, applications for special mining licenses are not publicly available, and consequently, not open for scrutiny by the public.²⁰⁰ Secondly, Tanzania does not yet have a comprehensive local content policy applicable to the mining sector that outlines a concrete percentage of goods and services (including employment) to be procured locally, and there are no enforcement mechanisms for compliance.²⁰¹

With respect to advising on developments in the sector, the Mining Advisory Board,²⁰² is tasked with advising the minister on all matters referred to it for advice, including matters relating to the sound development of the gemstone industry and such other matters connected to the administration of the Act or its regulations as may be referred by the

minister.²⁰³ While the Act contains a core of useful provisions as highlighted above, its implementation requires advice and perspectives from those involved in the sector. The Board's composition is predominantly comprised of Government officers, technocrats and experts, with only one representative for small-scale miners and no community representative living near the extractive operations, nor are CSOs or CHRAGG included as representatives on the Board²⁰⁴ to bring the voice of communities into the Board's discussions.

In addition, the Mining Act has not eliminated the discretionary powers of the Minister in licensing and contract negotiations. It does not clearly outline the legislature's oversight responsibilities.²⁰⁵

Rights Over Land

Under the Mining Act, mineral rights holders cannot exercise their rights (including to enter onto land covered) *"except with thorough consultation with the relevant Local Government Authority, including the Village Council, and thereafter, the written consent of the lawful occupier"* where land is occupied or used for crops.²⁰⁶ While the provision in theory provides good protection for land owners and occupiers in that prior consent is required, the Act also severely limits that protection by providing that *"in the opinion of the Minister and on the advice of the Board being unreasonably withheld, the Minister may, on such conditions if any as he may impose, direct that the need for the consent shall be dispensed with."*²⁰⁷ This provides wide discretion to the Minister without further criteria, to waive the requirement for consent. As noted above, as there is no requirement for representatives from CSOs, communities or the CHRAGG on the Advisory Board, the community voice on such cases will not be present.

Where the mineral rights holder cannot exercise its mineral rights without *"affecting injuriously the interest of any owner or occupier of the land,"* the mineral right holder must advise the owner or occupier to vacate, consult the relevant local government authority on amendment of the land use plan and submit a proposed plan on compensation, relocation and resettlement of the owner or occupier of the land as per the Land Act. The procedures established under the Land Act and the Village Land Act with regard to establishing the market value of land apply in determining fair and reasonable compensation of land. In addition, if there is any damage to land, crops, trees, buildings, stock or works, the registered holder of the mineral right is liable to pay the lawful occupier fair and reasonable compensation. Where the amount of compensation to be paid is in dispute, either party may refer the matter to the Mining Commissioner.²⁰⁸

Mineral Licensing

MEM maintains an open mineral rights registry, both in hard copies and digital database known as Mining Cadastre Information Management System (MCIMS) aligned with the Mining Act 2010.²⁰⁹ The information in MCIMS is publicly available. The Ministry of Energy and Minerals is collaborating with TEITI to establish an open registry for disclosing names of individuals who own mineral rights for non-public traded companies.²¹⁰ A key step in completing the information available in the Portal is to address the legal issues surrounding the disclosure of beneficial ownership.²¹¹

Mineral Development Agreements

The Mining Act of 2010 empowers the Mining Minister to enter into a binding [mineral] development agreement with the holder, or applicant, of a special mining license.²¹² This effectively confers statutory status to the agreements, by not only limiting ministerial discretion,²¹³ but also subordinating the country's applicable laws to the Ministries, Independent Departments and Executive Agencies (MDAs).²¹⁴ This means that once a MDA is signed, parties to the MDA will look to the provisions in the MDA and not the laws of the country, whenever any covered issue arises, unless the MDA is itself in question.

Typically, MDAs cover a wide range of matters such as human rights, environmental protection, dispute resolution, and labour issues. These issues should not only be included in the law but also in the binding agreement between the Government and extractive operators. For example, the Model Development Agreement created pursuant to the Mining (Mineral Rights) Regulations²¹⁵ provides for the procurement of local goods and services,²¹⁶ employment opportunities and skills development,²¹⁷ corporate social responsibility,²¹⁸ as well as ancillary land, forestry and water rights.²¹⁹ As significant as these provisions are, the ability for CSOs and other non-state actors' to demand accountability are significantly challenged because of the breadth of issues covered and the potential lack of precision of the requirements. For example, measurable targets are not contained in the Agreements, which weakens the Government's and CSOs ability to monitor progress.²²⁰

The MDA provisions intended to develop skilled nationals also lack specific targets. For example, the MDA mandates that companies "*in as far as is practicable*" engage in activities that enable Tanzania to increase the number of appropriately trained personnel to be employed in the mining industry. This leaves considerable discretion in meeting these requirements. Without specified percentages or tangible figures for the employment of Tanzanian workers, companies are not effectively incentivised to improve employment opportunities for Tanzanians in the mining sector.

2.4.2 Oil & Gas Policy, Law and Institutional Framework

Tanzania recently completed an overhaul of the legal and institutional framework for the petroleum sector. A package of laws including a new Petroleum Act, an Oil and Gas Revenue Management Act and an Extractive Industries Act (Transparency and Accountability Act) was pushed through parliament under a Certificate of Urgency to support the sector, with only cursory examination by the Committee for Energy and Minerals and limited participation from civil society.²²¹ As the next step, the Government will prepare and implement a Natural Gas Utilization Master Plan and the Natural Gas Act and the Natural Gas Implementation Strategy.²²²

The Natural Gas Policy of Tanzania 2013²²³

In addition to addressing challenges faced by the natural gas industry more broadly,²²⁴ the Natural Gas Policy comprehensively articulates a framework for guiding the industry's development and optimizing citizen benefits accruing from the sub-sector.²²⁵ It aims to ensure that natural gas revenue is managed transparently, efficiently and effectively.²²⁶ It also aims to "*substantially improve corporate social responsibility in communities*

neighboring natural gas facilities and operations."²²⁷ However, CSOs expressed concern with the weak environmental management provisions of the draft policy.²²⁸ The policy pronouncements relevant to human rights include the promotion of local content and capacity building,²²⁹ corporate social responsibility,²³⁰ transparency and accountability,²³¹ and gender mainstreaming in the natural gas sub-sector²³² as elaborated below.

Promotion of Local Content and Capacity Building

The Policy commits the Government to empower Tanzanians to fully benefit from the country's natural gas resources. In particular, Tanzanians should be ensured opportunities for the supply of goods and services, employment and investment.²³³ It also commits the Government to building the capacities of Tanzanians to participate in the natural gas value chain through skills development, transfer of technology and applied research. While the Policy only came into force in 2014,²³⁴ the power of local content provisions, whether through enforcement or the message it sends can be a powerful driver of local procurement. For the construction of the Mtwara Port, 70% of the sum a gas operator invested were spent with local businesses creating 400 jobs.²³⁵ In 2014 the Government, in collaboration with other actors, started to implement this pledge as evidenced by the scholarships²³⁶ offered to 10 Tanzanians by an operator to pursue oil and gas studies at the University of Aberdeen to build the longer term skills base in the country,²³⁷ as well as supporting local institutions to offer such courses locally, and supporting lecturers in the local institutions to pursue such studies in the UK.²³⁸

Promotion of Corporate Social Responsibility

The Policy also aims to improve corporate social responsibility (CSR) practices in order to benefit communities that neighbor natural gas facilities, defining CSR as *"the commitment by the business to share benefits arising from the business with the community in which it operates."* The Policy adds, *"Beyond the 'feel good' outcome of such practice, CSR is instrumental in developing and maintaining sound and trustworthy relations between business and the community."* Significantly, the Government pledges to ensure that all investors and contractors in the natural gas value chain are guided by contractual obligations while undertaking CSR plans preferably through local government authorities and community-based organisations.²³⁹

The Policy requires that companies operating in the natural gas industry must submit a credible CSR action plan to the relevant authorities. However, the Policy and the implementing law (the Petroleum Act 2015)²⁴⁰ fail to provide the mechanism for doing so or to define what constitutes a credible action plan. The Petroleum Act does provide that local government authorities are tasked with overseeing the implementation of the plans, as well as preparing CSR guidelines, making local CSR action plans accessible in the district council offices, and providing awareness to the public on natural gas projects in the area.²⁴¹ Neither the Policy nor the law provides for specific penalties for failure to submit a plan, or equally as importantly, what steps are available to oversee implementation.

A study carried out by the Legal and Human Rights Center (LHRC) published in Human Rights and Business Report in Tanzania-2013,²⁴² indicates that 39.0% of community members interviewed do not think investments have benefitted their areas because they cannot concretely see an increase in employment or social services. The report further provides that investors have full discretion to decide where and on what to invest and the

pledges that companies make are not binding contracts.²⁴³ The study was carried out prior to the changes in the new law which require specific contractual commitments to carrying out community development plans. Neighbouring Kenya is in the process of developing a set of regulations under its new mining law specifically to guide such programmes.

The success of those plans will depend on whether they are developed with input from the community and implemented and monitored transparently going forward, building on the growing learning around community development programmes²⁴⁴ and agreements. That may start to address the perception among community members interviewed during the field research for this Report that such commitments are *"a mere public relations initiative or business showcasing."* What is evident from the earlier study is that communities expect that such agreements are focused on immediate benefits to the local community – i.e. increase in employment or social services. Going forward, if such community development/CSR plans are developed jointly, communities will not only have the opportunity to participate but also see the challenges around balancing short and longer term outcomes and have a voice in selecting beneficiaries.

Promotion of Transparency and Accountability

The Policy recognises the need to promote, monitor and evaluate transparency and accountability in the natural gas industry.²⁴⁵ Accordingly, it commits the Government to develop transparency and accountability guidelines, as well as enforce values of transparency and accountability in the entire natural gas industry.²⁴⁶ While no guidelines have been formulated yet, the newly enacted Tanzania Extractive Industries (Transparency and Accountability) Act 2015²⁴⁷ (the EITI Act) is aimed at implementing the policy pledge, in addition to giving domestic legal force to the EITI principles.²⁴⁸

The Policy further commits the Government to improve communication and provide accurate and timely information to the public on activities implemented throughout the natural gas industry. However, it does not specify how or what institutions or enforcement mechanisms will be implemented to realise this policy goal.²⁴⁹

Without outlining any concrete measures, the Policy also pledges to ensure public participation at all relevant stages of the natural gas development activities in an effort: (1) to instill a sense of ownership over the country's natural gas resources²⁵⁰ and (2) to manage public expectations about benefits and potential benefits connected to Tanzania's natural gas resources exploitation.²⁵¹

Mainstreaming Gender Equality and HIV/AIDS Awareness

The Government commits to ensure gender equality and mainstream HIV/AIDS awareness in the sector by combining these aims.²⁵² In particular, the Government is mandated to ensure that programs related to the natural gas value chain, including education and training opportunities, are based on gender equality.

While no disaggregated data exists showing its impacts in the extractive sector, the HIV/AIDS scourge is particularly prevalent in Tanzania, suggesting that the figures may have heightened the need for inclusion of HIV/AIDS awareness in the oil and gas sector.²⁵³ A report by the Tanzania Commission for AIDS (TACAIDS) indicates for example *"as of 2011,*

an estimated 1.6 million people in Tanzania are living with HIV and among them 1.5 million are aged 15 and older."²⁵⁴

The Government commits to facilitate education on HIV/AIDS to stakeholders in the natural gas industry. While this is an important and necessary step for the furtherance of gender inclusion and the right to health, the policy fails to provide concrete plans on how to create gender equality such as providing grants and loans to women to increase their participation as investors in the industry.

Petroleum Act 2015²⁵⁵

This law aims to implement sector policies²⁵⁶ in Tanzania mainland and Zanzibar, and it expressly provides that *"the entire property in and control over petroleum in its natural state are vested in, and shall exclusively be managed by the government on behalf of and in trust for the peoples of Tanzania."*²⁵⁷ The law covers upstream, midstream and downstream petroleum activities, and it tasks the minister in charge of petroleum development with enforcement of the law, including the *"granting, renewing, suspending and cancelling of petroleum exploration and development licenses with advice from the Petroleum Upstream Regulatory Authority (PURA)."*²⁵⁸

The Petroleum Act contains provisions relating to human rights and environmental impacts in the extractive sector. For example, the law requires²⁵⁹ that an application for a development license contain an environmental impact assessment (EIA) outlining the necessary measures to protect the environment.²⁶⁰ It also requires the applicant to provide a proposal for the employment and training of Tanzanian citizens, as well as plans for the procurement of local goods and services.²⁶¹ However, the law falls short of providing specific targets for employment or local purchases.²⁶¹

Additionally, the applicant is required to indicate the potential land use impacts caused by the proposed extractive activities as well as how facilities may be disposed of once petroleum activities come to an end.²⁶² This requirement explicitly seeks to protect Tanzanian environmental, labour and development rights.²⁶³ However, these documents are not made publicly available.

Finally, the law provides that the lawful holder of surface rights can retain grazing and cultivation rights.²⁶⁴ Specifically, it provides that a license holder shall not infringe on the surface rights of the lawful landowner, and if infringement occurs the developer is responsible for compensating the lawful landowner.

The Local Content Policy of Tanzania for Oil and Gas Industry 2014²⁶⁵

The objective of the Policy is to guide sustainable development and utilization of natural gas and to maximize the benefits therefrom for the purpose of contributing to Tanzania's economic transformation. To achieve this, the Government has committed to managing revenues that arise from natural gas in a manner that benefits present and future generations of Tanzanians.

The main human rights focus of the Policy is to boost local participation in the gas economy value chain. In fact, Article 2.4 states that, *"Oil, natural gas and minerals are National resource that belong to the people of the United Republic of Tanzania...[and therefore]*

Tanzanians must be engaged in the entire value chain..." Local content policies are seen as *"a fundamental pillar of the inclusive social economic transformation potential of the vast natural gas resources discovered in Tanzania."*²⁶⁶

Scaling Up Local Participation in the Oil and Gas Sector

The Government realizes the importance of providing training and skills opportunities for Tanzanians so that they are prepared to participate in the sector. The Policy commits the Government to collaborating with companies to support universities, and other institutions, to build and *"enhance [the] competency of Tanzanians in provision of full range of services required in the oil and gas industry"*.²⁶⁷ Significantly, the Policy states that the Government shall do all of the following: (1) support training and technical institutions, (2) establish a centre for excellence in oil and gas, and (3) strengthen research and development functions.²⁶⁸ However, the Government has not yet taken steps to implement any of these pledges.

The Policy also provides a Government commitment to improve employment and training opportunities in the sector. This is to be achieved by harmonising relevant laws related to skills development and employment in order to ensure adequate development of local technical capacity to service the industry, while at the same time requiring companies to employ local experts and develop succession plans enabling Tanzanians to take over expatriate positions. It is unclear whether any of these steps have been taken.

Local Content in Model Production Sharing Agreement

The Government's efforts to implement these policy intentions in practice can be assessed through an analysis of the Model Production Sharing Agreement (MPSA) issued by the National Oil Company – TPDC²⁶⁹ as well as a publicly available Production Sharing Agreement (PSA) signed by the Government of Tanzania and the Pan African Energy Tanzania Limited.²⁷⁰ Even at the agreement level, there remains vague wording and a lack of measurable targets on meeting employment and contracting levels.. While some flexibility is needed, given the length of most of the agreements, sufficient clarity is nevertheless required in order for the Government to monitor progress and ensure implementation of stated commitments.

For example, a review of the PSA found that the agreement states that the company shall give preference to the employment of Tanzanian workers, but only *"as far as [the Tanzanian workers] are financially and technically competent and possess the necessary skills..."* Further, the company only commits to *"endeavor to employ Tanzanian citizens having appropriate qualifications to the maximum reasonable extent."* While these commitments sound promising, Tanzania presently has an insufficient supply of personnel who possess the required professional and technical skills necessary to meet the demand. Specifying a percentage or concrete number of employment positions reserved for locals with an alternative measure if they cannot be filled, such as implementing measurable targets and plans to educate and train locals to fill these positions in the future, would create the right incentives for companies to work together with local and national government and other partners to put such training programmes in place.

The Oil and Gas Revenue Management Act 2015²⁷¹

Following recent discoveries of natural gas, in 2015 the Government established the Oil and Gas Revenue Management Act. This law provides fiscal rules which regulate transfers of oil and gas revenues to local government authorities that host oil and gas operations. Section 17 (4) empowers the Minister for Finance in consultation with the Minister responsible for local government to develop fiscal rules to guide expenditure and savings.²⁷²

The MEM is developing a framework of cooperation between companies and district authorities that will collect a service levy to ensure funds are used on projects that benefit communities. The TEITI has conducted workshops on social accountability to empower communities to demand accountability on those expenditures.²⁷³

This law establishes the Oil and Gas Fund (to which funds accruing from the oil and gas sector will flow), and provides the framework for fiscal rules and other matters related to the management of oil and gas revenues.²⁷⁴ In relation to the TEITI Law, discussed above, this law further reinforces accountability and transparency by requiring the collection, deposit and disbursement of oil and gas revenues are undertaken in a transparent and accountable manner.²⁷⁵ Section 11 also prohibits certain uses of money deposited in the Fund, which is comprised of a revenue holdings account and revenue savings account. The following is prohibited:

- Providing credit to the government, public enterprise, or private sector entities;
- Providing collateral or guarantees for any commitments or other liabilities for any other entity; and
- Seeking rent or being the subject of corrupt practices, embezzlement or theft.

The Fund's leading objectives are to maintain fiscal and micro economic stability, finance investments in oil and gas, and enhance social and economic development as well as safeguard resources for future generations. Cumulatively, these objectives make the Act an important tool for protecting and promoting human rights in the extractive sector, and in particular the right to development. The goals and prohibitions of this law evidence Tanzania's intention to avoid the detrimental impacts of the "resource curse," which is further evidenced by its creation of the "Tanzania Natural Resource Charter Expert Panel."²⁷⁶

Promotion of Broadly Shared Values of Transparency and Accountability

The law states that the Minister shall publish all oil revenues and expenditure records, in whatever form.²⁷⁷ It also requires the Tanzanian central bank to report on the operational performance of the Fund and to publish an audit report in the official gazette and website.²⁷⁸ However, Section 18, which governs revenue transparency and accountability, provides that the collection, disbursement, and auditing of funds shall be performed in accordance with the current laws. Given widespread scandals around embezzled public funds under the current laws,²⁷⁹ the new law should provide a more robust provision on financial accountability, rather than relying on outdated mechanisms.²⁸⁰

2.4.3 Environmental Laws Relevant to the Extractive Sector

Environment Management Act 2004

Tanzania's Environmental Management Act (EMA)²⁸¹ is the framework legislation supported by sector legislation (such as the Mining Act 2010) and implemented by subsidiary legislation. The EMA provides the legal and institutional framework for the sustainable management of the environment in mainland Tanzania. It is a comprehensive piece of legislation that includes compliance and incentive mechanisms at all levels of governance, from the national level to the sub-national level, involving district and village representatives in the management of environmental resources and enforcement of the law.

The National Environment Management Council (NEMC) has primary responsibility of enforcing environmental legislation. It has been established as a semi autonomous entity mandated with a number of tasks including: oversee compliance and enforcement of environmental laws and standards; review and monitor environmental impact assessments and other assessments; undertake and coordinate research; carry out environmental investigations and inspections; and coordinate environmental inspectors. The NEMC is also charged with facilitating public participation in environmental decision-making; raising environmental awareness; and collecting and disseminating environmental information.²⁸² It has five offices throughout the country.

As to the coordination between the Ministry of Environment and relevant sectoral ministries, the EMA also requires each sector to establish an environmental section to ensure that sectoral operations are conducted in accordance with the law's provisions, to coordinate aspects related to the environment, and to ensure that environmental considerations are integrated into sectoral planning and project implementation (such as mines). The Ministry of Energy and Minerals has developed a Sector Environmental Action Plan (SEAPs) which commits it to strengthening its monitoring capacity on environmental compliance in resource exploration and extraction.²⁸³ This includes adopting a set of performance indicators on environmental compliance in resource exploration and extraction, including one indicator for upstream gas and petroleum activities.

Strategic Environmental and Social Assessments of the Extractive Sector (SESA)

A Strategic Environmental Assessment is an assessment of the environmental and social impacts of proposed strategies and policies governing a sector. The Government carried out a SESA of the mining sector in Phase I of its Sustainable Management of Mineral Resources Project.²⁸⁴ In addition, the preparation of a strategic environmental and social impact assessment for the gas sector is underway.²⁸⁵

Environmental Impact Assessments (EIA) in the Extractive Sector

An environmental impact assessment (EIA) is a process used to identify and assess major potential environmental impacts of proposed projects, evaluate alternatives and design appropriate mitigation, management and monitoring measures. Many extractive sector operators carry out combined environmental and social impact assessments (ESIAs),

recognising that extractive operations have both types of impacts that are often interlinked. Increasingly, extractive sector companies are carrying out human rights impact assessments (HRIA) as well, either as part of an integrated ESIA or as a stand-alone study, particularly in high-risk situations.²⁸⁶ Impact assessments provide a structured process for understanding and avoiding negative impacts, including on human rights. Involving those affected, including local communities is a critical part of the process.

The Government has also recognized the need to strengthen environmental impact assessment of large-scale projects as this is one of the key performance indicators in Tanzania's current Five Year Development Plan.²⁸⁷ EIAs are also required under the Petroleum Act and the Mining Act.

The Environmental Impact Assessment and Audit Regulations 2005²⁸⁸

The Environmental Impact Assessment and Audit Regulations set out rules concerning the procedures used to carry out environmental impact studies and environmental audits. These Regulations prohibit projects from being carried out if an EIA has not been conducted beforehand, and they also set the framework and the basic principles surrounding the EIAs and the environmental audits.

The Regulations require that an environmental impact assessment takes into account environmental, social, cultural, economic, and legal considerations²⁸⁹ and develops an environmental and social management plan in response to the assessment. The Regulations do not directly address human rights issues. The MEM has developed a specific guidance document for mining EIAs.²⁹⁰

Sections 89 and 90 of the EMA as well as Section 17 of the EIA Regulations require public participation in the EIA processes. However, while the law requires the NEMC to disseminate environmental information (including EIA reports) to public and private users,²⁹¹ in practice NEMC does not make the EIA reports public after issuing certificates.²⁹² Nor does the Ministry of Energy and Minerals - there are no EIAs available through the website, despite the presence of EIA Guidelines explaining the EIA procedure in Tanzania.²⁹³

A person who is aggrieved by a decision taken under the Regulations²⁹⁴ may appeal to the Environment Appeals Tribunal with the further possibility of an appeal to the High Court within thirty days of the decision.²⁹⁵ The appeal procedures are targeted to those who are the subject of the EIA rather than those who may be affected by a project or the failure to carry out an EIA, such as local communities.

A newly established government body – the Tanzania Minerals Audit Agency (TMAA) – monitors and conducts *“financial and environmental audit[s] as well as auditing [the] quality and quantity of minerals produced and exported by miners....”*²⁹⁶ In its 2014 annual report (latest available),²⁹⁷ the agency audited the compliance of environmental rules and standards by major mine operators, including six gold mines and one Tanzanite mine. Specifically, the agency reviewed mining operators' environmental management plans, conducted physical inspections of the mines to verify implementation, and assessed whether the funds allocated by the company for the environmental management activities were adequate.²⁹⁸ Following the review, the agency provides a report containing recommendations on improvements to reduced detrimental impacts on the environment.

2.4.4 Transparency Laws Relevant to the Extractives Sector

Tanzania Extractive Industries (Transparency and Accountability) Act 2015²⁹⁹

As the title suggests, this law aims at implementing the EITI principles³⁰⁰ in Tanzania, and thereby enhancing transparency and accountability in the sector.³⁰¹ The regulations implementing the law are expected to be published in October 2016.³⁰²

Three aspects of the law are closely related to the promotion and protection of human rights in the extractive sector, namely (1) the establishment of the Tanzania Extractive Industries (Transparency and Accountability) Committee,³⁰³ (2) the obligation to publish extractive industry related information,³⁰⁴ and (3) the requirement to submit local content and corporate social responsibility reports.³⁰⁵

The Tanzania Extractive Industries (Transparency and Accountability) Committee

According to the law, the Tanzania Extractive Industries (Transparency and Accountability) Committee "TEITI Committee" is an independent government entity that functions as an oversight body for the purpose of promoting and enhancing transparency and accountability in the country's extractive industry.³⁰⁶ Currently, this oversight function is performed by members of a multi-stakeholder group that was established prior to this law coming into force.³⁰⁷

The TEITI Committee is a 16 member tripartite body composed of members from the Government, CSOs, and extractive companies. The law provides that members from CSOs and companies shall be appointed by their respective umbrella organisations³⁰⁸ and the Minister of Energy and Minerals shall appoint members from the Government.³⁰⁹ While this composition reflects inclusion of important stakeholders in the industry, it overlooks the opportunity to make gender inclusion a statutory requirement, and also fails to require representation of communities living in or close to the extractive operations,³¹⁰ or a representative of CHRAGG.³¹¹ Involving representatives from local communities and the NHRI would have strengthened the Committee and helped ensure it was able to address human rights challenges from a practical and more informed standpoint.

Obligation to Publish Information

Another important provision for the promotion and protection of human rights appears under Section 16, which requires the Minister of Energy and Minerals to publish all concessions, contracts and licenses relating to extractive industry companies on the Ministry website, or through widely accessible media, in order to foster transparency and accountability in the sector. Access to information is essential for accountability and enforcement and is a key procedural right without which other rights discussed in this Report would be difficult to attain.

Significantly, the law applies retroactively as it does not exempt from disclosure any mineral development agreement (MDA) or production sharing agreement (PSA) signed prior to the Act coming into force.³¹² The law gives the multistakeholder Committee discretion to exempt information from disclosure on the basis of confidentiality.³¹³ TEITI in association

with the Ministry of Energy and Minerals, is now preparing a regulation which will be used as a guide in disclosure of contract, and set procedures for determining areas which may be confidential.³¹⁴ TEITI is also piloting disclosure of beneficial ownership of extractive companies.³¹⁵ This should address the earlier battles that pre-dated the law between the Minister of Energy and Minerals who denied access to the parliamentary accounts committee to signed Production Sharing Agreements (PSAs). The parliamentary committee ordered the arrest of the two top officials of the Tanzania Petroleum Development Corporation (TPDC)³¹⁶ in an effort to pressure them into releasing 26 PSAs for scrutiny.³¹⁷

In an effort to ensure sustainable management of the environment in relation to mining, oil and gas operations, Section 16(b) of the Act provides power to the TEITI Committee to cause the Ministry of Energy and Minerals to publish environmental management plans to be carried by the extractive industries. This seeks to ensure compliance of extractive companies to mine closure plans and reinstatement of the areas used for mining, oil and gas operations.³¹⁸

Tanzania EITI will also make contract information available through its website³¹⁹ but its 2015 work plan indicates engagement with extractive sector companies and Government in reaching consensus on establishing an open contracts registry.³²⁰

Submission of Local Content and Corporate Social Responsibility Reports

In an effort to ensure community development, Section 15 of the Act requires extractive companies to submit annual reports to the Committee containing information on local content and corporate social responsibility. Further, the law provides that failure to produce such information could result in a minimum fine of 150,000,000 shillings. While this requirement is commendable, it lacks any specific benchmarks or targets for companies to meet nor is there a mechanism to monitor compliance.

However, social payments are not mandated by law in Tanzania. Noting the difficulties of reconciling social contributions, the TEITI MSG agreed to include social payments in the TEITI reports for information purposes only. Although these expenditures were not reconciled, they can provide useful information that stakeholders may wish to follow-up with district government officials.³²¹

No Access to Information Law

Tanzania does not have a comprehensive freedom of information law. This makes it difficult for citizens, communities and CSOs to request access to information related to extractive operations that government authorities or the companies themselves do not put into the public domain.

In theory Article 18³²² of the Constitution provides for the right to information including the right to freedom of expression, and the right to seek, receive and disseminate ideas regardless of the frontiers. However, this right is exercisable only subject to the limits prescribed by ordinary legislation.³²³ For example, the Newspapers Act³²⁴ empowers the Minister in charge of information to ban newspapers if in the Minister's opinion the contents are considered to be in opposition to national interests. Accordingly, the application of the Newspapers Act poses a hindrance to the "right to seek, receive and, or

disseminate information" more broadly, including in the context of the country's extractive industry.³²⁵

Additionally, the Environmental Management Act³²⁶ acknowledges the right to access publicly held environmental information pertaining to the current state of the environment as well as future threats to the environment.³²⁷ However, the very same law specifically permits the Minister to adopt regulations to limit the exercise of this right.³²⁸

The Tanzanian Government should accelerate the process to adopt and implement an access to information law. The Government's OGP action plan promises to "*study global best practice of freedom of information laws in order to generate inputs for preparation of a potential freedom of information Bill.*"³²⁹

2.4.5 Land & Resettlement Policies and Laws

The National Land Policy,³³⁰ which is a precursor to land law reforms in Tanzania, provides that all land in Tanzania is public land and is held by the President as a trustee on behalf of all Tanzanians.³³¹ The implication of this policy is that landowners do not have absolute land rights, but revocable rights to occupy a given piece of land,³³² referred to as "*the right of occupancy.*"³³³ The right of occupancy is further restricted to the "land [surface]", which is defined to exclude subsurface resources such as minerals, petroleum and hydrocarbons.³³⁴ To implement this policy, the Government enacted two framework land laws: the Land Act³³⁵ and the Village Land Act.³³⁶

According to the Land Act, all land in Tanzania falls into three categories (1) General Land,³³⁷ (2) Village Land³³⁸ and (3) Reserved Land.³³⁹ "General Land" covers land in urban areas, while "Village Land," as the name suggests, covers land in rural areas. "Reserved Land", according to the Act, includes land set aside in accordance with the laws governing the conservation of forests, marine resources, and wildlife and includes national parks, game reserves and forest reserves.³⁴⁰ While there is no special category for land reserved for resource extraction, the laws of Tanzania do not prohibit mineral exploration or extraction in any of the land categories, including national parks.³⁴¹

The Village Land Act 1999 divides land into three categories: (1) communal land (e.g., public markets and meeting areas, grazing land, burial grounds); (2) occupied land, which is usually an individualised holding or grazing land held by a group; and (3) vacant land, which is available for future use as individualised or communal land. The Act does not recognise grazing land as a separate category, but pastoralists can assert customary rights of occupancy to grazing land.³⁴²

There is in principle, an open and transparent system of village land allocation that requires the Village Assembly to pass a resolution to allocate Village Land to an individual or a firm that has submitted land request to the Village Government. The Village Assembly constitutes all villagers with or above 18 years. According to the Village Land Act, Village Leaders have no mandate whatsoever to allocate land.³⁴³

Only 15% of all villages in the country have been surveyed, in part, because there is a lack of funds.³⁴⁴ The process of surveying, parceling and titling of land is lagging far behind the demand for acquisition of land for both settlement and commercial purposes. The Five Year Development Plan sets a target of increasing the proportion of households with land

certificates (e.g. certificates of title and customary right of occupancy) from 5% in 2009 to 10% by 2015/16.³⁴⁵

Land Acquisition and Compensation for Land and Assets³⁴⁶

The Constitution provides that no persons shall be deprived of property for any reason whatsoever, including nationalization (or expropriation), without "adequate and fair compensation."³⁴⁷ The Land Act no. 4 of 1999 provides that every person is entitled to full, fair and prompt compensation if their right to occupy or use the land is interfered with or revoked.³⁴⁸ Additionally, the Act provides for the payment of interest at market rate.³⁴⁹ However, by excluding minerals, petroleum, oil and gas, from the definition of land that communities and individuals can have rights over, the law expressly disentitles community ownership of natural resources found in their ancestral lands, and in turn no community right to compensation for underground resources.

The Land (Assessment of Values for Compensation) Regulations 2001³⁵⁰ provides the procedures to be followed in evaluating land for the purpose of payment of compensation. The relevant regulation provides that the basis for the assessment of the value of any land for the purpose of compensation shall be the market value of such land.³⁵¹ While market value is the guiding criteria for real property compensation, the law provides a long list of additional items that must be paid if interfered with or revoked. The list includes a disturbance allowance, transport allowance, loss of profit or accommodation, the cost of acquiring the subject land, and any other loss or capital expenditure incurred in the development of the land.

The Regulation provides three methods for computing the appropriate land value, (1) the comparative method, which is based on recent sales of similar properties, and for properties that possess intrinsic value there are the (2) income approach method and (3) replacement cost method. Once the Ministry for Lands, in collaboration with the local authorities, establishes the value of the land in line with legal procedures, companies pay the district council which in turns pays the individual villagers whose lands are taken for extractive operations.

Compensation amounts are determined by Government valuation not based on negotiations between a willing buyer and willing seller.³⁵² While market value is generally accepted as a reliable metric for calculating compensation, it is often ineffective in the village context because no 'market' exists in such cases where properties are 'for sale'. Moreover, sporadic sales of land in villages are often motivated by urgency factors, such as a need to pay hospital bills or send a child to school out of the region, which undermine the reliability of existing 'market values'. Because these urgency factors are contrary to arm's length negotiations, the resulting sales values are unfit to be used as value determinants.

Tanzania has in place a regulatory framework for valuing land which is already a significant step in providing protection to rural land owners and long-standing occupants as well as guide posts for extractive sector companies. There are pluses and minuses in the system Tanzania has in place that should be considered within the broader management of the sector. While Government valuation may protect vulnerable land-owners from unscrupulous negotiations in a willing buyer-willing seller circumstance, because communities have no say in the rate of compensation for their most valuable asset, this inevitably takes control of the situation out of community hands, often leading to feelings of frustration and

unfairness with the procedures and values set. While there is opportunity for corruption and mismanagement in willing buyer-willing seller procedures, a fully government controlled procedure without absolute transparency certainly heightens the risks of corruption and mismanagement at not just one, but many points along the chain in making the valuation, collecting payment and disbursing payment.

Compulsory Acquisition

The Land Acquisition Act of 1967 provides for the compulsory acquisition of land for public purposes. The law requires that the Government give landholders at least six weeks' notice of the acquisition, and lays down procedures for prompt and adequate compensation. Compensation can, 'at the option of the government,' take the form of monetary compensation or a combination of plots or buildings of comparable quality, plants and seedlings, and/or regular supplies of grain and other basic foodstuffs.³⁵³

Resettlement

There is no specific legislation that governs resettlement in Tanzania. Instead, sections in different legislation provide for issues related to compensation and resettlement including the Mining Act of 2010; Land Act of 1999 (Cap 113); Village Land Act of 1999; Land Acquisition Act of 1967; Land Disputes Courts Act, (Cap 216); Grave (Removal) Act of 1969; Environmental Management Act of 2004; Antiquities Act of 1964 (amended 1979); Land (Compensation Claims) Regulation 2001; and the Forest Act of 2002.³⁵⁴

Land Disputes³⁵⁵

Under Tanzania's formal law, land disputes can be brought before both formal and informal tribunals. The Courts (Land Disputes Settlements) Act of 2002, the Land Act and the Village Land Act recognise the jurisdiction of informal elders' councils, village councils and ward level tribunals.³⁵⁶ Village councils can establish an adjudication committee, with members elected by the village assembly. The primary mode of dispute resolution in these forums is negotiation and conciliation.³⁵⁷

Women's Right to Land

Tanzania's Land Act no. 4 of 1999 expressly states that women shall have equal rights to obtain and use land. The legal framework for land rights also provides for women's representation in governing bodies: the Village Land Act provides that three of the seven positions on village councils shall be filled by women and a quorum requires at least two women. However, despite this, women hold only an estimated 20% of the land registered in Tanzania and the percentage of women holding primary rights to use and control land under customary law is likely far lower.³⁵⁸