RE-AFFIRMING THE PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES: IMPLICATIONS OF EMERGING LEGISLATIVE TRENDS IN TANZANIA

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Abstract

This article provides for an overview of a legislative framework on the ownership, managing and utilization of natural resources. The rights and interests of the People and the State to manage their natural wealth and resources are reiterated within the Principle of Permanent Sovereignty over Natural Resources (PSNR). The recent legislative enactments in Tanzania provide for a revolutionary approach towards the re affirming of the PSNR in Tanzania to ensure that natural wealth and resources are beneficially utilized to serve interests of the Tanzanians. Such enactments have imposed upon all investors including foreign investors' mandatory requirement to submit themselves to renegotiation of terms of the agreements to own, manage or acquire rights on extraction of natural wealth and resources if the National Assembly finds the same to be unconscionable terms. Further, the national institutions -legislative, judicial or executive are given full mandate to deal with issues relating to dispute resolutions. These legislative enactments have departed from long entrenched provisions of Mining Development Agreements (MDAs), Bilateral Investment Treaties (BITs) and Multilateral Investment Treaties (MITs) which exclude the municipal judicial institutions and laws to determine investments disputes, stabilization clauses restricting the State to invoke legislative enactments to ensure equitable share and development from the utilization of natural wealth and resources. However, the existing MDAs, BITs and MITs may act as impediments in realization of the benefits arising out of use of resources. The Government must stand firm to realize the fruits of the enactments through renegotiations and other diplomatic means with Multinational corporations operating in Tanzania.

Key words: *Permanent Sovereignty, Natural Resources, Legislative, Tanzania*

1.0 Introduction

Tanzania is endowed with diverse natural resources within its territory. It is one of the twelve mega diversity countries of the world, and the nation's biological diversity has important economic, technological and social implications. It is the fourth country in Africa with the largest number of mammals and a number of highest species richness of birds, plants, amphibians and reptiles. The Eastern Arc Mountains is one of the biodiversity hotspots in Tanzania with significant socio-economic importance.[218] Other resources include fisheries, marine resources, minerals including energy, industrial or metal minerals, land, and genetic resources.

The abundance of these resources does not automatically guarantee economic development to the people of Tanzania unless some mechanisms are put in place to ensure sustainable and beneficial use of the resources. International community

218 United Republic of Tanzania, The National Environmental Action Plan 2013-18, p.23.

and States have applied two main principles to articulate the rights of State and its peoples to enjoy benefit and own the resources within their boundaries on one hand and the need to place such resources under the control of the State on behalf of its citizens, on the other hand. These principles are known as the Principle of Permanent Sovereignty over Natural Resources (PSNR) and the Public Trust Doctrine (PTD). PSNR revolves on the exclusive jurisdiction to own and control the natural wealth and resources vested upon the State and its people while PTD reiterates the need for the Sovereign authority or State to hold such properties in trust on behalf of and for benefit of the citizens. These principles are interconnected though they are different.

This article provides for a critical analysis of the legislative framework on PSNR in Tanzania following recent emerging episodes pertaining to the management of natural resources in Tanzania. PSNR is an international law principle which is based on the equality sovereignty of all independent states under United Nations legislative regime.[219] It entails State's assertion of authority over natural resources within its territory. Such mandates can be exercised over resources found within terrestrial, aquatic and atmospheric environment. Accordingly, PSNR applies to resources within the national airspace, land territory surface, internal water's surface, land territory underground, territorial waters surface and continental shelf underground which are under full national jurisdiction and sovereignty of the State.[220]

On the other hand, territorial waters airspace, contiguous zones airspace and surface, exclusive economic zones surface, continental shelf surface, extended continental shelf surface and underground these have limited/restriction on national jurisdiction and sovereignty. There is recognition of the right of innocent passage in such zones. The only exception is on the international airspace, international waters surface, international waters, international seabed surface and international seabed underground which are regarded as areas of international jurisdiction as per common heritage of mankind.[221] It only in the latter zone where every state can utilize, develop and extract resources without restrictions from any other states save for the need to respect international law and prohibitions from pollution of environment.[222]

2.0 Development of Permanent Sovereignty over Natural Resources

Development of PSNR at international level dates back to 1950s due to struggles by colonized underdeveloped States calling for the need of self-determination of countries liberating themselves from colonial domination. These struggles resulted into the adoption of non-binding legislative instruments at international

219 See Article 2(1) of the Charter of the United Nations, 1945, 1 UNTS XVI.

220 See Article 2, 55-57, 76 and 77 of the United Nations Convention on the Law of the Sea, 1982. For instance, Article 2 of the Convention on the Law of the Sea which provides as follows:

1. The sovereignty of a costal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.
2. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.

221 See Articles 136, 137, 140 and 141 of the United Nations Convention on the Law of the Sea, 1982. See also C. Voigt, Sovereignty over Natural Resources and Prohibition of Transboundary Harm International Environmental Law, University of Oslo. This can be sources at http://www.uio.no/studier/emner/jus/jus/JUS5520/h14/undervsiningsmateriale/3.-sovereignty-over-natural-resources.pdf as accessed on30th June 2017.

222 See for instance, Articles 192 and 193 of the United Nations Convention on the Law of the Sea, 1982.

level.[223] The first attempt to reiterate the PSNR principle was adoption of the United National General Assembly (UNGA) Resolution in 1952 on integrated economic development and commercial agreements. It states, among others, that "underdeveloped countries have right to determine freely the use of their natural resources and that they must utilize such resources in order to be in a better position to further the realization of their plans of economic plans in accordance with their national interests."[224]

The principle became more pronounced in the 1962 UNGA Resolution 1803(XVII) on permanent sovereignty over natural resources. It is this UNGA resolution which categorically detailed the ambits of PNSR. It declared that "the right of peoples and nations to permanent sovereignty over natural wealth and resources must be exercised in the interest of their national development and of the well-being of the peoples of the state concerned."[225]

PSNR entitles a State and its citizens to have the right to exercise control, ownership and have an ultimate say on the wealth and natural resources within their territories. It is the sole responsibility of the State concerned to set out the rules on the exploration, development and disposition of the resources. In cases of foreign capital being imported, the same is governed by national legislation in force and international law.[226] The profits derived from investment on wealth and natural resources must be shared in freely agreed proportion between the investor and the recipient State without impairment of the State's sovereignty over natural wealth and resources.[227] This provision entails protecting interest of the State whose resources are utilized. Parties to resources exploration, utilization and development agreements are empowered to negotiate on terms for such development and sharing of proceeds arising out of extraction of natural wealth and resources in a manner that is fair to all the parties concerned without distorting the inalienable rights of the State over the natural wealth and resources.[228]

Under this principle, the State has prerogative powers to deal with natural wealth and resources for betterment of the State's development and welfare of its citizens. In exercising such powers, the State is enjoined to adopt laws, enforce them, administer the territory, judge disputes that arise therein and exclude other States from exercising sovereign rights over the natural wealth and resources unless so permitted by contracts.[229]

223 Under UN it is only the Security Council's decisions which are binding to all member States by virtue of Article 25 of the Charter of the United Nations, 1945.

224 UNGA Resolution 523(VI) adopted in UNGA 360th Plenary Meeting dated 12th January 1952. This decision affirmed Recommendations contained in Paragraphs 1, 2, 3 and 4 of the Economic and Social Council Resolution 341(XII) of 20th March 1951.

225 Paragraph 1 of the UNGA Resolution 1803(XVII) adopted on 1194th Plenary Meeting dated 14th December 1962.

226 See Paragraph 2 and 3 of the UNGA Resolution 1803(VII), *ibid.*

227 See Paragraph 3, *Ibid*.

228 See for instance, Article 15 of the Convention on Biological Diversity,1992 which in essence empowers the national governments to determine the access to genetic resources, equitable sharing of benefits and terms on access of the genetic resources.

229 C. Voigt, Sovereignty over Natural Resources and Prohibition of Transboundary Harm International Environmental Law, University of Oslo. This can be sources at http://www.uio.no/studier/emner/jus/jus/JUS5520/h14/undervsiningsmateriale/3.-sovereignty-over-natural-resources.pdf as accessed on30th June 2017.

Since late 1960s, PSNR gained its recognition within the binding legal instruments at the International law. It was accommodated in various international instruments including the International Covenant on Civil and Political Rights (ICCPR),1966, the International Covenant on Economic, Social and Cultural Rights (ICESC),1966, the African Charter on Human and Peoples Rights of 1981, and the Convention on Biological Diversity (CBD), 1992.

3.0 The Rights and Duties of the State under PSNR

The principle of PSNR contains the rights and duties which are pertinent in exercise of the full jurisdiction over natural wealth and resources. The fundamental rights of the State and peoples in PSNR include the following:

3.1 Right to Freely Dispose of Natural Resources

It is argued that at the heart of the PSNR stands the inalienable right of all peoples and States to freely dispose of their natural resources. This entails an absolute right of the State to determine the ultimate management, exploitation and utilization of resources found within the geographical boundaries of the State.[230] This right has been reiterated invariably by different legislative frameworks at the international law. For instance, under the PSNR principle it is explicitly recognized that "all peoples may in their own ends, freely dispose of their natural wealth and resources."[231] PSNR entails ultimate control over natural resources falling into and remains at all times (hence permanent) with the State, and accordingly all activities related to their development, exploitation and utilization are subjected to the State's national laws. The State may choose to enter into national or international contracts granting other entities access to its natural resources on conditions set out by that host State.[232]

The right to freely dispose natural resources was articulated in the case of *Texaco Overseas Petroleum Co. Limited versus Libyan Arab Republic*[233] where the Arbitrator observed that:

> "Territorial sovereignty confers upon the State an exclusive competence to organize as it wishes the economic structures of its territory and to introduce therein any reforms which may seem to be desirable to it. It is an essential prerogative of sovereign for the constitutionally authorized authorities of the State to choose and build freely an economic and social system. International law recognizes that a State has this prerogative just as it has the prerogative to determine freely its political regime and its constitutional institutions".

230 N.Shrivjer, Sovereignty over Natural Resources: Balancing Rights and Duties in an Independent World pp. 244-248.

231 Article 1(2) of the International Covenant and Civil and Political Rights, 16th December 1966, 999 UNTS 171(1967); Art. 1(2) of the International Covenant on Economic, Social and Cultural Rights, 16th December 1966, 993 UNTS 3 (1967); Art. 21 of the African Charter on Human and Peoples Rights, 27th June 1981, 1520 UNTS 217.

232 See for example, Article 15 of the Convention on Biological Diversity, 1992. See also J.A. Hofbauer, the Principle of Permanent Sovereignty over Natural Resources and its Modern Implication, LL.M Thesis, Haskoli Island University, pp. 13-15; N. Shrivjer, Sovereignty over Natural Resources: Balancing Rights and Duties in an Independent World, Groningen University, Faculty of Law, pp.244-248.

233 17 ILM (1978) pp. 3-37. For a detailed analysis of this Arbitral Award see J. Cantegreil (2011), "the Audacity of Texaco/Calasiatic Award: Rene-Jean Dupuy and Internationalization of Foreign Investment Law" *European Journal of International Law*, Vol. 22, No. 2, pp.441-458.

This decision confirms that every State has sovereign right to control and manage its resources within its territorial boundaries. In implementing this duty, each sovereign State has the right to freely determine and control prospecting, exploration, development, exploitation, use and marketing of natural resources and to subject such activities to national laws and regulations within the limits of its exclusive economic jurisdiction.

3.2 The Right to Use the Natural Resources for National Development

Natural wealth and resources in State are essentially required to be used beneficially for national development of the State. This aspect entails exercising of free use and exploits the natural wealth and resources in a desirable manner for their own progress and economic development. [234] States have a sovereign right to exploit their own resources pursuant to their own environmental and economic policies. [235] Each State has a freedom to choose its own best suitable policy concerning development and economy of that particular nation. [236] The right to benefit from the exploitation of the natural resources is an important aspect of the PSNR. It is argued that the freedom to choose one's own economic, environmental and developmental policies is based on two fundamental ideas of the law of the nations: the sovereign equality of states on one hand and the duty not to intervene in matters within domestic jurisdiction.[237]

It is on such understanding that international legislative framework provides for the exclusive interest of the people.[238]Further, the UNGA Resolution 1803(XVII) is more articulate and recognises that the right of the peoples and the nations to PSNR should be exercised in the interests of their national development and of the wellbeing of the people of the State concerned.[239] Such right entails exclusive protection of peoples' interests within a particular State which are inalienable. Citizens should not be deprived of their livelihood as a result of free disposal of the natural wealth and resources.[240]

3.3 The Right to Regulate Investment, Expropriate or Nationalize Foreign Investment

Natural wealth and resources can be extracted, exploited and utilized through application of domestic capital and technologies or allow importation of capital, technology and skills. Under PSNR, foreign investment is recognised and protected.[241] The State is entitled to authorize and import foreign capital to

234 See Paragraph 1 of the UNGA Resolution 626(VII) dated 21stDecember 1952 on the Right to Exploit Freely Natural Wealth and Resources.

235 See Principle 2 of the United National Declaration on Environment and Development (Rio Declaration on Environment and Development) dated 14th June 1992.

236 J.A. Hofbauer, "The Principle of Permanent over Natural Resources and its Modern Implications," LL.M Thesis Faculty of Law, University of Iceland, pp. 15-16.

237 *Ibid*, p.15.

238 Article 21(1) of the African Charter on Human and Peoples Rights, 1981; and Article 1(2) of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, 1966.

239 See Article 1 of the UNGA Resolution 1803(XVII) dated 14th December 1962.

240 Article 21(1) of the African Charter on Human and Peoples Rights, 1981; Articles 1(2) and 47 of the International Covenant on Civil and Political Rights, 1966 and articles 1(2) and 25 of the International Covenant on Economic, Social and Cultural Rights, 1966.

241 Paragraph 3 of the UNGA Resolution 1803 (XVII).

extract, utilize and exploitation of resources. The State is empowered to restrict or limit the exercise of foreign investment in regulating the foreign investment, a State is entitled to regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities, supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulation and conform with its economic and social policies. Also, a State has the right to expropriate or nationalize foreign investment on grounds of public utility, security and national interest, and right to settle disputes on basis of national laws.[242]

4.0 An Overview of PSNR in Tanzania: Legislative Developments prior to 2017

PSNR in Tanzania has been articulated in different ways within the legislative framework. It is contained within binding and non-binding provisions of the laws including the Constitution of United Republic of Tanzania which is the fundamental law of the land and other legislation. This part provides an overview of the legislative framework on PSNR in Tanzania prior to the recent development on the PSNR in 2017. Generally speaking PSNR was accommodated in legislative framework of Tanzania. However, the intensity of the articulation has not been adequate in protection of the natural wealth and resources for country's development and well-being of the Tanzanians.

4.1 The Constitution of United Republic of Tanzania, 1977

This is the fundamental law of land provides for creation of the United Republic of Tanzania. The Constitution states that Tanzania is one State and is a Sovereign United Republic. [243] The territory of the United Republic of Tanzania consists of the whole area of Mainland Tanzania and the whole area of Tanzania Zanzibar and it includes the territorial waters. [244] It is clear from these provisions that Tanzania as a State has permanent sovereignty over natural wealth and resources located within its territory under the PSNR.

The Constitution provides for issues of natural resources on its Directive Principles of State Policy. It states that 'the object of the Constitution is to facilitate the building of the United Republic as a national of equal and free individuals enjoying freedom, justice, fraternity and concord thus the state authority and all its agencies are obliged to direct their policies and programmes towards ensuring that activities of the Government are conducted in such a way as to ensure that the national wealth and heritage are harnessed, preserved and applied to the common good and also to prevent the exploitation of one person by another; and that the use of national wealth places emphasis on the development of the people and in particular geared towards the eradication of poverty, ignorance and diseases.'[245]

242 See Paragraph 4 of the UNGA Resolution 1803(XVII).
243 See Article 1 of the Constitution of United Republic of Tanzania, Cap 2 R.E. 2002.
244 Article 2(1) of the Constitution, *Ibid*.
245 See Article 9(c) and (i) of the Constitution.

This part of the Constitution provides for general directives upon which a State is founded. It recognises the need to protect natural wealth and resources in Tanzania for betterment of the people of Tanzania. The use, exploitation and management of natural wealth and resources in Tanzania should be directed towards achieving sustainable development of the State. However, this part of the Constitution is excluded from justiciability in Courts of law.[246] Inclusion of issues on protection of natural wealth and heritage in the part on fundamental objectives and directive principles of State policy cannot render them meaningless. On this point Kabudi argues that "the fundamental objectives and directive principles of state policy remain to be significant both to the Constitution and in the development a new culture of constitutionalism and accountability in Tanzania, especially after the recent re-introduction of pluralism in politics."[247]

The Bill of Rights in the Constitution caters for PSNR in Tanzania. This is on the duties of every person in Tanzania in respect to protection of natural wealth and resources. The Constitution provides that:

> **27.**-(1) Every person has the duty to protect the natural resources of the United Republic, the property of the state authority, all property collectively owned by the people, and also to respect another person's property.
> (2) All persons shall be required by law to safeguard the property of the state authority and all property collectively owned by the people, to combat all forms of waste and squander, and to manage the national economy assiduously with the attitude of people who are masters of the destiny of their nation.

This provision of the Constitution mandates every person to ensure that natural wealth and resources in Tanzania is protected. Indeed, the provision essentially accommodates the PSNR. It reiterates the need to ensure that resources are used wisely for national development.

4.2 The Territorial Sea and Exclusive Economic Zones Act, No. 3 of 1989

Tanzania participated fully in negotiation, adoption, signing and ratification of the United Nations Convention on the Law of the Sea (UNCLOS), 1982.[248] Being a coastal State, Tanzania accommodated pertinent aspects of the UNCLOS within its municipal law before the coming into force of UNCLOS. It legislated a law to 'establish the territorial sea and to establish an exclusive economic zone, of the United Republic adjacent to the territorial sea, and in the exercise of the sovereign rights of the United Republic to make provisions for the exploration and exploitation, conservation and management of the resources of the sea and for matters connected with those purpose.'[249]

246 Article 7(2) of the Constitution.

247 P.J. Kabudi, "The Directive Principles of State Policy versus Duties of the Individual in East African Constitutions," *Law and Politics in Africa, Asia and Latin America*, Vol. 28, No. 3 (3. Quartal 1995), pp. 272-303, at p.302.It was sourced at http://www.jstor.org/stable/43110638 on 22nd January 2017.

248 Tanzania signed the United Nations Convention on the Law of the Sea on 10th December 1982 and ratified the same on 30th September 1985.

249 See the Long title of the Territorial Sea and Exclusive Economic Zones Act, 1989.

The object of this legislation can be clearly delineated from the long title of the Act. The law creates two important zones in respect of ownership and control of natural wealth and resources within the sea bordering Tanzania as a coastal State. These zones are the exclusive economic zone (EEZ) and territorial sea. Tanzania like any other coastal State is entitled to exclusive and full jurisdiction over all the resources within the two zones under international law as pointed out above. Secondly, the exercise of PSNR is categorically included within this part of the law and restatement of the role of the State in exploitation, conservation and management of the resources is stipulated.

Under this law there are several pertinent provisions with bearing on PSNR. The Act vests on the government of the United Republic the sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living of the waters superjacent to the Sea bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the Zone, such as the production of energy from the water currents and winds. [250] Tanzania has full ownership and control over all resources in the EEZ. This jurisdiction entails the establishment and use of artificial islands, marine scientific research and protection and preservation of marine environment. [251] The Act also reiterates exercise of all rights in and jurisdiction over the zone by Tanzania as recognised under international law. [252]

In exercising PSNR, the Territorial Sea and Exclusive Economic Zones Act prohibits any person from exploration or exploiting any resources; carrying out any search or excavation; conducting any research; drilling in or constructing, maintaining, or operating any structure or device; or carrying out any economic activities within the EEZ without an agreement with the United Republic of Tanzania.[253] The only exception is for fishing activities by Tanzanian citizens in or from a vessel registered in Tanzania. This prohibition essentially asserts the jurisdiction of Tanzania over all activities within the EEZ related to exploration, exploitation and utilization of natural resources in any form. Additionally, this Act provides for applicability of other laws in respect resources governance in Territorial Sea and EEZ including those related to fisheries, national environmental management, merchant shipping, petroleum and mining in relation to exploitation of natural resources and controlling marine pollution.[254]

The liability to any person in violation of PSNR in the EEZ is a fine of not less than US dollars two hundred and fifty thousand or to imprisonment for a term not exceeding five years, or to both such fine and imprisonment; and in addition, the court may order the forfeiture of any vessel, structure, equipment, device or thing in connection with which the offence was committed.[255] In order to comply with international law, the Act recognises the rights of other States either coastal

250 Section 9 (1) of the Territorial Sea and Exclusive Economic Zones Act.
251 Section 9(2), *Ibid.*
252 Section 9(3), *Ibid.*
253 Section 10(1) of the Act.
254 Section 12 of the Territorial Sea and Exclusive Economic Zones Act, 1989.
255 See section 10(2) of the Act, Ibid. See also section 17 of the Act on the general offence in the EEZ.

or land-locked, to exercise limited rights relating to freedom of navigation and over flight, the laying of cables and pipelines and other uses of the sea relating to navigation and communication, such as are recognized under international or embodied in a bilateral, agreement.[256]

4.3 The Forest Act, No. 14 of 2002

In 2002, Tanzania enacted the Forest Act in order to deal with sustainable management of forest resources in Mainland Tanzania. This Act recognises the application of PSNR in respect to biological resources in Tanzanian forests. It declares that "all biological resources and their intangible products, whether naturally occurring or naturalised within forests including genetic resources belongs to the government in accordance with Article 27 of the Constitution and shall be conserved and utilised for the people of Tanzania in accordance with the provisions of this Act and any other written law on biological resources."[257] Simply, the Act takes cognizance that biological resources belong to Tanzania as a State by entrusting them on the Government of Tanzania on behalf of the citizens of Tanzania.

Such rights over the biological and genetic resources are inalienable from the ownership and control by Tanzania. It is on such recognition that the Act categorically provides to the effect that the transfer of any biological resources, their derivative products or intangible components from forest is not operating so as to extinguish the sovereignty of Tanzania over those resources."[258] In other words, Tanzania is entitled to permit any person and revoke permit to extract the biological and genetic resources within its territory. It has the right to determine and regulate access to the genetic resources through the competent authorities established in Tanzania.[259]

4.4 The Fisheries Act, No. 22 of 2003

The fisheries resources are also forming part of the natural resources in Tanzania whose regulation entails the PSNR. This law governs sustainable development, protection, conservation, aquaculture development, regulation and control of fishing, fish products, aquatic flora and its products.

The Fisheries Act accommodates the PSNR within its provisions as well. The Act caters for sovereign rights of the Government of Tanzania over all biological resources and their intangible products within fisheries including the genetic resources. [260] The Act restates that such resources must be conserved, utilized and managed in accordance with the Constitution and the laws of Tanzania for the people of Tanzania. This for both naturally occurring biological and genetic resources and those which are naturalised within the fisheries resources. Further, the permission to extract, utilize and exploit fisheries resources does not in any way terminate or extinguish sovereign rights over the resources by Tanzania.

256 Section 11 of the Act, *Ibid*.
257 Section 69(1) of the Forest Act, No. 14 of 2002.
258 Section 69(2), ibid.
259 Section 69(3) of the Act.
260 Section 51(1) of the Fisheries Act, No 22 of 2003.

[261] The Director of Fisheries is mandated to keep records on performance of all genetic resource exported outside the country. [262]

This means that a continued monitoring and control over resources is within the mandate of the State under the PSNR. The right to determine and regulate access to genetic resources falling within fisheries resources remains with Tanzanian Government. Such right is exercised by competent authority in consultation with relevant organizations as provided for in the legislative framework of Tanzania on biological resources.[263] Further, permission to extract and utilize fisheries resources must to be preceded by Environmental Impact Assessment (EIA).[264] This is in compliance with the requirements set out in international legal instruments which subject the PSNR to the national environmental and development policies.

4.5 The Mining Act, No. 14 of 2010

The Mining Act, No. 14 of 2010 is yet another pertinent legislation in respect of PSNR. Under the Mining Act, there is recognition of the ownership and control over mineral resources by the United Republic of Tanzania. It means, therefore, that all mineral resources within the territorial jurisdiction of Tanzania are under ownership and full control by Tanzania. For instance, the Mining Act declares that the entire property and control over minerals on, in or under the land to which this Act applies is vested in the United Republic.[265] As such any person interested to participate in development, utilization and exploitation of mineral resources is required to apply for permission from Tanzania to undertake such activities. This is to be achieved through the grant of a mineral right to the applicant/investor.

5.0 General Trends in PSNR in Tanzania

Generally, these pieces of legislation though cater for PSNR but their coverage is in a piecemeal style. There was no common Act of the Parliament that reiterated an all-inclusive PSNR in Tanzania. The isolated protection sector based PSNR principle could not realize full potentials of the principles. Numerous provisions within these statutes diminished the essence of PSNR in practice. For instance, the Minister responsible for mineral resources is empowered to enter into Mining Development Agreements (MDAs) with investors holding Special Mining Licence (SML).[266] Such MDAs contain confidentiality clauses barring the government of Tanzania to disclose the contents of such MDAs to people of Tanzania and their elected representatives- Members of Parliament. It is such secrecy clauses and lack of scrutiny of MDAs that have made Tanzania mortgage or transfer all its rights over mineral resources to the investors without considering long term national development and well-being of the people.[267] Such MDAs have entrenched within them tax exemptions to foreign investors which were not in the interest of

261 See Article 51(2) of the Fisheries Act.
262 Section 51(3) of the Act, *ibid*.
263 Section 52(4), *Ibid*.
264 Section 52 of the Fisheries Act.
265 Section 5 of the Mining Act.
266 Sections 10 and 11 of the Mining Act, No.14 of 2010.
267 I. Shivji, *Zitto Kabwe's Suspension: An Episode or An Epitah?* Dated 25th August 2007 as retrieved from http://watanzania oslo.blogspot.com/2007/08/zitto-kabwes-suspension-episode or.html on 1st July 2017.

the public.[268] It has been argued that 'Africa should stop the practice of granting tax exemptions to mining companies in the mining contracts. All mining tax rates and terms should be legislated in the substantive laws and merely confirmed in the mining development agreements. As such African Parliaments are called upon to pass laws requiring mining development agreements to be ratified by Parliaments as it is the case of Ghana and Sierra Leone, and made public.'[269]

5.1 Re-Affirming the PSNR in Tanzania: A Revolutionary Legislative Approach

5.1.1 Legal Issues Triggering the Legislative Change in Tanzania

There have been a lot of laments from all walks of life in respect of exploitation of natural wealth and resources in Tanzania. Major foreign activities to extract natural wealth and resources in Tanzania rose in late 1990s and 2000s due to privatization whereby the Government of Tanzania permitted foreign investors to extract and exploit the resources especially the mineral resources. Within a decade of a large-scale exploitation and utilization of natural resources, laments that resources were not benefiting Tanzanians. In 2007, a Government Minister was questioned in the National Assembly about signing a MDA granting concession to a foreign investor in London, United Kingdom concerning the Buzwagi Gold mine.[270] Zitto Kabwe requested for formation of Parliamentary Committee to enquire into and review all the contracts signed between the government and investors.[271] Such debate resulted into suspension of Honourable Zitto Zuberi Kabwe who actively championed for PSNR by calling upon the Minister to account for the signed MDA. There reasons cited for his suspension were humiliating and unfounded criticisms against the Minister for Energy and Minerals during tabling of his private motion to investigate shady contracts on mining before the Parliament. [272]

Shivji termed Zitto's suspension from Parliament not simply an episode but it was a beginning of an epitah on the last twenty years of reckless privatization and exploitation of natural wealth and resources. It was an occasion for people to give vent to their accumulated grievances, problems and frustration.[273]This observation evidences lack of accountability and transparency on the utilization and exploitation of natural wealth and resources in Tanzania prior to the recent enactments.

268 O. Kibuta, *Tax Compliance in Tanzania: Analysis of Law and Policy Affecting Voluntary Taxpayer Compliance*, Dar es Salaam, Mkuki na Nyota,2011, p.174.

269 K.Lambrechts (Ed). (2009), *Breaking the Curse: How Transparent Taxation and Fair Taxes Can Turn Africa's Mineral Wealth into Development*, Open Society Institute of South Africa, Third World Network Africa, Justice Network Africa, Action Aid International and Christian Aid, Johannesburg/Accra/Nairobi/London, pp.45,46& 60.

270 See P. Shao, "*Kabwe Suspended*", retrieved from http://swahilitime.blogspot.com/2007/08/mheshimiwa-zitto-kabwe-asimamishwa.html as accessed on 1st July 2017; I. Shivji, *Zitto Kabwe's Suspension: An Episode or An Epitah?* Dated 25th August 2007 as retrieved from http://watanzania oslo.blogspot.com/2007/08/zitto-kabwes-suspension-episode or.html on 1st July 2017.

271 See O. Kibuta, *Tax Compliance in Tanzania: Analysis of Law and Policy Affecting Voluntary Taxpayer Compliance*, Dar es Salaam, Mkuki na Nyota,2011, p.174; and R.Aminzade (2013), *Race, Nation, and Citizenship in PostcolonialL Africa: The Case of Tanzania*, Cambridge, Cambridge University Press,2013, p.294.

272 E. Birgit "Ambiguous Relationships: Youth, Popular Music, and Politics in Contemporary Tanzania", in *Stichproben. Wiener Zeitschrift für kritische Afrikastudien* Nr. 14/2008, 8. Jg., 71-96 at p. 87. https://stichproben.univie.ac.at/fileadmin/user_upload/p_stichproben/Artikel/Nummer14/Nr14_Englert.pdf as accessed on 29th July 2017.

273 I.Shivji, *Zitto Kabwe's Suspension: An Episode or An Epitah?* Dated 25th August 2007 as retrieved from http://watanzania oslo.blogspot.com/2007/08/zitto-kabwes-suspension-episode or.html on 1st July 2017.

As a response to the growing public criticisms on improper managing mineral resources through shady MDAs, the then President Jakaya Kikwete appointed a Commission led by a former Attorney General of Tanzania, Judge Mark Bomani to review all existing mining contracts. The report of this Committee resulted into change of the policy and legislative framework on mineral resources by promulgating the Mineral Policy of Tanzania 2009 and the Mining Act, No. 14 of 2010.[274] Among others, this legislative approach increases the loyalties payable to the Government of Tanzania by one percent.

The most significant move towards re- affirming the PSNR was taken in 2017 on series of events. In March 2017, His Excellency the President of United Republic of Tanzania Dr. John P. J. Magufuli ordered suspension from exporting unprocessed mineral concentrates and ore mainly from Bulyankulu and Buzwagi mines both owned by Acacia Mining Plc.

The President constituted two high level committees of experts tasked with investigating potential under declaration of mineral content in the exportation of the mineral concentrates. The two Committees found that there were substantial violations of laws of the land and huge loss of income to the Government through the exported minerals and unprocessed mineral concentrates exported from Tanzania.[275]

The recommendations of the Committees include that: First, Government should ensure that it sets a minimum share of participation in all companies operating in Tanzania and the Government should negotiate to facilitate acquiring/buying more shares in the investor companies. Second, the law should explicitly declare all minerals are natural wealth and resources under trusteeship of the President on behalf of and for benefit of Tanzanians. Third, the law should stipulate clearly that all MDAs are no longer secret and shall be ratified and reviewed by the National Assembly. Fourth, the need of limiting the discretionary powers of the Minister for Minerals, Commissioner for Minerals, and other Zonal Minerals Officers in granting mining licenses. Fifth, retention of the earnings from mineral disposal in banks and financial institutions operating in Tanzania for development of the economy and prevent tax evasion; and sixth, Government should review or repeal and replace the Mining Act and tax laws to remove all terms which are not in the interest of the State including stabilization clauses.[276]

These recommendations prompted the Government to initiate legislative enactments categorically to address issues of PSNR in Tanzania with view of protecting the extraction, exploitation or acquisition of natural wealth and resources against misuse. The legislative framework re-affirms the need to ameliorate the eroded PSNR and ensure that the State and People of Tanzania benefit from these resources.

274 R.Aminzade, *Race, Nation, and Citizenship in PostcoloniaL Africa: The Case of Tanzania*, Cambridge, Cambridge University Press,2013, p.294; and E. Birgit "Ambiguous Relationships: Youth, Popular Music, and Politics in Contemporary Tanzania", in *Stichproben. Wiener Zeitschrift für kritische Afrikastudien Nr.* 14/2008, 8. Jg., 71-96 at p. 87.

275 United Republic of Tanzania, Summary Report of Committee of Experts to Investigate Economic and Legal Issues relating to Export of Unprocessed Mineral Concentrates, p. 44.

276 Ibid, pp. 44-49.

5.2 Current Legal Framework on PSNR in Tanzania

Towards the end of June 2017, the government of Tanzania introduced under certificate of urgency three bills for enactment by the National Assembly of the United Republic with bearing on PSNR. These are the Natural Wealth and Resources (Permanent Sovereignty) Act, 2017; the Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act, 2017; and the Written Laws (Miscellaneous Amendments) Act, 2017. The first two laws which were passed on 3rd July 2017 and assented to by the President on 5th July 2017have a clear bearing on PSNR. The last legislation though has a bearing on natural resources particularly mineral extraction and tax legal regime is not subject of this analysis.

5.2.1 The Natural Wealth and Resources (Permanent Sovereignty) Act, 2017

This Act has a total of thirteen sections divided into three main parts containing preliminary provisions, permanent sovereignty over natural wealth and resources and protection of PSNR in Tanzania. The Act provides for a definition of natural wealth and resources to entail all mineral or substances occurring naturally such as soil, subsoil, gaseous and water resources, and flora, fauna, genetic resources, aquatic resources, micro-organisms, airspace, rivers, lakes and maritime space, including the Tanzania's territorial sea and continental shelf, living and non-living resources in the Exclusive Economic Zone which can be extracted, exploited or acquired and used for economic gain whether processed or not.[277] This coverage is all inclusive and entails all the resources which under international law are regarded to be properties within the PSNR.

The Act provides for a proclamation of the PSNR principle over resources in Tanzania. It states that people of the United Republic of Tanzania shall have permanent sovereignty over natural wealth and resources.[278] Exercise of the ownership and control over natural wealth and resources is by and through the Government on behalf of the People and the United Republic.[279]

Further, the Act provides for inalienability of the natural wealth and resources and the Public Trust Doctrine. It states that natural wealth and resources are inalienable in any manner whatsoever and shall always remain the property of the People of United Republic.[280] This inalienability of the natural wealth and resources is enforcing the PSNR under international law which recognises the inalienability of resources which are in full control and ownership of the sovereign State. The President of Tanzania is entrusted to hold the natural wealth and resources in trust on behalf and for the benefit of the People of Tanzania.[281] In order to ensure that inalienability and PTD are entrenched fully in Tanzania, the Act provides to the effect that all activities and undertaking relating to the exploitation of natural wealth and resources shall be conducted by the Government on behalf of the People of the United Republic.[282]

277 Section 3 of the Natural Wealth and Resources (Permanent Sovereignty) Act, 2017.
278 *Ibid*, section 4(1) of the Act.
279 *Ibid*, section 4(2) of the Act.
280 *Ibid*, section 5(1) of the Act.
281 *Ibid*, section 5(2) of the Act.
282 *Ibid*, section 5(3) of the Act.

Recognizing that under globalized world, Tanzania cannot exploit and utilize the natural wealth and resources alone without participation of other persons, the Act thus provides for the possibility of the entering into agreements with investors on extraction, exploitation or acquisition and use of natural wealth and resources. Such agreements must comply with two main conditions: first, such agreement must fully secure the interests of People and the United Republic and second, approval of the agreement by the National Assembly is required.[283] The Act prohibits any agreement which violates the interests of People of Tanzania and is not approved by the National Assembly.

This provision curtails all discretionary powers exercised by executives on agreements with investors without taking into account the interests of the People of Tanzania. It implements one of the rights the accountability of the executive arm of the State to the People of Tanzania through their elected representatives.

Furthermore, the Act calls for any arrangement or agreement for international cooperation for the economic and social development involving natural wealth and resources to aim at furthering Tanzania's independence based upon respect of PSNR. This is whether such agreement is in form of public or private capital investments, exchange of goods and services, technical assistance and exchange of scientific information.[284] This is a full claim of PSNR and jealously guarding of State's sovereign rights over its natural wealth and resources.

Section 7 of the Act reiterates the need to control economic development through the extraction, exploitation and utilization of natural wealth and resources. In order to achieve this aspect, any arrangement or agreement must guarantee returns to the economy from the earnings accrued or derived from such extraction, exploitation or acquisition and use. Economic benefits for national development are thus a major focus of the development agreements under the new regime on PSNR.

Participation of the Government and People of Tanzania in the development and utilization of natural wealth and resources is yet another important milestone of the Act. The law requires that any authorization granted for extraction, exploitation or acquisition and use entails equitable share to the Government in the venture and the People who are citizens of Tanzania can have stake in venture.[285] It means that participation of the Government and Tanzanians in the development and utilization of the resources.

For Tanzania to benefit from the extraction of natural wealth and resources processing of resources need not to be emphasized. As such the Act prohibits export of raw resources outside Tanzania without beneficiation.[286] This is invalidating any agreement or arrangement for extraction, exploitation or acquisition and use of the resources without beneficiation. The law requires that any arrangement

283 *Ibid*, section 6(1) of the Act.
284 *Ibid*, section 6(2) of the Act.
285 *Ibid*, section 8 of the Act.
286 *Ibid*, see Section 9(1).

or agreement for the extraction, exploitation or acquisition and use of natural wealth and resources must include a commitment to establish beneficiation facilities within the United Republic.[287]

Retention of earnings arising out of disposal of the natural wealth and resources in Tanzanian banks and financial institutions is among the mandatory requirements in the extraction, utilization or acquisition and use of natural wealth and resources in Tanzania.[288]The law prohibits keeping earnings in banks and financial institutions outside Tanzania. The only exception permitted relates to distributed profits which must be repatriated in accordance with the laws of Tanzania.[289]This inventive step is for accountability purposes as it in sense that Tanzania as a host State can ably know the revenues accruing from the extraction of natural wealth and resources in Tanzania.

Another important milestone relates to judicial competence of institutions in Tanzania in all matters relating to extraction, exploitation or acquisition and use of natural wealth and resources. The law prohibits as a general rule that PSNR should not be subjected to any foreign court or tribunal.[290] As such, all matters related to PSNR must be adjudicated within the judicial bodies and other organs established in Tanzania pursuant to laws of Tanzania.[291] Indeed, this is what UNGA Resolution 1803 (XVII) envisaged in relation to rights of host State under the PSNR.

This is a very progressive approach to subject all the disputes relating to resources in Tanzania should be governed by the laws of Tanzania and determined by judicial institutions within Tanzania. As such, the Act states the mandatory requirement to acknowledge and incorporate in all arrangements or agreements for extraction, exploitation or acquisition and use of natural wealth and resources the jurisdiction of judicial bodies in Tanzania and applicability of the laws of Tanzania in dispute resolution.[292]

It is a clear departure from the existing situation as contained in various Bilateral Investment Treaties (BITs) and Multilateral Investment Treaties (MITs). For example, the Bilateral Investments Treaty (BIT) between United Kingdom and Tanzania provides expressly that each Contracting Party consents to submit disputes to the International Centre for Settlement of Investment Disputes (ICSID).[293]

One of the issues in respect of extraction, exploitation or acquisition and use of natural wealth and resources particularly in mining sector is the secrecy of the agreements of mineral resources. In order to ameliorate such weaknesses, the

287 *Ibid*, section 9(2) of the Act.
288 *Ibid*, section 10 of the Act.
289 *Ibid*, section 10(2) of the Act.
290 *Ibid*, section 11(1) of the Act.
291 *Ibid*, section 11(2).
292 *Ibid*, section 11(3) of the Act.
293 Article 8(1) of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Republic of Tanzania for the Promotion and Protection of Investments, 7th Jan. 1994.

Act provides for powers of the National Assembly to review all agreements or arrangements entailing extraction, exploitation or acquisition and use of natural wealth and resources.[294] This provides for scrutiny of the agreements on natural resources thus increasing accountability of the executive arm of the government. Such mandates of the National Assembly entail reviewing and initiating re-negotiation of unconscionable terms.

The last provision in this Act relates to the powers of the Minister for Constitutional Affairs to make regulations for better implementation of the Act. These regulations include those prescribing code of conduct for investors in natural wealth and resources; minimum guidelines for inspection, monitoring and evaluation of investments in natural wealth and resources; and anything which is incidental or conducive to the effective implementation of this Act.

5.2.2 The Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act, 2017

This is yet another important legislation in dealing with PSNR in Tanzania. It is divided into three main parts: the preliminary provisions covering title of the law, application and interpretation of terms; powers of the National Assembly to review contracts; and Government re-negotiation of unconscionable terms. The Act applies to Mainland Tanzania.[295] One of the important terms is 'unconscionable term' which means any term in the arrangement or agreement on natural wealth and resources which is contrary to good conscience and the enforceability of which jeopardizes or is likely to jeopardize the interests of the People and the United Republic.[296]The Act reiterates the National Assembly's advisory and oversight mandate to the Government under Article 63(2) of the Constitution. This is through reviewing any arrangement or agreement made by the Government relating to natural resources.[297]

In asserting PSNR over natural wealth and resources in Tanzania, the Act provides that every arrangement or agreement must impliedly contain a condition that the negotiations are concluded in good faith and fairly and, at all times observes the interests of the People and the United Republic.[298] Further, the law requires that principle of PSNR to afford fair and equitable treatment to the parties.[299] Equity is very important to ensure that host State obtains a fair share arising out of the disposal of its natural wealth and resources within its territorial boundaries.

The National Assembly is required mandatorily to devise a procedure under the Standing Orders of the National Assembly for reviewing any arrangement or agreement made by the Government over natural wealth and resources.[300]

294 Section 12 of the Act.
295 See section 2 of the Natural Wealth and Resources (Contracts Review and Re-Negotiation of Unconscionable Terms) Act, 2017.
296 *Ibid*, section 3 of the Act.
297 *Ibid*, section 4(1) of the Act.
298 *Ibid*, section 4(2) of the Act.
299 *Ibid*, section 4(3) of the Act.
300 *Ibid*, section 4(4) of the Act.

The law clearly provides for the procedure for review by stating timelines for the review of the arrangements or agreements. It requires that all arrangements or agreements over natural wealth and resources made by the Government must be reported to the National Assembly within six sitting days of the National Assembly next following the making of such arrangement or agreements.[301] The National Assembly can by resolution direct the Government to initiate re-negotiation of the arrangement or agreement with a view of rectifying the terms if the arrangement or agreement is found to contain unconscionable terms.[302] This applies to new arrangements or agreements which are entered upon after coming into force of the new legal regime on protection of PSNR in Tanzania.

Also in cases where the National Assembly considers that certain terms of the arrangement or agreement on natural wealth and resources or entire arrangement or agreement made before coming in force of this Act are prejudicial to the interests of the People and United Republic by reason of unconscionable terms, the National Assembly may resolve to direct the Government to initiate re-negotiation of the arrangement or agreement with the view of rectifying the terms.[303] This is an important step in protection of Tanzanian national wealth and natural resources. There is a possibility for re-negotiation of terms which are violative of PSNR found within jurisdiction of the United Republic of Tanzania.

More importantly, the law states the need for the Government to initiate re-negotiation timely. The first step is notification of the other party to the arrangement or agreement within thirty days of the resolution of National Assembly. The notice of the intention to re-negotiate on the terms which were found by the National Assembly to be unconscionable terms is required to inform the other party to the natural wealth and resources arrangement or agreement.[304]

Furthermore, the Act provides for a long list of the terms which must be considered to be unconscionable terms and treated as such:

(a) aim at restricting at restricting the right of the State to exercise full permanent sovereignty over its wealth, resources and economic activities;
(b) are restricting the right of the State to exercise authority over foreign investment within the country and in accordance with the laws of Tanzania;
(c) are inequitable and onerous to the State;
(d) restricts periodic review of arrangement or agreement which purports to last for life time of the mining;
(e) securing preferential treatment designed to create a separate legal regime to be applied discriminatorily for the benefit of particular investor;
(f) are restricting the right of the State to regulate activities of transnational corporations within the country and to take

301 *Ibid*, section 5(1) of the Act.
302 *Ibid*, section 5(2) of the Act.
303 *Ibid*, section 5(3) of the Act.
304 *Ibid*, section 6(1) of the Act.

measures to ensure that such activities comply with the laws of the land;

(g) are depriving the people of Tanzania of economic benefit derived from subjecting natural wealth and resources to beneficiation in the country;

(h) are by nature empowering transnational corporation to intervene in internal affairs of Tanzania;

(i) are subjecting the State to the jurisdiction of foreign laws and forum;

(j) expressly or implicitly are undermining the effectiveness of State measures to protect the environment friendly technologies; or

(k) aiming at doing any other act the effect of which undermines or is injurious to welfare of the People or economic prosperity of the Nation.[305]

The list of the unconscionable terms is quite comprehensive and embraces wide range of issues. It caters for authority of the State to assert ownership, control and regulate every kind of extraction, exploitation and acquisition of the natural wealth and resources. It provides for the competences of national institutions to deal with all matters pertaining to PSNR. Commendably, the judicial authorities as well as national legislative framework are applicable in disputes arising out of extraction, exploitation and acquisition of natural wealth and resources in Tanzania.

In the notice of intention to re-negotiate, the Government is required to state the nature of unconscionable terms and the intention to expunge the terms from the arrangement or agreement if the re-negotiation is not concluded within a specified period.[306] The period of renegotiation is fixed to ninety days from the date of service of the notice to the other party on the renegotiation of unconscionable terms unless extended by parties on mutual agreement.[307] The Government is required to prepare and lay down a report before the National Assembly on the outcome of the re-negotiation.[308] Laying down a report before the National Assembly is a clear implementation of accountability of the executive part of the State to the people elected representatives i.e. Members of Parliament. [309]

The effect of the notice to re-negotiation is categorically addressed. The law provides that in cases where the Government serves notice of intention to re-negotiate the arrangement or agreement and the other party fails to agree to re-negotiate or in event the agreement is not reached with regard to the unconscionable terms such terms shall cease to have effect to extent of unconscionable terms and by operation of this Act shall be treated as having expunged.[310]

305 *Ibid*, section 6(2) of the Act.
306 *Ibid*, section 6(3) of the Act.
307 *Ibid*.
308 *Ibid*, section 6(5) of the Act.
309 See Article 63(2) and (3) of the Constitution of United Republic of Tanzania, Cap. 2 R.E. 2002.
310 *Ibid*, section 7 (1) of the Act.

The Natural Wealth and Resources (Review and Re-Negotiation of Unconscionable Terms) Act, 2017 is superior to other laws on natural resources. The Act has an overriding effect over any other laws governing administration and management of natural wealth and resources in Tanzania.[311] It means that all laws like the Mining Act, the Land Act, the Wildlife Conservation Act, the Water Resources Management Act, the Territorial Sea and Exclusive Economic Zones Act, the Fisheries Act and others of similar nature must comply with the provisions relating to unconscionable terms. This overriding effect of the legislation is ameliorating the existing situation as it limits too much discretionary powers of each institution entrusted with particular natural resources on arrangement or agreement on extraction, exploitation or acquisition and use of the resources. Indeed, the new enactments ameliorate such impasse by providing for need to renegotiation of the unconscionable terms.

Finally, the Act empowers the Minister for Constitutional Affairs to make regulations for better carrying of the Act. [312] These regulations are important in the implementation of the law in order to effectively achieve the objects of the law.

6.0 Challenges in Implementation and Enforcement of the PSNR in Tanzania

One needs not to re-emphasize that the newly enacted legislative framework on PSNR in Tanzania has gone a mile ahead to effectively contribute to full re-affirmation and rightly re-positioning Tanzania and its People to benefit from extraction, exploitation or management of its natural resources for the national development. However, there are few aspects which might be stumbling blocks in the achieving the intended objects. These aspects relate to non-retrospective application of the laws, secrecy requirements under the existing agreements particularly Mining Development Agreements, and the role of Stabilization clause in the Bilateral and Multilateral Investments Treaties.

6.1The Mineral Development Agreements (MDAs) and their Unfavourable Terms

The existing mining operations in Tanzania are governed by Mining Development Agreements (MDAs) which pose a great challenge to national development in respect on utilization of natural wealth and resources. These MDAs were entered upon by the Government of United Republic of Tanzania. MDAs are legally binding agreements between the government of a host country and foreign mining companies with the purpose of supplementing or supplanting the prevailing mining legal and fiscal regime. Such agreements are very rare in developed nations as the general laws of the country bind all companies.[313] MDAs are aimed at assuring foreign companies as to the security of their investment, including the government guarantee that it is not going to change local laws or take any measure that will adversely affect the projected profits of the company. They constitute a one way of minimizing investment risks.[314] Before the Minister decides to grant a

311 *Ibid*, section 7(2) of the Act.
312 *Ibid*, section 8 of the Act.
313 D. N. Smith and L. T. Wells, Jr., *Negotiating Third-World Mineral Agreements*, Ballinger Publishing Company, Cambridge, Mass,1975, p. 29.
314 *Ibid*.

special mining license he is obligated to enter into negotiations with the applicant or holder of a mining right.[315]The MDA covers a wide array of matters and once signed it is presumed to be the main law that governs mining operations for that particular mine. It is argued correctly that: "many concession agreements are an expression of virtually all the laws that will govern the company's operations in the country."[316]

Tanzania had signed MDAs with different Multinational Companies operating in Tanzania including the Barrick Gold Corporation and AngloGold Ashanti.[317] It has been argued that the companies are afforded an opportunity to extent life of the goldmine for a much longer period than Pangea vis-à-vis both the Tulawaka and Buzwagi goldmine which have a maximum of 50 years. Like Pangea, the GoT provides a guarantee against expropriation and in the same manner, as well as secures the other rights to secure the other rights to take the proceeds of minerals and associated products outside the country and sell the minerals to foreign purchasers.[318]

These MDAs are creating separate legal regime to regulate the operation of the mining activities in the respective mines. According to Policy Forum, such legal regime failed to accommodate socio-environmental terms that could address the needs of the local communities in which mine operates as well as protect the environment which would be reinforced by the governing legislation. The strength of incorporating such terms into the contract means that failure to adhere to them would constitute breach of contract, and possibly lead to termination thereof.[319] Simply, environmental protection is onerously left to the government as all the agreements did not incorporate such requirements into the contracts.

Secondly, the freezing clauses i.e. stability clauses make it difficult for the host State owning the resources to impose any better terms for its national development through taxation. Arguably, based on MDAs for the Tulawaka, Buzwagi and Geita goldmines, it is clear that the mining contracts afford investors with an extremely favourable tax regime. Cumulative effects of such contractual terms with additional statutory fiscal exemptions like 100% capital allowance, the indefinite carry forward of losses against future profits is that the GoT has bargained to receive comparatively little from the mining industry. The GoT also failed to provide for review of fiscal terms in event of change in economic circumstances, such as mineral prices. This is compounded by the fiscal guarantee which locks the terms for the life of the mining projects.[320]

315 *Ibid*. See also Section 11 of the Mining Act, No. 14 of 2014

316 *Ibid*.

317 M. Curtis, and T.A. Lissu, *A Golden Opportunity?: How Tanzania is Failing to Benefit from Gold Mining* (2nd Edition), Dar es Salaam, the Christian Council of Tanzania (CCT), National Council of Muslims in Tanzania (BAKWATA) and Tanzania Episcopal Conference (TEC), 2008, p. 8.

318 Policy Forum, The Demystification of the Mining Contracts in Tanzania, Dar es Salaam, Policy Forum, p.4.

319 Policy Forum, *ibid*. p.8.

320 *Ibid*, pp.7 & 8. See also H. Mann, IISD Handbook on Mining Contract Negotiations for Developing Countries: Preparing for Success (Volume I), Manitoba, International Institute for Sustainable Development, 2015, pp. 13-14.

The tax stability clauses in MDAs limit the Government to introduce any changes for betterment of that particular State and its People. MDAs undermine the democratic rights of future Tanzanian governments to manage the country's economy with full mandate as empowered by citizens.[321] Investors are given such protective tax stability for life of the mine i.e. approximately 25 years with an option to renew for further term up to 25 or 15 years. Such enjoyment of special rights on the part of investors for life time of the MDAs undermine greatly the sovereignty of the State to own, manage and regulate activities relating to mineral resources.

The third important aspect is the ousting of jurisdiction of domestic courts and other judicial bodies to deal with disputes between investors and the Government on resources found within our territory. As Mann argues that:

> "a contract with a foreign investor is understood to be an international contract between the State and the foreign investors. The contract is governed by law of another State or increasing by an international law as the basis for interpreting the contract. In addition, contracts now often have international dispute settlement provisions that alter the usual recourse to resolving contract dispute settlement in the domestic courts". [322]

Immediately after the enactment of three laws on management of natural wealth and resources in Tanzania in 2017, Acacia Mining Plc served notices to the Government of Tanzania for arbitration. It stated that the notices of arbitration were in accordance with dispute resolution processes agreed by the Government of Tanzania in the MDAs with Bulyankulu Gold Mine Limited (BGML) and Pangea Minerals Limited (PML).[323] The newly enacted revolutionary legislative framework resulted into re-negotiation between Tanzania and Barrick Gold Corporation as the majority shareholder of Acacia Mining plc operating the Buzwagi goldmine.

6.2 Role of the Bilateral and Multilateral Investment Agreements

Another pertinent impediment for Tanzania to fully realize the PSNR is the existence of the Bilateral and Multilateral Investment Agreements. The Bilateral Investment Agreements (BITs) refers to the agreement entered into between two independent States to provide for protection of investors and investments from each party to another State. First important aspect of the BITs is the ousting the jurisdiction of national courts in investment dispute settlement. For instance, the Agreement between the Government of the United Kingdom of Great Britain

321 M.Curtis, and T.A. Lissu, *A Golden Opportunity?:How Tanzania is Failing to Benefit from Gold Mining* (2nd Edition), Dar es Salaam, the Christian Council of Tanzania (CCT), National Council of Muslims in Tanzania (BAKWATA) and Tanzania Episcopal Conference (TEC), 2008, pp. 10, 16 and 30.

322 H. Mann, *IISD Handbook on Mining Contract Negotiations for Developing Countries: Preparing for Success*(Volume I), Manitoba-Canada, International Institute for Sustainable Development, 2015, pp. 7-8.

323 On 4th July 2017, Acacia Mining plc gave a press release on Update on Development in Tanzania informing the market that the Notices of Arbitration were served in Tanzania on behalf of Bulyankulu Gold Mine Limited (BGML) the owner of the Bulyankulu and Pangea Minerals Limited(PML) the owner of the Buzwagi mine. For more details seehttp://www.acaciamining.com/~/media/Files/A/Acacia/press-release/2017/update-on-developments-in-tanzania-20170704.pdf (Accessed on 7th August 2017).

and Northern Ireland and the Government of United Republic Tanzania[324] and the Agreement between the Government of Canada and the United Republic of Tanzania for the Promotion and Reciprocal Protection of Investments.[325]
Under these BITs, Parties consent to the submission of the investment disputes between a State and investors from the other party State to the Arbitration.[326] This submission of the dispute is either to the International Centre for Settlement of Investment Disputes (ICSID) or any other Ad hoc Arbitration Tribunal.[327]

Secondly, BITs are categorically on the law applicable to the dispute settlement between foreign investors and State Party to the BITs. The municipal law of the State Party whose resources extraction, exploitation and acquisition of natural wealth and resources are in question is excluded in dispute resolution relating to that investment. It is either the BIT or international law which applies in such circumstances.[328]In fact, the international law applicable to investment dispute resolution referred to in these BITs is that which provides the most favourable conditions to the investors.[329] Such international law covers the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965, the Arbitration Rules of the United Nations Commission on International Trade Law (UNICTRAL), 1976 and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.

Tanzania being a State Party to the BITs and MITs is bound to fulfil her obligations under such BITs and MITs. Failure to adherence to the provisions of these BITs and MITs is against the rule of "*Pacta sunt servanda*"which requires State Party to observe and perform all obligations under international agreement in good faith.[330] Further, the principle proscribes any Party State from invoking its municipal law to defeat the purpose of the international treaty to which that State has freely signed and ratified.[331] Such legal obligation may hamper Tanzania's resolve to change the benefit structure arising out of the utilization, extraction and acquisition of the natural wealth and resources. Such inroads can be invoked by instituting legal cases against Tanzania at international tribunals.

6.3 Non-Retrospective Application of the Law

Generally, retrospective application of law is restricted unless it confirms some rights but not creating liabilities to a Party. It has been argued that 'passing retrospective legislation is considered as a practice which could adversely affect

324 Dated 7th January 1994. It entered into force on 2nd August 1996 upon ratification.
325 Dated 16th May 2013.
326 Article 8(1) of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of United Republic Tanzania, 1994; and Articles 23-26 of the Agreement between the Government of Canada and the United Republic of Tanzania for the Promotion and Reciprocal Protection of Investments, 2013.
327 See Article 27 of the Agreement between Canada and United Republic of Tanzania, 2013.
328 Article 11 of the Agreement between UK and Tanzania, 1994; and Article 32 of the Agreement between Canada and Tanzania, 2013.
329 See Article 11 of the Agreement between UK and Tanzania, *ibid.*
330 Article 26 of the Vienna Convention on the Law of Treaties, 1969. This is reported in *United Nations Treaty Series* (UNTS), Vol. 1155, p. 332.
331 Article 27 of the Vienna Convention on Law of Treaties, 1969.

rights and liberties or impose obligations retrospectively and therefore breach fundamental legislative principles. However, it is recognised that there are occasions on which curative retrospective legislation, which does not significantly affect individuals' rights and liberties, is justified in order to clarify a situation or correct unintended legislative consequences.'[332] Investors can raise the argument that these enactments cannot apply in respect of MDAs they entered into with the Government under the then existing legislative frameworks.

7.0 Conclusion

It is clear that Tanzania has made a critical step towards re- affirming its sovereignty over its natural wealth and resources. The recent negotiation/ dialogue between the Government of Tanzania and Barrick Gold Corporation is a sign of accountability to calls by Tanzanians that resources should be benefit Tanzanians. The legislative approach taken by Tanzania is a revolutionary milestone achievement as provide for the balancing between the rights of the State ownership over the resources and investors rights over the same resources. Such legislative approach is likely to bring about positive change in the resources' management for benefit of the citizens.

There are few challenges towards achieving PSNR in Tanzania with the newly enacted legislative regime. These are inroads brought about by terms of existing MDAs which do not consider equity. They are averse to achievement of sustainable development of the country through the exploitation, utilization and acquisition of natural wealth and resources. The MDAs contain stability clauses which prevent the Government from exercising its authority over resources where such MDAs apply. Secondly, the ousting jurisdiction of national courts ad legal framework applicability is a big challenge.

The re-negotiation of the terms of the MDAs is the only best way forward for the Government of Tanzania in order to address the anomalies entrenched in the MDAs. Such renegotiation is likely to change the terms towards more beneficial MDAs taking into account increasing the contribution of the natural wealth and resources in the economic growth.

332 See paragraph 50 of the Office of the Queensland Parliamentary Counsel, Principles of Good Legislation: Guide to Fundamental Legislative Principles: Retrospectivity, 2013, pp 15-16. See https://www.legislation.qld.gov.au/Publications/OQPC/FLP_Retrospectivity.pdf (Accessed on 14th August 2017).