

2012
Vol. 5 N° 1



UNIVERSIDAD
EAFIT[®]
Abierta al mundo
ISSN: 2027-2340

Revista de Negocios Internacionales

DEPARTAMENTO DE Negocios Internacionales

John Sinato Ombella

Challenges of access to clean water and healthy environment:

An inter-link between huge investment projects and the surrounding local community in Tanzania

Revista de Negocios Internacionales. Vol. 5 N° 1 - Enero - Junio de 2012 - Pp. 102 - 114

Challenges of access to clean water and healthy environment: An inter-link between huge investment projects and the surrounding local community in Tanzania

JOHN SINATO OMBELLA¹ (LLB, LLM)

FECHA DE RECIBIDO: 12/04/2012

FECHA DE ACEPTADO: 30/04/2012

Abstract

This article is written with the intent of shading a light on the challenges that face the local communities surrounding the huge investment projects in Tanzania. The focus is on the access to social and economic rights specifically the rights to clean water and healthy environment. This article addresses the challenges that arise out of the failure to strike a balance on the access to the use of clean water and healthy environment between both the villagers and the investment projects. This issue is pertinent to be discussed now as there are a growing number of investment projects both from within and outside Tanzania. Such an alarming growth seemingly a heaven for the tax collectors is not the same to the local community around areas where the investment projects are located. This article shades a light on the legal aspects of the access to clean water and clean environment and the extent of access of the said basic rights. The discussion revolves around the question whether the investment projects and the local community are living in a symbiotic relation or one is prospering at the detriment of the other within the scope of the pointed rights.

Resumen

Este artículo fue escrito con la intención de ilustrar los retos que afrontan las comunidades locales que rodean a los grandes proyectos de inversión en Tanzania. El enfoque está en el acceso a los derechos económicos y sociales. Esta

1 J.S. Ombella is a lecturer at Mzumbe University in Tanzania. He holds a LLB from the Mzumbe University, and a LL.M from the University of the Western Cape in South Africa. Contact ombella@gmail.com

publicación aborda los desafíos que surgen de la falta de equilibrio en el acceso a agua potable y medio ambiente saludable entre los habitantes de la región y los proyectos de inversión. Esta discusión es pertinente puesto que este tipo de proyectos está teniendo un protagonismo creciente tanto de origen local como extranjero. Un crecimiento tan alarmante es, sin duda, completamente beneficioso para el recaudo de impuestos, sin embargo no es así para las comunidades aledañas. Este estudio examina los aspectos legales de estos derechos y de los que se supone hacen parte de los fundamentales. La discusión gira en torno a la pregunta por si los proyectos de inversión y la comunidad local están viviendo en una relación simbiótica o una de las dos está prosperando a costas del detrimento de la otra en el ámbito de estos derechos.

Key words

Investment projects, Access to clean environment, local communities, balance of interest, Tanzania, Africa.

Palabras clave

Proyectos de inversión, medio ambiente, comunidades locales, balance de interés, Tanzania, África.

Introduction

Tanzania from its independence had been operating under a closed market economy, which did not allow investment of large private owned companies, to own or conduct business in whatever sector of its economy and other major means of production. However, in 1990s² the government opened up its market to private investment and the State ceased from being the giver but rather the overseer and the regulator of the business activities generally. However, where the government wishes, it may enter into a kind of joint venture investment projects with the private firms. As such, up to now, almost all sectors of the economy have been kept open for investments by private entities save only some sectors that touch on national security. Mining and hunting is the growing area of investment. In

2 See the 1986 Zanzibar Resolution in which the Tanzanian government assigned for the structural adjustment Programs that allowed free market and put to an end the closed economic system, See also the end of protracted war of nerves between the Ruling party and the government, in Okema, Michael, "Investment Code: For Capitalism or Socialism?" Business Times (Tanzania), 13th April 1990 as cited in Chris Maina Peter (1994) Foreign Investment in Tanzania: The Main land and Zanzibar, Department of International Law, University of Dar es Salaam, pages 16-17

most cases the investors are huge (capital wise) such as Multinational Corporations from outside Tanzania.

Most of these investment projects are carried out in rural areas due to the nature of these economic sectors and the fact that most areas, which are rich in minerals and forest or hunting blocks are developed into townships or suburbs. These kinds of investments need a guarantee of land in the first place and other resources like labor, power and water for their establishment. As such there is no land which is unoccupied land awaiting investors in Tanzania, although they are guaranteed of getting it via the Tanzania Investment Center. Currently the government in collaboration with the Investment Climate Facility (ICF) is trying to identify land potential for investment with the aim of establishing land bank in a number of regions. This exercise is aimed at assuring investors that there is land available for investment in Tanzania. However, the challenge which the government and its project face is that of compensation and re-allocation of the existing population on the land so identified.³It is not however, the concern of this article to address issues of land and compensation nor is it concerned with resettlement of the villagers for vacant possession by the investors.

This article tries to address the access to selected basic social economic rights by the local communities surrounding the huge investment projects in Tanzania. By social economic rights as applied in this piece of writing, mean clean water and healthy environment. These two are chosen mainly due to two reasons. Firstly, water is life; this has been the slogan for all environmentalists who are working at preserving water sources for its sustainable use. The second reason is that in rural Tanzania historically such areas were full of running streams of water and greenish forests or bushes. However, with climate change and the increase of human activities such areas have changed drastically. With the increasing human activities both local and of the huge foreign investment projects therefore, the environment in rural area seems to be inhabitable. Clean water for example has become a scarce resource, which therefore calls for proper management if a balanced access is to be attained.

While the first part of this article provides an introduction, the second immediate part discusses the legal aspects of the right to clean environment and clean water by both the villagers and the huge investment firms. The immediate next part discusses the challenges that accompanies the accesses to those rights and the last part provides concluding remark. The discussion in this article is purely doctrinal.

3 See the speech by the minister for Land and Housing Development in the Parliamentary Budget sessions 2009/2010, page 23

Access to clean water and healthy environment

The idea of access to clean water and environment is not new in the legal writings. As such a number of publications have been advanced that indicate how important the phenomenon is. This is even very true given the nature of human development which sometimes jeopardizes the standard of quality of water and sometimes its quantity. Air and land have not been excused from the human activity jeopardy. This is evidenced by increase in industrialization in least developing countries, increased and widened mining activities and expansion of human habitat which harm the existing forest.

The access to these basic rights has been so challenging in rural areas especially where there are huge investment projects, example North Mara Mining and Bulyanhulu Mining. As noted from above there is no balance in the use of the water and sharing the clean and healthy environment between the investment firm and the local community around. The concept of access to clean and safe water in rural areas is also pointed as challenging area, the challenges however, have to be looked upon from legislative and policy perspectives. The legislative and policy measures are aimed to solve the problem of diminishing in quantity and quality of rural water supply in Tanzania.⁴ The later is mainly caused by pollution from industries, mining works and farming activities nearby water sources and catchment areas. This also bears impact on environment as the pollution in water also impairs ecological system.

Cementing on the scarcity of water as a resource Nicola Lugaresi argues that there is growing lack of access to clean water worldwide which is definitely a pressing and critical issue today, as we appear to set on a destructive course, which seems hard to reverse.⁵ The article sets a proposal to set an international water code that shall regulate water issue as a global problem. With less quantity of water and poor management to maintain its purity, it is however, not surprising to have investment firms in least developed countries where the issue of clean water is so burning, dealing with the refining of water and supply to local communities and elsewhere around the globe.⁶

4 See Palamagamba John Kabudi (2005) Challenges of legislating for Water Utilization in Rural Tanzania: Drafting new Laws, A paper presented at the International workshop on 'African Water Laws: Plural Legislative Frameworks for Rural Water Management in Africa', 26-28 January 2005, Johannesburg, South Africa, pg 1

5 See Lugaresi N, (2000) Rethinking Water Law: The Italian Case for a Water Code, International Water Resources Association's X World Water Congress, Vol. 11, March 17, 2000

6 See an abstract by, Patricia H. Werhane and Jenny Mead, (2010) Procter & Gamble: Children's Safe Drinking Water (a) Darden Case No. UVA-E-0314, available at, <http://papers.ssrn.com>

last visited 30th August 2010.

Human development is accompanied with other costs that harm the environment we live in. When the environment is harmed its standard does not support life. For example, when land is polluted with chemicals in such a way that it becomes less or is rendered completely unproductive, this bears impact on the food security within the rural communities.⁷ In the second place, the produces which are harvested on a polluted land are also contaminated in such a way that their consumption leads to diseases.

While it is important to protect our environment from being polluted by the internal stake holders, it is also necessary to take into account the concept of trans-boundary pollution. This bears impacts to least developing countries which are assumed to be the dumping sites by the developed countries. The toxic wastes may be deposited in these countries by the developed countries who would not wish to have the waste in their jurisdiction nor incur the cost of rightfully handling them. African countries [Tanzania inclusive] in this case seem to be the main target either due to lack of legal framework to address such environmental management issues or non enforcement of the existing rules for preservation of environment.⁸ The problem of scarcity of clean water and increase of environmental issues like land degradation is alarming around the globe. In its report UNEP observed as follows;

The increasing numbers of African countries facing water stress and scarcity, and land degradation, are major environmental issues in the region. The rising costs of water treatment, food imports, medical treatment and soil conservation measures are not only increasing human vulnerability and health insecurity but are also draining African countries of their economic resources.⁹

So much so, the access to these resources poses a challenge especially to the poor communities in rural Africa. The gap in economic capacity between the haves

7 See Jessie (2009) Once upon a water source, available at <http://jessieboylan.wordpress.com/2009/12/11/once-upon-a-water-source/> last visited 30th August 2010.

8 See the conviction of a Dutch company for Toxic waste dumping in Ivory Coast, available at, <http://www.amnesty.org/en/news-and-updates/trafigura-found-guilty-toxic-waste-dumping-tragedy-2010-07-23>, last Visited on 30th August 2010. This is an indication that the developed countries are assuming that the least developing countries are just dumping sites.

9 Source, Extract from the GEO3 synthesis, available at, <http://www.unep.org/geo/geo3/>

Last visited 1st September 2010

and the have not's has widened the gravity of the access to these rights.¹⁰ This therefore, calls for serious measures to be taken by the relevant legal institution to handle and manage resources like water and assure environmental preservation around the globe [Tanzania inclusive]. A recent measure adopted by the UN Global Compact's CEO Water Mandate today released a Framework for Responsible Business Engagement with Water Policy to facilitate effective water policy engagement. This is in line with the global concern of increased threats to the supply, quality, and reliability of global water resources. It thus posed the need for policy that integrates environmentally sustainable, economically viable, and socially equitable water management approaches.¹¹

Legal aspect of access to clean water and safe and healthy environment in Tanzania

The Constitution of the United Republic of Tanzania¹² guarantees the right to life¹³ to every Tanzanian. This right is inherently vested to every being by virtue of birth. It is therefore, a crime to take ones' life. From this right there underlies a right of access to clean and safe water to everyone. As noted from above the slogan for water services in Tanzania and elsewhere has always been water is life. Ones' life can be easily terminated in case of lack of clean water.

The Water Resources Management Act¹⁴ vests the ownership of all water resources in Tanzania to the government.¹⁵ It also provides a right to access and use for domestic purposes clean water by all Tanzanians.¹⁶ The law states that it is a duty of every Tanzanian to protect water resources and make sure that its quality or quantity is not jeopardized.¹⁷ In efforts to make sure that the waters remain clean and safe for use by every Tanzanian, the law has set an obligation

10 See, UNGC Delegates Manual, Module 2: The business Case for UNGC Environmental Principles:

11 See Framework for Responsible Business Engagement with Water Policy Brings Business and Stakeholders Together to Reduce Water-Related Risk available at <http://www.unglobalcompact.org/news> last visited on 1st October 2010

12 CAP 2 R.E 2002

13 See Article 14 of the United Republic of Tanzania 1977 (as amended from time to time)

14 Act number 11 of 2009

15 See section 10 of the Act

16 See section 11 of the ACT

17 See section 7 of the War Resources Management Act, Number 11 of 2009, read together with section 6 of the Environmental Management Act number 20 of 2004

on every person or organization that intends to invest or carry any development projects to carry out an environmental impact assessment.¹⁸ The main aim of the assessment is to provide the government with information of the probable environmental impacts that may emanate from the development project. The international institutions dealing with investment also requires investment projects carried under their guarantee to carry out environmental impact assessment. These institutions have even listed the mandatory sectors where prospective investors have to undergo the assessment, for example the World Bank and Multilateral Investment Guarantee agency requires the environmental impact assessment to be carried out in the sectors like , mining, oil and natural gas and tourism projects in the parks and coastal areas.¹⁹ Basing on this assessment the project may be allowed to carry out its activities or may be banned to establish its activities on the area, so assessed.²⁰

The law also contains some directives for the prevention of pollution in case the project is established. It directs that an occupier or owner of land must take all reasonable measures to prevent any pollution from occurring or continue occurring.²¹ With regard to accesses to clean, safe and healthy environment, this is also a right guaranteed under the law in Tanzania. The right is granted under the Environmental management Act.²² The Act states that every Tanzanian has a right to clean, safe and healthy environment.²³ This position therefore, grants to all the Tanzanians regardless of their location a right to live in clean and safe environment for their good health.²⁴

18 See section 9 of the War Resources Management Act read together with section 6 of the Environmental Management Act Number 20 of 2004

19 See UNCTAD (2003) Investment Policy Review: United Republic of Tanzania Report page 45, see also Alex J. Sikalumba (2009) An overview of theoretical analysis of Environmental Impact Assessment in Tanzania Orient Journal of las and Social Science, Vol. III Issue number 6.

20 See The OECD Report on: Environmental Impacts of Foreign Direct Investment in the Mining Sector in Sub-Saharan Africa 2002 page 20.

21 See section 39 of the War Resources Management Act Number 11 of 2009.

22 Act Number 20 of 2004.

23 See section 4 of the Environmental Management Act Number 20 of 2004.

24 See also Resolution 45/94, passed on 14 December 1990, by the General Assembly of the United Nations, on the need to ensure a healthy environment for the well-being of individuals declaring that everyone has the right to an adequate standard of living for his or her own health and well-being.

The same law prohibits pollution of any kind to either, water, air and land by any person.²⁵ Severe penalties have been imposed against those who contravene such a prohibition under the law.²⁶ These penalties are worth especially at this era of open market economy where investment firms are mainly derived by profits rather than environmental preservations.

It is paradoxical, however, that despite the access to clean water, safe and healthy environment is a right that is legally recognized under the laws as seen above, yet those who live nearby huge investment projects especially mining activities rarely such a right enjoy. The investment firm and the local community surrounding the firm project are the stakeholders who should live symbiotically. That is, the community should gain some benefit by having the investment around and the investment should also benefit by having the community around. It is worth noting that one of the stakeholders (local community) seems to endure while the other gains at the detriment of the former.

Pollution born diseases

Generally, there is a massive increase in pollution born diseases in both developed and developing countries in this century of science and technology.²⁷ Tanzania is no exception to this problem. The common diseases arising out of the pollution are inclusive cancer, diarrhea, worms, skin diseases like burns, skin cancer and rushes. These are all result of the use of low quality water which is unsafe for human consumption or consuming products which are contaminated. A good example in Tanzania can be drawn from the practical realities that arose after the North Mara mine discharged its toxic wastes into the river waters. The river water was being used by the villagers around the mining site for domestic use and for their cattle as well. As a result of the

25 See section 89 of the Environmental Management Act Number 20 of 2004.

26 Under section 89 of the Environmental management Act, Any person who pollutes water or air and found guilty of such acts is either imprisoned, or fined a fine ranging between ten million to fifty million Tanzanian shillings.

27 See the scientific consideration number 2 of the International Declaration on the Diseases Caused by Chemical Pollution which states that, "Whereas chronic diseases registered by WHO, especially cancers, are increasing alarmingly; whereas the global incidence of cancers is on the rise worldwide; whereas since 1950, the incidence of cancers among the populations of highly industrialized nations has increased steadily; whereas anyone, young or old, can be affected by cancer; whereas chemical pollution, the magnitude of which remains to be assessed, could largely contribute to the onset of cancer."

use of such contaminated waters, a number of villagers contaminated skin diseases and their animals died of the poison contracted in the water.²⁸

It should be noted that, the polluted river is a source of water to the local communities around North Mara and the investors as well. Before the investment project, villagers were freely and harmlessly using the river water for their domestic use and feeding their cattle and farming as well. However, things are no longer the same with the chemicals spillage into the river basin.²⁹ It can be argued that the expected symbiotic relation that could have arisen out of the investment project and the surrounding communities went disarray as the later seem to suffer by the presence of the former.

In its report the North Mara mine company, states that the company recognizes the need to preserve environment and that it recognizes the possible impacts that might accompany their investment projects. That being the case, precautionary approach is being taken throughout the existence of the mining project. This approach is aimed at controlling and identifying the possible impacts that might arise and be arrested with immediate effect.³⁰ However, the chemical pollution to the river water from the mine project indicates the contrary to what the report states. This raises a sense of carelessness on the side of the investment firm. This situation might carry with it tarnishing impacts on the image of the investment firm both within the country it has invested as well as cross the borders wherever it trades or carries on activities in the same name.

28 An example can just be picked from the approach taken by the government in handling the issue of high level of pollution into the water sources in the Tigithe River caused by the North Mara Gold Mining Company under the giant Barrick Mining Corporation which is a foreign private investment Multinational Corporation. In justifying the laxity by the government to protect its population, some members of the parliament had the following to say. "It is quite strange that the Government fails to safeguard the safety of its own citizens, for the sake of embracing so-called investors. And that "the Government should immediately close down the mine while ensuring people already affected by the pollution get proper medical care," added the MP Moshi Urban legislator Philemon Ndesamburo (CHADEMA) as cited by in a news paper article; Government under pressure to close down Barrick mine; This Day Tanzania July 10th 2009

29 See, Boylan Jessie (2009) Once upon a water source, available at <http://jessieboylan.wordpress.com/2009/12/11/once-upon-a-water-source/> last visited 30th August 2010.

30 See North Mara Gold Mine (Fall 2009) Responsibility Report page 2

Ruin of the corporate image

For consumable products or goods that are produced in an environmental friendly manner tend to gain more market than others. Corporations make use of environmental friendly mechanisms as a means of winning both the public and relevant authorities' wish to proceed investing in a given jurisdiction. The latter, can be seen at the time of renewal of operation licenses whereby the relevant authorities would not hesitate to grant where the investment firm is renowned for being environment friendly. It is however, a challenge to those rouge companies who are not environment friendly in their production and operation system.

Moreover, it should be noted that the name of the company is part and parcel of its assets. Any company which will be polluting environment through either production system or operation system or in the manner the company handles its wastes will be negatively labeled by the community members in a market. This being the case, where a company indulges in into polluting environment it is indirectly lowering down its assets in business. This is because its name will bear a negative image in the eyes of the public. Of important to note is the fact that the pollution carries with it the punishment that may also pose a great financial down fall to a company.³¹

Endless hostilities between the investor and the locals

It is undisputed fact that most of the huge investment projects in Tanzania are foreign by nature. The firms that manage the projects are also foreign by nature. In this regard therefore, they either occupied the land after the eviction of the local communities subject to compensation by the government or entered into a joint venture with the government over the already government owned property. In the initial way of entrance to the market, the feelings of loathing began right from the beginning. These feelings are spearheaded with either the little compensation the local community members get for foreign investors vacant possession³² or the administrative approaches adopted by the firm after they have gained access to the land. For example, the violent approach adopted by the villagers around

31 See section 89 of Environmental Management Act Number 20 of 2004, see also the conviction of a Dutch company for Toxic waste dumping in Ivory Coast, available at, <http://www.amnesty.org/en/news-and-updates/trafigura-found-guilty-toxic-waste-dumping-tragedy-2010-07-23>, last Visited on 30th August 2010.

32 This writing is not intended to discuss the extent of the compensation the local communities are paid but rather the possible outcome that determines the nature of the relation with the investment project.

North Mara Gold Mines in demanding extra pay of the compensation moved the investor to employ extra efforts to reinforce the security of the plots. Despite this the hostilities are still on. The hostilities between the local community and the investors can be substantiated in a number of ways in Tanzania. It ranges from a number of killings of the local villagers on allegations of being criminal trespass³³ to forced eviction of either the villagers from their farms or the small artisanal miners for vacant possession of the huge firm capital wise.³⁴

However, the hatred is not only aimed against the foreign investors. It is observed by one of local investors that the local communities around huge investment projects need to be handled with care by the investors. The care should be seen right from the entry point throughout the length of the investment project itself. The main reason is that of worries of the local community to lose their land for the benefit of the investor who is there just for profit maximization and nothing else.³⁵ The government has considered this situation and as a result it has amended the laws dealing with mining sector. The aim of the government is among others to increase the participation by local investors in this very important sector. It is argued however, that the government heeded as a means to avoid the said evolving xenophobic feeling that would inevitably develop to the extreme between the local community and the investors.

Concluding remarks

The global community is experiencing economic move to have the economy opened for investment in almost all sectors. This move is irreversible since once the investors are in the market they are granted some rights which may not even be amended by newly enacted legislations. These investors have so far penetrated the economies of almost all least and transitional economy countries in such a way that their withdrawal could render the country stand still.³⁶ While acknowledging their contribution in busting such economies, countries should always make endless efforts to strike a balance between the users of the basic resources like clean

33 See Tundu Lisu (2006) Six Villagers Killed in North Mara Mine, Available at, <http://protest-barrick.net/article>. last visited on 29th August 2010

34 See The Human Right and Good Governance Commission complaint number 127/2003/2004 Madini between Elisha Marwa Nyamhanga &59 others v The Director Africa Mashariki Gold Mines and others

35 See Richard Magaba, How investors can end hostilities in mining areas; The Guardian News Paper 4th April 2010

36 The economic crisis that took place in Zimbabwe for example was caused by among other reason the withdrawal or forceful eviction of the investors from their land.

water between the giant investment firms and the local communities surrounding the investment. The environmental standards have also to be adhered right from the entry to the market by a foreign or a local investment firm throughout its existence and at the exit point. The stake holders in development which are the government, local community and the investment firm should adopt transparency in handling any matter so as to gain the confidence of all of the interested parties. Investment firms should be more socially responsible by integrating the local communities into its activities. This will make them feel as owners and beneficiaries of the investment project rather than victims of the existence of the project.

References

- Alex J. Sikalumba (2009) An overview of theoretical analysis of Environmental Impact Assessment in Tanzania Orient Journal of Law and Social Science, Vol. III Issue number 645-51
- Chris Maina Peter (1994) Foreign Investment in Tanzania: The Main land and Zanzibar, Department of International Law, University of Dar es Salaam, Dar es Salaam.
- Lugaresi N, (2000) Rethinking Water Law: The Italian Case for a Water Code, International Water Resources Association's X World Water Congress, Vol. 11, March 17, 2000
- Magaba, Richard (2010). How investors can end hostilities in mining areas; The Guardian News Paper 4th April 2010
- North Mara Gold Mine (Fall 2009) Responsibility Report
- Okema, Michael (1990) "Investment Code: For Capitalism or Socialism?" Business Times (Tanzania), 13th April 1990.
- OECD (2002): Environmental Impacts of Foreign Direct Investment in the Mining Sector in Sub-Saharan Africa Report.
- Palamagamba John Kabudi (2005) Challenges of legislating for Water Utilization in Rural Tanzania: Drafting new Laws, A paper presented at the International workshop on 'African Water Laws: Plural Legislative Frameworks for Rural Water Management in Africa', 26-28 January 2005, Johannesburg, South Africa,

UNCTAD (2003) Investment Policy Review: United Republic of Tanzania Report.

Werhane, Patricia H. and Mead, Jenny (2010) Procter & Gamble: Children's Safe Drinking Water (a) *Darden Case No. UVA-E-0314*.

Speech:

- The speech by the minister for Land and Housing Development, (Tanzania) in the Parliamentary Budget sessions 2009/2010.

Statutes:

- The Constitution of the United Republic of Tanzania (as amended)
- The Water Resources Management Act, Number 11 of 2009.
- The Environmental Management Act number 20 of 2004

Resolution(s) and declaration(s):

- UN General Assembly Resolution 45/94, passed on 14 December 1990.
- WHO International Declaration on the Diseases Caused by Chemical Pollution