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HOW FAR HAVE WE GONE?

Daniel Mirisho Pallangyo



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ENVIRONMENTAL LAW IN TANZANIA; HOW FAR HAVE WE GONE?

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TABLE OF CONTENTS

1.	Introduction	28
2.	Environmental Law and Institutions in Tanzania	30
2.1	National Environmental Policy	30
2.2	Environmental Legislation	31
2.3	The National Environmental Management Act, 1983	33
2.4	The Environmental Management Act, 20 of 2004	34
3.	Policy Instruments for Environmental Protection	35
3.1	Environmental Impact Assessment	35
3.2	Strategic Environmental Assessment	36
3.3	Use of Economic Instruments	37
3.4	Tax Relief and Subsidies	37
3.5	Polluter Pays Principle	38
4.	Conclusion	39

1

INTRODUCTION

Over the past few decades, environmental protection has emerged from a point of obscurity to one of the important issues of our time. Both at the international and national planes, the dominant theme of the environmental protection movement is the achievement of sustainable development.¹ It is the theme, which underlies the Rio Declaration on Development and Environment, the Tanzania National Environmental Action Plan (NEAP) and the Tanzania National Conservation Strategy for Sustainable Development (NCSSD).² The contemporary international norm which underpins environmental law generally is undoubtedly the notion of sustainable development. The pioneering World Commission on Environment and Development (the Brundtland Commission) convened by the United Nations General Assembly in 1983 in response to global environmental concerns, describes sustainable development as, 'the development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.³

According to the NEAP, the key policy instruments and strategies for achieving sustainable development are environmental impact assessment, environmental legislation, economic instruments, environmental indicators and standards, and public participation.⁴

The purpose of this paper is to give an outline of environmental law, policy and institutions in Tanzania. It is intended to give an understanding of environmental law and policy and how the same is covered under the newly enacted Environmental Management Act, 2004.

In 1989, the General Assembly of the United Nations called for a global conference to devise strategies that would halt and reverse the negative impacts of anthropogenic activities on the environment and promote sustainable development. The United Nations Conference on Environment and Development (UNCED), held in Rio de Janeiro, Brazil, 3-14 June 1992, fulfilled the mandate given to it by the General Assembly by adopting Agenda 21, which is a programme of action for sustainable development into the 21st century, the Rio Declaration on Environment and Development and the Forest Principles, a non-legally binding authoritative statement of principles for a global consensus on the management, conservation and sustainable development of all types of forests.⁵

Thus, during the 1992 UNCED held in Rio de Janeiro, Tanzania, together with other countries, made a declaration to abide by the principle of sustainable development based on the recognition that 'the current generation should meet their needs without compromising the ability of future generations to meet their needs'.⁶

1 The principles of sustainability were accepted by all nations at the Earth Summit in Rio in 1992 and reaffirmed in Johannesburg in 2002. The 1992 United Nations Conference on Environment and Development (UNCED) was a historic watershed. It placed the environment crisis at the top of the international agenda, and linked environment with development in a new paradigm of sustainable development.

2 National Environmental Management Council (NEMC), Tanzania, National Conservation Strategy for Sustainable Development (NCSSD), January 1994.

3 J. Glazewski, *Environmental Law in South Africa* 14-15 (Durban: Butterworths, 2000). This definition contains within it two key concepts: the idea of limitations imposed by the state of technology and social organisation on the environment's ability to meet present and future needs; and the concept of 'needs' in particular the essential needs of the world's poor, to which overriding priority should be given. The general principle that states should ensure the development and use of their natural resources in a manner which is sustainable, emerged in the run-up to UNCED, although the ideas underlying the concept of sustainable development have a long history in international legal instruments and the term itself began to appear in treaties in the 1980s in the period prior to the publication of the Brundtland report in 1987. The general principle of sustainable development has been first referred in a preamble to the 1992 EEA Agreement.

4 See R. Mwalyosi, *Impact Assessment and the Mining Industry: Perspectives from Tanzania* 13 (Paper presented in a conference organised by International Association for Impact Assessment, Vancouver, Canada, April 2004).

5 J. Kindia, 'Institutional Aspects of Sustainable Development in the United Republic of Tanzania', 6 *East African Law Review* 6 (1999).

6 Sustainable Development means that people can make their living without destroying the natural resources and ecosystems necessary for meeting their needs and supporting the diversity of their life on the planet. See T. Mohamed, *The Challenges of Sustainable Development After Johannesburg* (Santiago: Global Environment Facility, 2003). The definition contains within it two key concepts: the idea of limitations imposed by the state of technology and social organisation on the environment's ability to meet present and future needs; and the concept of 'needs' in particular the essential needs of the world's poor, to which overriding priority should be given. See also P. Sands, *Principles of International Environmental Law* 13 (Cambridge: Cambridge University Press, 2000).

The government is signatory and has acceded to a number of other international and regional environmental treaties as follows:

- Convention on Biological Diversity ratified on 8 March 1996;
- Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region and Related Protocols ratified on 1 March 1996;
- United Nations Convention to Combat Desertification ratified in April 1997;
- United Nations Framework Convention on Climate Change ratified in April 1996;
- The Vienna Convention on the Protection of Ozone Layer and Montreal Protocol on Substances that Deplete the Ozone Layer acceded on 7 April 1993 and 16 April 1993 respectively;
- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal acceded on 7 April 1993 and,
- Bamako Convention on Ban of the Import into Africa and the Control of Transboundary Movements of Hazardous Wastes within Africa ratified on 7 April 1993.⁷

One of the challenges that faced Tanzania after acceding to the Rio Declaration was in the taking of necessary legislative steps to ensure sustainable development.⁸ Therefore, Tanzania made concerted efforts to alleviate environmental concerns with a view to achieving sustainable development. Although progress in many areas remains slow, the government is nevertheless engaged in a major exercise aimed at formulating or reviewing national policies for the sectors.⁹ Thus, the Planning Commission under the President's Office is charged with national development planning and

economic management. The main function of the Planning Commission is economic management and coordination of development activities including integration of environmental concerns in development planning. At the central and local government levels, there are several line ministries and government departments whose work is of relevance to environment and sustainable development.¹⁰

In addition to the government organisations, there are more than 100 non-governmental organisations (NGOs) and community-based organisations (CBOs) which are involved in implementing programmes which relate to the environment and sustainable development. Academic institutions, the business community and professional associations are also involved in this task.¹¹

Specific activities related to the commitment to environmental concerns at the national level included the finalisation and endorsement of the NEAP, which reflects the findings and recommendations of the National Conservation Strategy for Sustainable Development, and the drafting of a national environmental policy.¹² Participants in these activities included government agencies, the private sector, NGOs, local communities, and academia. Sectoral activities included among others, the preparation of a national mining sector and environmental policy.¹³

⁷ See Mwalysosi, note 4 above.

⁸ See NEMC, note 2 above.

⁹ This has been done since 1997 when the environmental policy was formulated.

¹⁰ See NEMC, note 2 above. See also Chapter 8 of Agenda 21 on Policy Making for Sustainable Development recognises that country-specific laws are among the major instruments for transforming environment and development policies into action. Recognising the importance of science and its potential impact on sustainable development, the government of Tanzania must put a higher education policy to provide the direction and guidance to stakeholders and service providers.

¹¹ See NEMC, note 2 above. However, most NGOs are either registered as societies under the Ministry of Home Affairs or as companies limited by guarantee under the Registrar of Companies. Generally speaking, the smaller NGOs are community based and are continuously affected by problems of leadership and the lack of financial resources. Research NGOs are affiliated with universities and other academic institutions.

¹² The National Environmental Policy was drafted in 1997. These policies resulted in sectoral policy reforms thereafter and finally the enactment of the Environmental Management Act, Act No. 20 of 2004.

¹³ Tanzania, Report on Existing Legislation Pertaining to Environment, Division of Environment, Ministry of Tourism, Natural Resources and Environment, 1994.

2

ENVIRONMENTAL LAW AND INSTITUTIONS IN TANZANIA

'Environmental law' is a new term in Tanzania, although some of the many concepts in environmental law have existed since the birth of the nation and earlier.¹⁴ Also, in some senses, most laws pertain to some aspect of the natural or human environment and may be called environmental laws in the sense that they regulate uses of the environment.¹⁵

In some respects, however, laws that purely regulate the use of the environment so that the state may benefit from private development, through payment of license fees or economic royalties, do not always effectively conserve the environment for purposes of sustainable development. Therefore, the best way to define the laws addressed in this study is 'those laws which pertain to environment,' some of which may be 'environmental laws'.

The phrase 'environmental law' is a combination of the words 'environment' and 'law'. In its modern conception, 'environment' is treated as including the physical surroundings that are common to all of us, including air, space, water, land, plants and life.¹⁶ However, Kidd concludes that the dictionary definition of 'environment' is a relative one, since it deals with the circumstances surrounding something or someone.¹⁷

In the case of the term, 'law', it may be defined as a set of enforceable rules and principles regulating behaviour of individuals in the society.¹⁸ Environmental law

therefore constitutes enforceable rules and principles regulating the activities of persons, natural or legal, which have an impact on any of the media mentioned above as forming part of the environment.¹⁹

2.1 National Environmental Policy

The term 'policy' may be defined as a set of principles that guide a regular course of action.²⁰

The National Environmental Policy, 1997 provides a framework for making fundamental changes that are needed to bring environmental considerations into the mainstream of decision-making in Tanzania.²¹ It also seeks to provide policy guidelines and plans and gives guidance to the determination of priority actions, for monitoring and regular review of policies, plans, and programmes. It further provides for sectoral and cross-sectoral policy analysis thus exploiting synergies among sectors and interested groups.

The overall objectives of the National Environmental Policy are, therefore, to ensure sustainable and equitable use of resources without degrading the environment or risking health or safety; to prevent and control degradation of land, water, vegetation, and air which constitute the essential life support systems; to conserve and enhance natural and man-made heritage, including the biological diversity of the unique ecosystems of Tanzania; to improve the condition and productivity of degraded areas including rural and urban settlements in order that all Tanzanians may live in safe, productive and aesthetically pleasing surroundings; to raise public awareness; to promote individual and community

14 K. Kulindwa, and O. Mashindano, *Mining for Sustainable Development in Tanzania* (Dar es Salaam: Dar es Salaam University Press, 2003).

15 See Kulindwa, note 14 above at 6.

16 S. Ball and S. Bell, *Environmental Law 2* (Durban: Blackstone Press Ltd., 1991).

17 M. Kidd, *Environmental Law: A South African Guide 1* (Durban: Juta and Company Ltd., 1997). See also the *Concise Oxford Dictionary* (Oxford: Oxford University Press, 1982). It defines 'environment' as 'surrounding; surrounding objects, region, or conditions, especially circumstances of life of a person or society.

18 Sheila Bone and Georges Osborn, *Osborn's Concise Law Dictionary 197* (London: Sweet & Maxwell, 1983).

19 See R. Goodland, R. Mercier and S. Muntemba eds., *Environmental Assessment (EA) in Africa: A World Bank Commitment: Proceedings of the Durban, World Bank Workshop* (Washington: World Bank, 1995).

20 See Bone and Osborn, note 18 above at 225. It provides that,

- *De facto* policies are those which can be inferred by observing patterns of action and behaviour among key players.
- *De jure* policies are those that are stipulated in documents such as legal Acts and regulations and formulated policies in documents originating from stakeholders such as professional associations and organisations.

21 For a stimulating account of the evolution of policies and approaches of environmental protection, see M. Michelson, *The Environmental Age 82* (Cambridge: Cambridge University Press, 1986).

participation; and to promote international cooperation.²²

The National Environmental Policy also provides for the execution of a range of strategic functions using policy instruments such as environmental impact assessments, environmental legislation, economic instruments and environmental standards, and indicators. A framework is also provided for institutional arrangements and coordination.²³ The role of major groups such as non-governmental and community based organisations, and the private sector is underscored. Capacity building and human resource development are emphasised.²⁴

Thus, the National Environmental Policy provides a set of principles and objectives for an integrated and multi-sectoral approach addressing the totality of the environment. With the enunciation of the Policy, the main challenge is to ensure that all sectors and interested groups take priority actions in a mutually supportive manner. It is in this regard, therefore, that an action plan was developed as a first step towards the incorporation of environmental concerns in the national development planning process.²⁵

The NEAP²⁶ seeks, among other things, to integrate the environmental policy and the conservation strategy into the planning process; involve stakeholders in environmental management; promote environmental education and public awareness; promote research and technology initiatives; evolve and strengthen a national environmental information system; promote environmental impact assessments; guide the development of a framework environmental legislation; and prepare a long term investment plan to address major environmental concerns.

Until recently, environmental issues were the responsibility of sectoral ministries. However,

institutional structures and strategies are changing towards cross-sectoral coordination with the growing awareness of the importance, severity, complexity and cross-cutting nature of environmental issues. In line with this new thinking, the government has recently reviewed all sectoral policies to ensure that they are consistent with current macro-economic reforms and national environmental policy. The underlying premises of the sectoral policy reviews are the need to balance accelerated economic growth with more efficient and sustainable use of the environment and natural resources, with the need to integrate environmental management into all sectors.

A good example is the mining sector policy which is aimed at creating an enabling environment for investors in the sector.²⁷ Specifically, the government revised the legal framework related to mining in order to increase consistency and transparency.²⁸ In this regard the following legislations were revised: the Mining Act of 1979, the Income Tax Act of 1973 and the Investment Promotion Act of 1991. The Model Mineral Agreement was reviewed and mineral licensing procedures streamlined. The divestiture of public mining companies and the re-organisation of the State Mining Company (STAMICO) were done too. The environmental impact of the mining sector was addressed through the Mining Sector Environmental Action Plan and includes provisions for health, safety, and environmental regulations.²⁹

2.2 Environmental Legislation

The Constitution of the United Republic of Tanzania was amended in 1984 to provide for the Bill of Rights.³⁰ Article 14 of the Bill of Rights stipulates that every person has a right to life and to the protection of life by society. The High Court in a landmark ruling in the case

22 Tanzania, National Environmental Policy, 1997, Section 18.

23 *Id.*, Section 21.

24 *Id.*, Section 28.

25 See Michelson, note 21 above at 36.

26 D.M. Pallangyo, 'Environmental Impact Assessment for Mining Activities in Tanzania: Legal Analysis', LL.M. Dissertation (Pietermaritzburg: University of Kwazulu-Natal, 2005).

27 This will be explained in detail in page 14 of this work.

28 This review resulted in the 1998 Mining Act which repealed the 1979 Mining Act. This is also elaborated in section three of this study.

29 See A. Donnelly *et al.*, *A Directory of Impact Assessment Guidelines* 27 (London: International Institute for Environment and Development, 2nd ed. 1998).

30 R.M. Bierwagen and C.M. Peter, 'Tanzania: Political and Constitutional Evolution and Analysis of the Constitution', in F. Reyntjens ed., *Constitutiones Africae* 1, 20 (Brussels: Bruylant, Vol. 4, 1992).

of *Festo Balegele v Dar es Salaam City Council*³¹ interpreted this article to mean that persons are entitled to a healthy environment, and held that the City's decision to locate the garbage dump near residential areas violated plaintiffs' constitutional rights to a healthy environment.

In addition, Article 9 of the Constitution requires the Government to ensure that national resources are harnessed, preserved, and applied toward the common good. Although this Article is part of the non-judicial 'fundamental objective and directive principles of the state policy' provisions of the Constitution,³² it portrays the commitment of the Government to ensure sustainable development.³³

31 *Festo Balegele v Dar es Salaam City Council*, Misc. Civil Case No. 90 of 1991, High Court of Tanzania, Dar es Salaam; see also *Felex: Joseph Mavika v Dar es Salaam City Commission*, Civil Case No. 316 of 2002, High Court of Tanzania, Dar es Salaam. In this case, the plaintiffs instituted a main case claiming remedies from the defendants. They also applied for an interim order to restrain the respondents from dumping solid and liquid wastes in the Vungunguti area (Dar es Salaam) to prevent pollution of the environment as well as to stop the endangering the lives of the plaintiffs and their families and other residents, pending the determination of temporary injunction. This case was still pending in the High Court of Tanzania in Dar es Salaam when this work was compiled.

32 See R. Mwalosi and R. Hughes, *Introduction Course on Environmental Impact Assessment in Tanzania: Resource Handbook* 34 (London: International Institute for Environment and Development, 1999).

33 Under the Constitution of the United Republic of Tanzania of 1977, policies and laws respecting natural resource management, are established and implemented by the central government. Parliament has exercised its constitutional authority to make laws concerning resources and the environment, but, as discussed above, local governments have been delegated specific powers of implementation and enforcement that differ depending on the particular resources and laws involved. Zanzibar, although a part of Tanzania, has a unique legal status. According to Article 2(1) of the Constitution, the territory of the United Republic consists of the whole area of mainland Tanzania and the whole of the area of Tanzanian Zanzibar, and includes the territorial waters. Mainland Tanzanian law (the Fisheries Act of 1970) does not cover the territorial waters of Zanzibar, and Zanzibar has its own fisheries legislation. See R. Makaramba and F. Stolla, *Tanzania Coastal Management Partnership* (Working Paper No. 5007 TCMP prepared for the joint initiative between the National Environment Management Council and the University of Rhode Island/Coastal Resources Center, 1999), available at http://www.crc.uri.edu/download/1999_5007_TCMP_PolicyLegal.pdf.

For instance, the Tanzania Investment Act, 1997 stipulates that one of the functions of the Investment Promotion Center (IPC) is to liaison with appropriate agencies to ensure investment projects use environmentally-sound technologies and restore, preserve, and protect the environment.³⁴ Under this important step, IPC vets unscrupulous investors who may want to maximise profits at the expense of the environment.

The country's major sources of law include: the common law; principles of equity; statutes of general application; Islamic law in some instances; customary law; international conventions to which Tanzania is a party; constitutional law; and principal, subsidiary, and case law. However, the main sources of environmental law are the common law³⁵ and the statutory law in the form of principal legislation,³⁶ subsidiary legislation and international law and the Constitution.

34 I.H. Juma, 'Role of the Judiciary in the Crystallisation of Environmental Principles into Enforceable Norms in Tanzania', 31-34 *Eastern Africa Law Review* 40, 45 (2004).

35 'Common law' refers to binding rules and principles of laws developed by the courts over time, as opposed to laws enacted by Parliament. The common law rules that are applicable in Tanzania are those developed by the Tanzanian courts, both colonial and post-colonial, as well as those that were in force in England on 22 July 1920. The most important common law principles that are relevant to environment are the torts of negligence, nuisance and the rule in *Rylands v Fletcher* (1868) L.R.3 H.L. 330. These torts are covered by any standard book on the law of tort. Environmental torts have been defined more extensively in the common law of other countries. However, where these rules have evolved in Commonwealth countries, they may be argued to apply in Tanzania, as 'persuasive authority' to the courts. For example, the courts of India and Australia have extensively defined common law environmental torts. Therefore, even where no specific precedent exists in the Tanzanian context (and some already do), it is fair to say that these developed environmental common law rules may very well bind individuals and businesses in the future. (This is by the virtue of the Judicature and Application of Laws Ordinance, Cap. 453).

36 All laws enacted by the Parliament in Tanzania are known as principal legislation. The NEAP and the NCSSD note that there are over 50 principal laws which relate to environmental issues. Many of the laws are outmoded, most are not understood or currently enforced and overlap in terms of functional authority. Further, most of the existing laws are penal in nature. However, these laws fail to induce compliance because the *ex ante* value of the penalties prescribed is far below the cost of compliance. The NCSSD notes that there is a need to develop and implement new, integrated, enforceable and effective laws that are based upon sound social, ecological, economic and scientific principles:

The management of the activities that affect environment in Tanzania has been undertaken on the basis of a plethora of laws and regulations. Almost the whole corpus of environmental law is statutory based. Few cases (as shown above) have been decided on the basis of these laws. However, the common law of torts on nuisance and negligence are applicable in Tanzania. Thus, since these laws are widely scattered, their enforcement (or non-enforcement) has often led to conflicts between different departments of government, thus undermining their effectiveness. Legislation aimed at regulating the use and management of natural resources has evolved along sectoral lines, governing specific environmental media.³⁷

The complexity of environmental problems means that many sectors of the government and society are involved in actions to address them. In Tanzania, the Office of the Vice President is responsible for the environment. This office, using the Division of Environment, is responsible for the development of policy options, and coordination of the broad-based environmental programmes and projects. It is also responsible for facilitating meaningful involvement of civil society in environmental activities. In particular, the office is charged with the duties and responsibilities of environmental research, environmental policy making, environmental planning, environmental monitoring, and environmental coordination of both national and international environmental issues. The strategic functions of the Office of the Vice President form the basis for the effective inter-ministerial cooperation and coordination, which has been underscored in the NEAP.³⁸

Tanzanian laws that pertain to the environment may be grouped in four main categories: land use laws; natural resources and conservation areas laws; pollution-related legislation; and overall environmental management legislation.

This study addresses the first, second and the last category especially the last category, that of overall environmental management legislation and the laws pertaining to mining in Tanzania.³⁹

³⁷ See Pallangyo, note 26 above at 42.

³⁸ Tanzania, Report on Existing Legislation Pertaining to Environment (Division of Environment, Ministry of Tourism Natural Resources and Environment, 1994).

³⁹ This is explained in section 3 of this work.

2.3 The National Environment Management Council Act, 1983

The National Environment Management Council Act, 1983 was the first law to demonstrate the government's interest in development that takes the environment into consideration.⁴⁰ The Act created the National Environment Management Council (NEMC) in 1983 for the purpose of 'acting as an advisory body to the government on all matters relating to the environment.' In its advisory capacity, NEMC was to formulate and recommend policy; coordinate activities; evaluate and improve existing policies; stimulate public and private participation in programmes and activities for national beneficial use of natural resources; specify standards and norms; establish and operate a system of documentation; formulate proposals for legislation; establish and maintain liaison in other national and international organisations; and undertake general environmental education programmes.⁴¹

In addition, the Director General of the Council was given specific duties to 'consider means and initiate the steps for the protection of the environment and for preventing, controlling, abating or mitigating pollution, carrying out investigations into the problems of environmental management, obtaining advice from experts to review progress of attainment of purposes of the Act and to promote and carry out short and long-term planning and projects in environmental management and protection.'⁴²

To date, most of NEMC's activities have involved the preparation of the National Conservation Strategy for Sustainable Development. The Division of Environment, in the Ministry for Tourism, Natural Resources and Environment, is the government body for overall environmental matters.⁴³

Apart from the Vice President's Office and NEMC, many government ministries have been undertaking

⁴⁰ This was the first law to address environmental issues in Tanzania. This law has recently been repealed by the Environmental Management Act, Act No. 20 of 2004.

⁴¹ See Report on Existing Legislation Pertaining to Environment, note 13 above.

⁴² See Report on Existing Legislation Pertaining to Environment, note 13 above at 29.

⁴³ See Report on Existing Legislation Pertaining to Environment, note 13 above at 29.

activities relevant to the implementation of Agenda 21.⁴⁴ The complexity and inter-relatedness of environmental problems have necessitated the involvement of almost every sector in environmental protection. The Government institutions and ministries which have been more directly involved in the implementation of Agenda 21 are the Prime Minister's Office; the Planning Commission; the Ministry of Agriculture; the Ministry of Water, Energy and Minerals; the Ministry of Lands, Housing and Urban Development; the Ministry of Education and Culture; the Ministry of Science, Technology and Higher Education; the Ministry of Community Development, Women Affairs and Children; the Ministry of Industries and Trade; and the universities.⁴⁵

Chapter 8 of Agenda 21 on policy-making for sustainable development recognises that country-specific laws are important instruments for transforming environment and development policies into action. This can be accomplished not only through 'command and control' methods, but also by using a framework for economic planning and market instruments. Major constraints facing environmental management in Tanzania include the lack of capacity to enforce environmental laws and lack of working tools.⁴⁶

Tanzania has a number of other statutes sometimes referred to as environmental laws, but which are actually resource-exploitation statutes. These include the Mining Act (1998), Fisheries Act (1974), Water Utilisation and Control Act (1974), and the Forest Ordinance (1959). All these Acts are currently under review to reflect sustainable utilisation of resources. The challenge ahead

is to incorporate the requisite institutional machinery and enforcement authority, including effective judicial procedures and compliance with international agreements into these laws, and to ensure their periodic review.⁴⁷

2.4 The Environmental Management Act, 20 of 2004

The Environmental Management Act was passed by the National Assembly in 2004,⁴⁸ and in the beginning of 2005 the President assented to the Act. The Act repealed and replaced the National Environment Management Council Act, 1983.

This Act is a framework Act (a comprehensive umbrella) in that it is the legislation governing environmental aspects in Tanzania. The Act includes provisions for; legal and institutional framework for sustainable management of environment;⁴⁹ an outline principles for management,⁵⁰ impact and risk assessments,⁵¹ prevention and control of pollution,⁵² waste management,⁵³ environmental quality standards,⁵⁴ public participation,⁵⁵ compliance and enforcement;⁵⁶ and the basis for implementation of international instruments on environment.⁵⁷ However, the Act further repeals the National Environment Management Act, 1983 and provides for the continued existence of the National Environment Management Council;⁵⁸ and

44 Agenda 21 elaborates upon the concept of sustainable development and issues related to it. Taken together, they constitute the framework for international law in the field of sustainable development. Fourteen chapters address the issues which are primarily environmental and the rest of the chapters address the issues pertaining to sustainable development, including the social and economic dimensions of development; the participatory role of major groups; and financial and other means of implementation. *See* Agenda 21, *in* Report of the United Nations Conference on Environment and Development, Rio de Janeiro, UN Doc. A/CONF. 151/26/Rev.1 (Vol. 1), Annex II (1992).

45 *See* Michelson, note 21 above.

46 Tundu Antiphias Lissu, *Environmental Impact Assessment of Foreign Investment Projects: A Study in the Law, Policy and Governmental Decision-making in Tanzania* (Dar es Salaam: Lawyers' Environment Action Team, 1999).

47 Raphael Mwalyosi, Ross Hughes and David Howlett, *Introduction Course on Environmental Impact Assessment in Tanzania: Resource Handbook* (London: International Institute for Environment and Development, 1999).

48 The first draft of the Environmental Management Act, 2004 was released in November 2003 and was subject to consultation involving over 140 stakeholders from different sectors, districts and regions. Comments and suggestions from these workshops were used to produce a second draft of the Act which was considered by the Cabinet and was submitted in the National Assembly in 2004. The Act provides for detailed measures for the protection of ecological processes, the sustainable utilisation of ecosystems and for environmental protection.

49 The Environmental Management Act, 2004, Part V.

50 *Id.*, Part II.

51 *Id.*, Part VI.

52 *Id.*, Part VIII.

53 *Id.*, Part IX.

54 *Id.*, Part X.

55 *Id.*, Part XIV.

56 *Id.*, Part XVI.

57 *Id.*, Part XV.

58 *Id.*, Sections 16-29.

provides for the establishment of the National Environmental Trust Fund to provide for other related matters.

Additionally, the Act establishes a national Environmental Regulatory Body (ERB),⁵⁹ which oversees Environmental Units (EUs) at district and sectoral levels. The ERB and EUs are responsible for screening projects and the review of environmental impact assessment (EIA) reports. The ERB is to be consulted during scoping, although this is the responsibility of the proponent. ERB is also responsible for approving terms of reference prepared after scoping.⁶⁰

Under the Act, local authorities are supposed to be the principal executive agencies of environmental policies and regulations. These local authorities are argued to work with environmental NGOs and community-based organisations (CBOs) which are coordinated by the Vice President's Office (VPO) and the Tanzania Association of Non-Governmental Organisations.⁶¹ Local government is however weak and coordination with central government is lacking. Local authorities and institutions dealing with environmental management have often very few resources including environmental experts and funds.⁶²

3 POLICY INSTRUMENTS FOR ENVIRONMENTAL PROTECTION

As noted earlier, environmental degradation has emerged as one of the important issues of the century and has resulted in new approaches to supplement penal laws and environmental protection. These are outlined in

⁵⁹ *Id.*, Section 12.

⁶⁰ In the absence of a robust institutional and legislative framework, it is perhaps not surprising that the quality and effectiveness of EIA in Tanzania has been highly variable.

⁶¹ See Dalal-Clayton and B. Sadler, *The Status and Potential Strategic Environmental Assessment* (London: International Institute for Environment and Development, 2003).

⁶² *Id.*, at 107

Tanzania's NEAP⁶³ as environmental impact assessment, economic instruments and public participation.⁶⁴ Each aspect is briefly discussed hereunder for the purpose of looking at how the same are incorporated in the Environmental Management Act, 2004.

3.1 Environmental Impact Assessment

One of the policy instruments considered most effective for the achievement of sustainable development is the requirement that environmental impact assessment (EIA)⁶⁵ shall be undertaken for all proposed activities that are likely to have significant adverse impacts on the environment and which are subject to a decision of a competent national authority⁶⁶. The National Environmental Action Plan describes the objective of EIA as 'allowing maximisation of long-term benefits of development while maintaining the natural resource base.'⁶⁷ However, the objectives of EIA are broader as they seek to protect the environment in the wider sense, and not just natural resources. Thus, an activity which would raise noise levels near a hospital or school or which can affect the human-made environment such as archaeological sites, historic towns, monuments and artifacts or relics, may also be subjected to environmental impact assessment.⁶⁸ Such assessment forms the basis for refusal of permission to undertake a particular activity or grant of permission with conditions necessary to minimise the effect on the environment.⁶⁹

Different countries have adopted different elements of the traditional EIA process, which originated in the United States. For example, some countries mandate

⁶³ See Declaration of the United Nations Conference on Environment and Development (hereafter Rio Declaration), Rio de Janeiro, UN Doc. A/CONF. 151/26/Rev.1 (Vol. 1, 1992), Principle 17.

⁶⁴ See Clayton and Sadler, note 61 above.

⁶⁵ See the schedule to the new Environmental Management Act, 2004. However, this aspect is explained in detail in chapter three of this study.

⁶⁶ See Pallangyo, note 26 above at 3.

⁶⁷ See Pallangyo, note 26 above at 3, Para 8(a).

⁶⁸ See Donnelly and Sadler, note 61 above at 29. The post-completion follow-up does not seem to exist in Tanzania. The reason might be that proponents do not always have ownership of donor-supported projects and that there is little accountability for the recommendations contained within the environmental impact statement.

⁶⁹ See Clayton and Sadler, note 61 above at 71.

EIA for all projects, while others limit the process to those projects which have a certain level of government involvement, such as the requirement of licensing and permitting or the expenditure of funds, and the process itself is limited to a test of potentially significant environmental impacts.⁷⁰

The Environmental Management Act, 2004 provides that, 'Any person, being a proponent or a developer of a project or undertaking of a type specified in the Third Schedule to this Act [i.e. the Environmental Management Act, 2004], to which environmental impact assessment is required to be made by the law governing such project or undertaking [...] shall undertake or cause to be undertaken, at his own cost, an environmental impact assessment study'. 'An Environmental Impact Assessment study shall be carried prior to the commencement or financing of a project or undertaking. A permit or license for the carrying out of any project or undertaking in accordance with any written law shall not entitle the proponent or developer to undertake or to cause to be undertaken a project or activity without an environmental impact assessment certificate issued under this Act.'⁷¹

Institutional arrangements for environmental management in Tanzania have now been agreed upon. EIA provisions contained in the new legislation (Environmental Management Act, 2004) makes an important contribution to institutionalising environmental management. The Act includes provisions for incorporating EIA/Strategic Environment Assessment in national, sectoral, district and community planning processes -although there is extremely limited capacity at the latter levels.⁷² The system establishes an Environmental Regulatory Body, which will delegate responsibilities to the district and sectoral levels through Environmental Units. These units will be responsible for screening proposals. They will also be consulted by the proponents during scoping and will review EIA reports. The terms of reference for EIA studies will be approved at the central level.⁷³

⁷⁰ EIA is now a law in Tanzania. See third Schedule of the Environmental Management Act, 20 of 2004. This law was assented by the president Benjamin Mkapa in early 2005.

⁷¹ See United Republic of Tanzania, Environmental Management Act, 2004, Section 81.

⁷² See Clayton and Sadler, note 61 above.

⁷³ *Id.*, p. 71.

3.2 Strategic Environmental Assessment

Strategic Environmental Assessment (SEA) is defined to mean a formal, systematic process to analyse and address the environmental effects of policies, plans and programmes and other strategic initiatives.⁷⁴ This process applies primarily to development-related initiatives that are known or likely to have significant environmental effects, notably those initiated individually in sectors, such as transport and energy, or collectively through spatial or land use change. As with EIA, SEA can and should be interpreted broadly, for example to include social, health and other consequences of a proposed action and their relationship to sustainable development concepts and strategies.⁷⁵

The terms 'policy', 'plan' and 'programme' also mean different things in different countries.⁷⁶ Even within the same country, the terms can be used flexibly or interchangeably in the case of plans and programmes. Generally, policy is understood to be an overall directive which outlines, guides or sets a context for the proposed action(s) a government or organisation intends to take. It may take the form of a law, document, statement or precedent.⁷⁷

SEA extends the aims and principles of EIA to the higher levels of decision-making when major alternatives are still open. At this level there is far greater scope than at the project level to integrate environmental considerations into development goals and objectives. It allows problems of environmental deterioration to be addressed at their upstream source in policy and plan-making processes, rather than mitigating their downstream symptoms or project-level impacts. As such, SEA directly responded to what the World Commission

⁷⁴ A. Hussein, B. Ron and B. Sadler, Environmental Impact Assessment and Strategic Environmental Assessment: Towards Integrated Approach (Geneva: United Nations Environment Programme, 2004).

⁷⁵ *Id.*, p. 50.

⁷⁶ See Mwalyosi, note 4 above at 15. Typically, policy is implemented by plans and programmes, which set out actions, options and measures to be carried out in a sector or area. For practical purposes, developing countries and those transitional countries that are not in accession to the European Union can move forward by subjecting whatever is normally understood to be a policy, plan or programme to SEA.

⁷⁷ See Mwalyosi, note 4 above at 15.

on Environment and Development (1987) called 'the chief institutional challenge of the 1990s.'⁷⁸

In addition, SEA can provide early warning of large-scale and cumulative effects, including those resulting from a number of smaller-scale projects that individually would fall under thresholds for triggering a project EIA. When applied systematically, this process affords a means of environmental clearance of key issues related to whether, where and what forms of development are environmentally sound and appropriate.⁷⁹

Unfortunately, the environmental laws in Tanzania put emphasis on EIA more than SEA.⁸⁰ Part VII of the new Environmental Management Act, 2004 provides that SEA should be carried out for the enhancement, management and conservation of the environment, or sustainable management of natural resources.⁸¹ At the time this work was completed, the regulations to implement this law were not yet in place hence its efficiency cannot be examined.

3.3 Use of Economic Instruments

Concern with protecting the environment for the benefit of present and future generations is now at the centre of the international agenda. Awareness of the extent of the damage done to our environment through unsustainable economic activities is steadily growing. In particular there is growing awareness of the need for international actions to implement realistic and workable solutions for the reduction of these man-made environmental impacts.⁸²

Principle 16 of the Rio Declaration⁸³ states that individual countries should endeavour to internalise their environmental costs through the use of economic

instruments. The same principle also states clearly that the polluter must pay for the damage which arises as a result of his/her activities. Agenda 21 states, moreover, that it is essential to design economic and political reforms which promote effective planning and use of resources for sustainable development on the basis of sound economic and social policies, integration of social and environmental costs, and pricing of resources.⁸⁴

Economic instruments applied in environmental protection and resource conservation should encompass all tools that are designed to influence economic behaviour. They usually include funds for environmental cleaning or progressive investment, deposit schemes for containers, subsidies, emission charges, product charges, exemption fees, and administrative fees to supervise environmental protection and resource conservation, non-compliance fees, and tradable emission quotas.⁸⁵

Traditionally, in Tanzania, environmental protection litigation and standards have been enforced through imposition of negative sanctions prescribed by the laws themselves. This approach is increasingly supplemented by the use of economic instruments.⁸⁶

3.4 Tax relief and subsidies

Environmental taxation has been widely applied in a number of countries, such as consumer taxes, fees paid for direct resource use, waste disposal, and income taxes. Mining and real estate taxes are also widely applied, as well as subsidies to encourage specific resource exploitation, in order to regulate and better manage the extraction and utilisation of mineral resources. The mining tax, for example, increases the unit cost of exploitation while other factors remain constant and thus helps lower overall level of resource exploitation and presumably prevents aggressive exploitation and damage to the environment.⁸⁷ In the European Union, a

⁷⁸ See Pallangyo, note 26 above at 14.

⁷⁹ By doing so, SEA facilitates and contributes to sustainability assurance, for example by evaluating the effect of a national transport plan or programme, *inter alia*, against carbon dioxide emission commitments made by a country under the Kyoto Protocol.

⁸⁰ The discussion on EIA is in page 14 of this work.

⁸¹ See Environmental Management Act, note 71 above, Sections 104-106.

⁸² M. Doug, Green Taxation and Environmental Policy (Paper presented to the annual meeting of the Environmental Studies Association of Canada, 5 June 1995).

⁸³ See Rio Declaration, note 63 above.

⁸⁴ X. Wana, Taxation Policy: Its Role in Environmental Protection and Resource Conservation in China 2 (Berkeley: University of California, 1990).

⁸⁵ See Rio Declaration, note 63 above.

⁸⁶ See Tanzania Environmental Impact Assessment Procedures and Guidelines (National Environmental Management Council, 2002, Revised in March 2004).

⁸⁷ See S. Gaines and R. Westin, *Taxation for Environmental Protection: A Multinational Legal Study* (New York: Quorum Books, 3rd ed. 1991).

comprehensive ecological taxation system is under formulation.⁸⁸

Taxation is mainly a government instrument for raising revenue; however taxation may also be used to achieve other objectives such as encouraging or discouraging certain activities or behaviour. The government can use taxation to support environmental protection by waiving or imposing lower taxes on environmentally friendly technologies or products. Governments can also induce compliance with environmental standards by providing government subsidies for those who adopt methods of abating pollutants which arise from production or consumption.⁸⁹

The NEAP indicates that tax relief and subsidies are among the key policy instruments the Government of Tanzania deploys in pursuit of sustainable development. However, the possibility of this (tax relief and subsidies) happening depends much more on the current fiscal policies and realities. At the moment, the country is facing difficult budgetary problems and the International Monetary Fund, World Bank and other donors who support both the development and recurrent budgets are strongly against tax relief and government subsidies. These options are therefore not likely to be used in the near future.⁹⁰

Taxation may be, and has been, used as a disincentive to environmental degradation by imposing taxes on environmentally damaging processes, products, as well as consumption patterns. In addition to the preventive aims, taxes so raised have been committed to environmental protection activities in Tanzania. Normally, taxes on a particular industry or product would go to support remedial measures for the element of the environment damaged by the industry or product. For example, money raised from taking wood products of a particular tree may be used in planting new trees of the same species.⁹¹

The NEAP proposed the establishment of an environmental tax on permits, imports and domestic goods, earmarked for the following areas:

- Air pollution enforcement and subsidy programs
- Water pollution enforcement and subsidy programs
- Solid waste management/pollution enforcement and subsidy programs
- Protection of public health through enforcement of public health laws, and
- Land reclamation activities.⁹²

3.5 Polluter pays principle

The 'polluter pays principle' refers to a device of internalising environmental costs by making those who benefit from the environmentally damaging activity bear the costs of the damage. The polluter pays principle is implemented through charging polluters for the right to pollute. This may be achieved through a variety of means, including taxes and fees on licences. The difference between these kind of taxes and environmental taxes discussed above lies in their respective objectives. While 'green taxes' aim at raising money from polluting activities with the principal objective of putting the sums so raised into environmental protection, 'polluter pays' taxes are mainly intended to punish the polluter without necessarily using the monies raised for environmental protection activities. The other method which is increasingly being used to implement the polluter pays principle is the legal imposition of compensatory damages as well as environmental reparation features which hereto have seldom been included in pollution control legislation. In the near future, compensation and reparation (in the form of environmental clean-up) are features likely to replace penal sanctions as the main characteristics of environmental law. This, in turn, will dramatically increase the cost of polluting the environment.⁹³

The application of economic tools also has a strong incentive in stimulating the application of new techniques in industry. Usually, with the increase of pollution tax, the polluter must pay more attention on adopting new techniques to decrease the pollutant discharge.

⁸⁸ D. Hunter, J. Salzman and D. Zaelke, *International Law and Policy* 420 (New York: Foundation Press, 2002)

⁸⁹ *Id.*, at. 420.

⁹⁰ See Pallangyo, note 26 above at 4.

⁹¹ G. Milne, Swedish Support to the National Environmental Management Council in Tanzania (Stockholm: Sida Evaluation 2000/5, 2000).

⁹² See Pallangyo, note 26 above at 4.

⁹³ *Id.*, at 4.

Environmental taxes have been used to promote economic efficiency by requiring polluters to pay the economic costs that their pollution imposes on others, costs sometimes called 'negative externalities.' Secondly, the polluter pays principle has assured fairness in allocating cleanup costs by making sure that they are borne by the polluter rather than the innocent public.⁹⁴

In industries where there are large environmental risks, smaller firms often lack the financial wherewithal to guarantee cleanup if a major accident or leak should occur. Taxes which finance cleanup or insurance funds have proved to protect the environment, by allowing small operators to stay in business because they are often supported by the industries which pay the tax.⁹⁵

regulations to implement it by the Minister. This Act provides for the detailed measures for the protection of ecological processes, the sustainable utilisation of ecosystems and for the environmental protection as a whole, but we will not know how effective the Act is until the regulations are made to implement it. This is because practice has shown that there is a lack of capacity to enforce environmental laws and lack of working tools.

4 CONCLUSION

This paper has discussed the environmental law, policy and institutions in Tanzania. From this discussion, it can be seen that the environmental issues are often complex and less addressed. In Tanzania, this concept is new as far as the legal part of it is concerned. This being the case, the environmental issues are not adequately addressed by the laws. The Bill of Rights chapter in the Constitution of the United Republic of Tanzania (URT) does not directly and adequately address environmental matters. It does not directly spell out the environmental rights, which could prompt the development of environmental laws and other laws, which are relevant to the subject. We should also note that the constitutional provision of the same is important to provide the framework for the administration of environmental laws.

The Environmental Management Act, 2004⁹⁶ came into force when the President assented to it in February 2005, but it will only be effective after the promulgation of

⁹⁴ P. James and J. Andrew, *The Impacts of Increased Corporate Average Fuel Economy, Standards on the U.S. Auto Sector* (Oakland: Redefining Progress, July 2005).

⁹⁵ *Id.*, at 14

⁹⁶ *See* the discussion at 2.3.3.

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