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**PLAGARISM DECLARATION**

Research dissertation paper presented for the approval of senate in fulfillment of part of the requirements for the Master of Commercial Law in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of the Master of Laws dissertation including those relating to the length and plagiarism, as contained in the rules of this University, and this dissertation conforms to those regulations.

.....

Chitsanzo Ivy Zingano

## DEDICATION

To my sister, Maggie Zingano- the most beautiful person in my life, an inspiration for change, a blessing, a ray of sunshine and reflection of what it means not to give up.

## ACKNOWLEDGEMENTS

My sincere thanks and praise to the Lord Almighty, through whom all things are possible. I would not have been able to accomplish this task on my own. Thank you Lord for the grace, wisdom, strength and ability. All glory is yours Lord, Amen. I wish to express my gratitude and sincere appreciation to my supervisor, Professor Salvatore Mancuso for his guidance, insight, support and patience in writing this dissertation. His insistence for academic excellence has challenged me and it will never be forgotten.

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**TABLE OF CONTENTS**

<b>PLAGARISM DECLARATION</b>	<b>i</b>
<b>DEDICATION</b>	<b>ii</b>
<b>ACKNOWLEDGEMENT</b>	<b>iii</b>
<b>TABLE OF CONTENTS</b>	<b>iv</b>
<b>ACRONYMS</b>	<b>v</b>
<b>Chapter I: INTRODUCTION</b>	<b>1</b>
1. Introduction	1
2. Aim	7
3. Methodology	10
<b>Chapter II: DEVELOPMENT AND PROGRESSION OF ECONOMIC DEVELOPMENT AGREEMENT</b>	<b>12</b>
1. Introduction	12
2. The progression of Economic Development Agreement	13
3. The legal nature of EDAs	16
4. The applicable law to drafting EDAs	18
5. The legal framework provided by EDAs	20
6. The Conclusion of EDAs	21
6.1 Procedure	21
6.2 The concept of national interest	23

## **Chapter III: THE NEGOTIATION PROCESS** **26**

1.	Introduction	26
2.	How negotiation is done	27
3.	Factors that influence the process	28
	3.1 National policy and law	28
	3.2 Regulation and monitoring	31
	3.3 The MNC's Strategy	33
	3.4 Administrative and Institutional factors	34
	3.4.1 Imbalances in Information	34
	3.4.2 Weak governance	35
	3.4.3 Transparency	37
	3.4.4 Accountability	39
	3.4.5 Weak Administrative institutions	40
	3.4.6 Political influence	41
	3.4.7 Bribery and Corruption	43
	3.5 Capacity and Resources	44
	3.5.1 Capacity	44
	3.5.2 Negotiating Power	45
4.	How the factors fail to cater for national interest	46
5.	Conclusion	47

## **Chapter IV: MALAWI/PALADIN ENERGY LIMITED AGREEMENT** **51**

1.	Introduction	51
2.	Steps leading to the Malawi Government and Paladin Energy Limited Agreement	52
3.	Malawi Government and Paladin Energy Limited	

negotiations in the context of influential factors	55
3.1 An overview of the agreement	55
3.2 How the factors influenced the clauses	56
3.3 The clauses that were excluded	71
4. Implementation of the agreement	75
5. The way forward	75
6. Conclusion	78
<b>Chapter V: CONCLUSION AND RECOMMENDATIONS</b>	<b>81</b>
<b>BIBLIOGRAPHY</b>	<b>85</b>



**LIST OF ACRONYMS**

AMV	African Mining Vision
C R I M Rs	Countries Rich in Mineral Resources
DA	Development Agreement
EDAs	Economic Development Agreements
EIA	Environmental Impact Assessment
EITI	Extractive Industries Transparency Initiative
EMP	Environmental Management Plan
GoM	Government of Malawi
HC	Host Country
IC	Investment Contracts
MNC	Multinational Corporations
MMA	Mines and Minerals Act
NMLRF	National mining legal regulatory framework

NGOs

Non-governmental organizations

PEL

Paladin Energy Limited

## CHAPTER I

### INTRODUCTION

#### 1. Introduction

Mineral resource exploration and exploitation is Africa's stepping stone to further economic development. This is a view that is held by many on the continent. The economic benefits associated with ventures in mineral resource development and management is now cemented as one of the gateways to achieving sustainable economic development for countries that are rich in mineral resources on the continent.<sup>1</sup> The exploitation of these resources has come to also immensely contribute to the expansion of infrastructure and development of other areas in a nation's economy.<sup>2</sup>

In Africa, mineral resources are owned by the state, which acts as a custodian on behalf of the nation.<sup>3</sup> Unfortunately, most State governments do not have the financial and industrial maturity to fully develop and meet the demands involved with the extractive industry in Africa.<sup>4</sup> Thus, many such governments then rely on multinational corporations [MNCs] to explore or exploit the natural resources in this industry on their behalf.<sup>5</sup> The MNC is a privately owned enterprise that is incorporated in the HC, in most cases it is usually the subsidiary company to the parent company, which is registered

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<sup>1</sup> T Allen 'The Law relating to Private Foreign Investment in manufacturing in Botswana, Zambia and Zimbabwe' (1992) 4 *African Journal International & Comparative Law* 44.

<sup>2</sup> N Kofele-Kale 'The political economy of foreign direct investment: a framework for analyzing investment laws and regulations in developing countries' (1992) 23 *Law & Policy International Business* 619.

<sup>3</sup> K Bindemann 'Production Sharing Agreements: An Economic Analysis' 8 (1999) available at <http://www.oxfordenergy.org/pdfs/WPM25.pdf>, accessed on 26 December 2013.

<sup>4</sup> JE Strongman (ed) 'Strategy for African Mining' (1992) Volumes 23 - 181 x.

<sup>5</sup> WW Hogan, F Sturzenegger & L Tai 'Contracts and Investment in Natural Resources' in William W. Hogan & F Sturzenegger's *The Natural Resources Trap: Private Investment without Public Commitment* (2010) 1.

and located somewhere else in the world.<sup>6</sup> The MNC brings foreign investment into the HC, which in this case is a developing country and owns more than one profit making enterprise in many countries.<sup>7</sup> The MNC concludes a contract with the HC as the state or a state owned enterprise known as an investment contract [IC] in which it cements its decision to invest in the development of the mineral resource it has chosen to explore and exploit.<sup>8</sup> In addition, it agrees to provide a majority of the finances; the specialized know how, technical assistance and expertise.<sup>9</sup>

The decision by the MNC is not automatic the HC must first make efforts to create an environment that is favourable to attract the MNC.<sup>10</sup> The HC does so by drafting, redrafting and modifying its policies, regulations and national laws in order to increase its chances of receiving investment.<sup>11</sup> There are several terms that are used to refer to ICs in the extractive industry. They are sometimes called state contracts due to the fact that the state is a party to the contract.

The determinants of investment project are thus the national mining legal regulatory framework [NMLRF] and the contract. The contract is the legal undertaking agreed upon by the parties to manage the project.<sup>12</sup> It is separate from the NMLRF because it comes into existence after the parties

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<sup>6</sup> JH Dunning 'Re-evaluating the Benefits of Foreign Direct Investment' in United Nations *the 1990s'* (1996) 73 -101.

<sup>7</sup> Ibid.

<sup>8</sup> L Cotula 'Investment Contracts and sustainable development: How to make contracts for fairer and more sustainable natural resource investments' (2010) 20 *Natural issues* available at <http://pubs.iied.org/17507IIED>, accessed on 27 July 2013.

<sup>9</sup> United Nations Commission on Trade and Development World Investment Report 2006 ' FDI from Developing and transition Economies: Implications for Development' July 2006 available at [http://unctad.org/en/Docs/wir2006\\_en.pdf](http://unctad.org/en/Docs/wir2006_en.pdf), accessed on 26 December 2013.

<sup>10</sup> T Fredriksson 'Forty Years of UNCTAD research on UNCTAD' (2003) 12 3 *Transnational Corporations* 1 at 8.

<sup>11</sup> B Land 'Capturing a fair share of fiscal benefits in the extractive industry' (2009) 18 1 *Transnational Corporations* 157.

<sup>12</sup> L Cotula op cit (note 8) at 4.

have discussed and negotiated the terms and conditions.<sup>13</sup> The NMLRF is already existing and it is what the investors use to determine whether to invest in the HC. The parties also use the NMLRF during the negotiations of the contract. This is to ensure that the terms and conditions that they have put in the contract comply with the principles of national law.

The HC's drafting of policies; regulations and national mining laws that will promote its social, economic development goals cannot be underestimated. The national policies, regulations and laws that relate to the development of the minerals are a very important guide for the HC before and after the negotiation of the contract. The fact that the HC owns the subject matter to the contract and has enacted laws that will bring investment is not enough. The policies, regulations and laws must reflect the HCs development agenda for the sector and the provisions there must be coherent in terms of content. ICs in the mining sector do not focus on incentives that are given to the investor anymore they now have a broader outlook on the development of the country which involves the consideration of other issues like governance, transparency, public participation, protection of the environment and the observance of human rights.<sup>14</sup>

There are different categories of ICs depending on what parties wish to achieve in their contractual arrangement.<sup>15</sup> In this dissertation we will focus on economic development agreements [EDAs], these are agreements that are commonly used in the development of mineral resource projects in Africa. They are also popular because in some instances the HC does not have an adequate NMLRF to regulate the project and the existing law cannot deal with

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<sup>13</sup> L. Cotula 'Sustainable Markets Investment Briefing 4: Foreign Investment Contracts' August 2007 available at <http://www.pubs.iied.org/17015IIED.html>, accessed on 2 February 2014.

<sup>14</sup> Ibid.

<sup>15</sup> J Salacuse (ed) *'The Three Laws of International Investment Law: National, Contractual and International'* (2013) 17.

changing circumstances during the operation of the contract.<sup>16</sup> In the MNCs case, it is for its protection, it wants a guarantee that the state will not tamper with the investment. This is because in Africa the development and management of the mining sector is linked to both the economic and political spheres of a country, which means that for the project to survive dramatic changes like changes of government, sustainable measures must be taken before hand to guarantee that the project continues with little disruptions.<sup>17</sup>

EDAs are contracts with dual capacity, first, as legal arrangements that regulate the investment project and second, as documents that contain rights and obligations, which affect the economic and social interests of a nation.<sup>18</sup> The main aim of EDAs is to bring about short and long term economic development and improve the welfare and livelihoods of the people.<sup>19</sup> Unfortunately, this is not the case in Africa. One of the challenges that are faced by countries rich in mineral resources [CRIMRs] is the failure of EDAs to bring about sustainable economic development.<sup>20</sup>

One of the prevalent factors to this challenge is the negotiation process; this is the process that starts the contractual process.<sup>21</sup> It is in this process that the parties undertake to discuss their terms and obligations in relation to the project; it is where they also get to know each other's interests, strengths and weakness.<sup>22</sup> This is the process that allows the HC the opportunity to set the

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<sup>16</sup> R Dolzer & C Schreuer (ed) *'Principles of International Investment Law'* (2012) 72.

<sup>17</sup> R Kraemer & R van Tuler 'Internationalization of the TNC's from the Extractive Industries: a Literature review' (2009) 18 No.1 *Transnational Corporations* 137 at 138.

<sup>18</sup> AFM Maniruzzaman 'The Relevance of Public International Law in Arbitrations Concerning International Economic Development Agreements: An Appraisal of Some Fundamental Aspects' (2009) *Journal of World Investment and Trade* 263.

<sup>19</sup> African Development Bank Report (2007) 'Natural Resources and Sustainable Development in Africa' available at <http://www.afdb.org/en/knowledge/publications/african-development-report/african-development-report-2007>, accessed on 20 August 2013.

<sup>20</sup> L Cotula op cit (note 8) at 7.

<sup>21</sup> African Economic Outlook (2013) 'Structural Transformation and Natural Resources' available at <http://www.africaneconomicoutlook.org/fileadmin/uploads/aeo/PDF/Pocket%20Edition%20AEO2013-EN.web.pdf>, accessed on 27 July 2013.

<sup>22</sup> M Kamuwanga (ed) *'Negotiating Investment Contracts; Investment laws in the Context of Development'* (1995) 138.

tone for the investment. The HC must make sure that the terms and conditions in the contract comply and promote the policies, regulations and mining national laws in the country in order to set out a standard of performance for the MNC in its contractual obligations.<sup>23</sup> In addition, where the HC does not set some kind of standard for the MNCs operation in the country the MNC may take advantage of this and formulate strategies that will negatively affect the HCs development goals through the project.<sup>24</sup>

Until recently, the importance of the negotiation process has been neglected in many CRIMRs. One of the reasons is that in their quest to attract investors these HCs have neglected to formulate policies, regulations and to a greater extent national mining laws that reflect the consideration and commitment to their country's development agenda. The HCs have also failed in some cases to include provisions in the national legislation that effectively manage the projects and the MNC or to enforce such provisions where they exist.<sup>25</sup> The NMLRF influences the contractual negotiation process and the neglect to address this area is demonstrated in the negotiation process.

This process precedes the conclusion of the contract and it is in this process that problems emerge. These problems then influence the conclusion the contract. In that they lead to the HC accepting clause or terms that are against their national interest. The interests here are the country's social and economic development agenda. These need to be protected and given attention when negotiating EDAs. However, what happens instead is the contract is formulated in such a way that it does not benefit the nation but those that have an influence in how it is drafted.<sup>26</sup> This influence results in the

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<sup>23</sup> Ibid 144.

<sup>24</sup> Global Witness Report (2007) 'Heavy Mittal; A State within a State: the inequitable Mineral Development Agreement between the Government of Liberia and Mittal Steel Holdings NV' October 2006 available at [http://www.globalwitness.org/sites/default/files/pdfs/mittal\\_steel\\_en\\_oct\\_2006\\_high\\_res.pdf](http://www.globalwitness.org/sites/default/files/pdfs/mittal_steel_en_oct_2006_high_res.pdf), accessed on 12 June 2013.

<sup>25</sup> L Cotula op cit (note 13.)

<sup>26</sup> L Cotula op cit (note 8) at 3.

contract losing its quality as an EDA because the clauses that embody the contract do not reflect the government's intentions of achieving social and economic development.

Thus the HC must protect its national interests, which are its sustainable social, economic development and growth. The HCs behaviour during the negotiation process has the potential to introduce and increase the existence of negative factors to development.<sup>27</sup> In brief these factors are administrative and social factors like the lack of transparency, public participation, weak governance, political influence corruption and bribery.<sup>28</sup> Unlike the lack of an adequate regulatory framework that influences the content some of these factors influence the environment in which the negotiations are done. Others factors are the imbalances that exist at the onset when negotiating, these are the lack of resources and capacity in relation to the technical expertise, information or finance and specialized know how.<sup>29</sup> The factors put the HC in a difficult position because they weaken its bargaining power and tilt the negotiating power in the MNC's favour.<sup>30</sup> The identification of these factors is what has been used to explain the reason behind why the HC concludes contracts that are against national interests.

The negotiation process is influenced by the negative factors mentioned above, which also hamper development. The existence of these negative factors and an inadequate national legal regulatory framework raises many questions as to whether the HC negotiated the contract to serve national interest or a few individuals. These questions will not arise where the HC has committed to developing development policies, mining regulations and laws that can adapt to changing circumstances and have social and economic

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<sup>27</sup> Ibid 13.

<sup>28</sup> African Economic Outlook (2013) op cit (note 21) at 152.

<sup>29</sup> Ibid p 5.

<sup>30</sup> UNCTC Report (1992) 'Formulation and Implementation of foreign investment policies selected issues' available at <http://unctc.unctad.org/data/e92iia21h.pdf> accessed on 30 July 2013.



development as their focus. This will produce results that will guarantee the HC the right amount of economic competitiveness in order for the HC to meet its social and economic development goals.<sup>31</sup> Further, it would also curtail the MNCs chances of formulating a strategy that obstructs the HCs course to development by regulating the MNC's operations and offering a better negotiating environment.<sup>32</sup>

The HCs strategy to concede vital interests with the hope of recovering them at renegotiation does not work. These contracts are for a long period of time and renegotiation is usually frozen for a long time in some cases until the MNC has achieved the profits it wanted. This is because in making the investment the MNC is accepting a lot of risk so they will do all they can to achieve their profit margin in the period that they have negotiated.

## **2. Aim**

This dissertation seeks to examine how factors like weak and incoherent mining laws, weak governance, transparency and accountability measures, political influence and negotiating power negatively contribute to the negotiation of EDAs in the mining extractive industry of countries that are rich in mineral resources like Malawi. The analysis of these factors is to provide a better understanding why countries like Malawi enter into EDAs on containing terms and conditions that are against their national interest, which in the cases of these contracts are their social and economic development goals. The conclusion of EDAs by countries that want to further their economic development is not reflected in the terms they agree to. Thus

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<sup>31</sup> Ibid.

<sup>32</sup> Global Witness Report (2007) op cit (note 24) at 5.

the conclusion of these contracts fails to serve the underlying goal, which is to advance social and economic development.

When the HC negotiates with the MNC there are points where each party may have to concede certain things. In the case of the HC is sometimes concedes beyond what is reasonable in terms of national law and international standards. In some instances the other terms are not included or they are drafted in such a flexible way that the MNC escape them. Thus the terms and obligations agreed upon in the contract do not bring about the desired economic and social development. Instead the country continues to move further and further away from achieving these goals. The equitability in these contracts is discovered when assessments are done on how much the country has benefited from the project and it is found that the benefits are minimal.

The discussion will focus on the initial stages of the contractual process where the negative factors outlined above are either already existing or are created as the parties start to interact during negotiation. The aim is to discuss the influence of the factors to the contracting process and then later how the decisions made here impact the terms agreed upon in the contract. Factors like national mining laws and policies will be considered as one of the factors that influence the negotiation process and thereby the clauses that are concluded. During the negotiations national mining laws offer general regulation and guidance to the drafting of the contract during the negotiation on process.

The HCs failure to negotiate favourable terms in EDAs is a common problem in the extractive industry of countries rich in mineral resources in

Africa.<sup>33</sup> As a result, it has become a focal and sensitive issue in Africa. The main reason for choosing Malawi is because it has been possible to secure a valuable case to study, which means a greater level of comprehensive research. In addition, information specifically relating to the contract is now available and it is now possible to do a case study focusing on the contract. Thus this case study is being done in order to critically look at and discuss the aforementioned problem.

The dissertation will therefore argue that there are considerations that an HC like Malawi must take into account when coming to the negotiating table in order to first of all determine its own interests and then to find ways to secure more or reasonably fair terms that will benefit national interests. It will be argued that these interests are often defined by Malawi's national policies and legislation on economic, mining, environmental and social development. As it stands the implementation and operation of EDAs tends to illustrate that factors; like not having national policies on, stringent regulations, adequate national mining laws, weak governance and transparency measures work against the effective regulation of the mining project.<sup>34</sup> Consequently, HCs like Malawi find themselves with limited control on how to regulate the MNC and its operations on the project.<sup>35</sup>

The dissertation further examines the reasons behind the inadequate regulation and formulation of EDAs in the negotiation process. It argues that attention must be paid to drafting policies and regulations that can then be used to draft national legislation and regulations in the extractive industry. There must be a promotion of greater transparency and accountability in

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<sup>33</sup> G Bainkong 'Africa Wants Harmonized Manual for Negotiating Mining Contracts' July 2013 available at <http://allafrica.com/stories/201307050002.html>, accessed 20 August 2013.

<sup>34</sup> L Cotula 'Reshaping contracts for quality natural resource investments' March 2013 available at <http://pubs.iied.org/17147IIED>, accessed on 25 June 2013.

<sup>35</sup> N Nsiku 'Assessing Incentives in Malawi' Trade Knowledge Network/International Institute for Sustainable Development *Policy Brief* December 2012 available at [http://www.iisd.org/pdf/2013/assessing\\_investment\\_incentives\\_malawi.pdf](http://www.iisd.org/pdf/2013/assessing_investment_incentives_malawi.pdf), accessed on 9 December 2013.

increasing openness in EDA negotiations. The HC must modify its mining laws and stick to their long-term agendas. Further the HC must seek more guidance in the negotiation process by employing the assistance of experienced experts in the field of EDAs negotiations and commit to train its own personnel in the area. There must be consideration of periodic reviews of the terms of EDAs based on agreeable parameters, proper consideration of interests that serve the nation and the HC political elite must shift their vision from the short term monetary gain to longer sustainable ventures that include the nation's interests.<sup>36</sup>

Finally the dissertation endeavours to show that if an HC like Malawi negotiated the EDAs on terms that were strong in the sense that they were not vague and hard to ignore, it would limit the negative impact of issues that arise from the contracts after it comes into operation. In addition, this will also mean that the parties should also put in place measurable performance indicators and mechanisms to properly monitor the contract once it is in operation.

### **3. Methodology**

This research has been conducted through an analysis of views and opinions expressed by scholars in textbooks, journals, online publications and relevant case law in the form of arbitral decisions. In brief, scholars have indicated that due to their intrinsic inadequate economic standing, developing countries will seek to attract foreign investment and in their efforts to do so they will concede to accept unfavourable terms to be included in the EDAs that they sign. The effect of this is that the terms agreed upon do not serve national interest and do not bring about sustainable development.

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<sup>36</sup> EI Nwogugu (ed) *'The Legal Problems of Foreign Investment in Developing Countries'* (1965) 187.

In addition, selected aspects of EDAs concluded by different African countries will be discussed and analysed and these will be compared to the EDA that the government of Malawi signed

## **CHAPTER II**

### **THE DEVELOPMENT AND PROGRESSION OF ECONOMIC DEVELOPELMNT AGREEMENTS**

#### **1. Introduction**

The formulation of EDAs as contracts is done through the agreement of terms, which are included in the contract through the consent of the parties. This contract is separate from the policies, regulations and national laws. The negotiation of the terms in the contract must however be in line with the policies, regulations and national mining laws. EDAs are contracts that focus on socio economic and development issues of a country. Their drafting must therefore take into account the NMLRF that looks at the issues stated. In order for the HC to derive the benefits that they envision for the country this contract must capture the provisions in the NMLRF. Most countries in Africa fail to derive sustainable benefits from projects that have been contracted through EDAs because the NMLRF is inadequate to effectively deal with such projects. A NMLRF is very important when formulating EDAs because it offers the HC guidelines or a standard on which the HC and the MNC must formulate the EDA. Thus in order to understand the importance of the HCs having a NMLRF it is key to first have an understanding of the development and progression of EDAs. This chapter will therefore look at the development and legal significance of EDAs as contracts and components of the national legal regime in the extractive industry.

## **2. The progression of Economic Development Agreements**

The United Nations General Assembly resolution 1807 (XVII) of 14 December 1962, "Permanent sovereignty over natural resources" revolutionized the management of natural resources in developing

countries.<sup>37</sup> The resolution gave ownership in the natural resources to the developing countries and centered mineral resource agreements signed by these countries on economic developments.<sup>38</sup> Previously, the contracts that applied to private foreign investment were known as concession agreements. These were the agreements that were mostly found in the extractive industry before the UN resolution.<sup>39</sup> Concession agreements are agreements where a “private company [MNC] is granted the exclusive right to explore, produce and market mineral resources.”<sup>40</sup> The increase in state influence has transformed how these contracts are now handled and viewed by the parties.

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The concession agreements that existed before the UN resolution granted the investor unlimited rights for exploration.<sup>42</sup> In the long run the investor would then assume complete control over the development of the mineral.<sup>43</sup> It would also not have an obligation to produce.<sup>44</sup> In the end these agreements were more beneficial for the investor than the state because the investor operated as it saw fit.<sup>45</sup> Most African leaders signed them without understanding their implications. Where the leaders did know of the implications they deliberately resolved to not care about them as they cared more about the gains that they were receiving personally.<sup>46</sup> Where the leaders saw their chance of gaining immense personal benefits they saw no need to bargain for better terms.<sup>47</sup> This sentiment has not changed; traits of it can still

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<sup>37</sup> UN General Assembly Resolution 1803 (XVII) "Permanent sovereignty over natural resources" 14 December 1962 available at [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/1803\(XVII\)](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/1803(XVII)) accessed 27 July 2013.

<sup>38</sup> Ibid.

<sup>39</sup> EI Nwogugu op cit (note 36) at 187.

<sup>40</sup> M Likosky 'Contracting and Regulatory issues in the oil and Gas and Metallic Minerals Industries' (2009) 18 1 *Transnational Corporations* 1 at 2.

<sup>41</sup> AFM Manunizzuman 'The New Generation of Energy and Natural Resource Development Agreements: Some Reflections' (1993) 11 *Journal on Energy & Natural Resources Law* 207 at 211.

<sup>42</sup> Z Gao(ed) 'International Petroleum Contracts: Current Trends and New Directions' (1994) 11-14.

<sup>43</sup> Ibid.

<sup>44</sup> R Dolzer and C Schreuer op cit (note 16) at 72.

<sup>45</sup> M Sornarajah 'The international Law on foreign Investment' (2004) 40.

<sup>46</sup> A Bebbington, L Hinojosa & D Humphreys Bebbington et al 'Contention and Ambiguity: Mining and the Possibilities of Development' (2008) 3 *Issue Development and Change* 965 at 968.

<sup>47</sup> Ibid.

be seen in CRIMRs whether forcefully constituted or democratically elected. In addition, there were no measures of accountability on which to hold the investor accountable to in terms of production period and the state did not take a significant part in the production, economic development remained stagnant.

The changes that came in the 1960's did away with the old characteristics of the concession agreements. The underlying character of concession agreements was not done away with completely. The concession agreement was revised and restructured. These were a better form of concession contracts because the old concession agreements did not benefit the HC.<sup>48</sup> The concession agreements are still being used in the mineral sector but new forms of agreements have also developed from this restructuring and revision.<sup>49</sup> These contracts now focus on the balancing of interests of the parties and accountability measures.

The concession agreements that were used in the 1960's were considered to be something of the past and several scholars reconsidered the term assigned to such agreements.<sup>50</sup> They reasoned that the appellation "concession" was out of date and this understanding did not consider the two-fold effect of the agreement. Thus EDAs were born.<sup>51</sup> These agreements focus on economic development as a goal for the natural resource project.<sup>52</sup> This makes the country's development policy a part of the contract. The agreements that became popular in the extractive industry were collectively called "new generation agreements".<sup>53</sup> Examples of these agreements are joint

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<sup>48</sup> W Peter (ed) *'Arbitration and Renegotiation a of International Investment Agreements'* (1995) 9.

<sup>49</sup> Ibid.

<sup>50</sup> J Hyde 'Permanent Sovereignty and over Natural Wealth and Resources' (1956) 50 *American Journal of International Law* 854 at 862; ADM McNair 'The General Principles of Law Recognized by Civilized Nations' (1957) 33 *British Yearbook of International Law* 1 at 2- 4.

<sup>51</sup> AFM Maniruzzaman 'The New Generation of Energy and Natural Resource Development Agreements: Some Reflections' (1993) 11 *Journal on Energy & Natural Resources Law* 207 at 224.

<sup>52</sup> EI Nwongugu op cit (note 36) at 167.

<sup>53</sup> AFM Maniruzzaman op cit (note 41) at 209.



ventures, production sharing contracts, service contracts and management contracts.<sup>54</sup> The agreements differ where state ownership, control and level of direct management by the state are concerned.<sup>55</sup> These factors are what introduced the different terms for the contracts. Another factor that changed the terminology was economic development. An agreement where the focus is on the HC granting MNC rights to explore and exploit its mineral resources for the HCs economic development is considered to be an economic development agreement.

EDAs have managed to attain a balance between economic development and the profit expectations of the investor. The “new generation agreements” came about as a result of the principle of sovereignty, which introduced greater protection for HCs in the ownership and control of natural resources. So the main difference between contracts like EDAs and the old concession agreements is in the rights they vest in the investor, with EDAs the states right in management of the mineral resource has increased. The investor’s rights are also clearer in the case of EDAs than with concession agreements. Further, EDAs also introduced accountability measures on the part of the investor, which was not the case before.<sup>56</sup>

Thus EDAs agreements in the extractive industry are classified as EDAs because the project they are contracted for deal with natural resources and the economic development of the country. However, the contracts are then termed differently because of the nature of the right they give to the MNC. The level of engagement between the HC and the MNC is what will determine the difference in terminology. For example with joint ventures the MNC has a contractual right and the HC maintains title and ownership.<sup>57</sup>

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<sup>54</sup> AFM Maniruzzaman op cit (note 18) at 269.

<sup>55</sup> E Laryea ‘Contractual arrangements for resource investment’ in Francis N. Botchway’s (ed) *Natural Resource Investment and Africa’s Development* (2011) 110.

<sup>56</sup> Ibid at 225.

<sup>57</sup> Ibid at 212.

While with production sharing contracts the MNC is a contractor who shares with the HC in the production of the natural resource.<sup>58</sup>

### 3. The legal nature of EDAs

The unique features of EDAs arise from the fact that they deal with natural resources and are linked to the achievement economic development. They are not ordinary contracts because they are concluded between a private company and a state.<sup>59</sup> They are also not treaties in terms of public international law.<sup>60</sup> With EDAs the HC contracts as a private entity but within the project and contract it exercises both private and public powers.<sup>61</sup> So EDAs is a private contract and it has such characteristics.<sup>62</sup> However, when the HC is exercising its powers in the project and to some extent the contract itself it exercises both public and private powers.<sup>63</sup> For example, where a dispute arises because the MNC failed to fulfil its obligations the HC will exercise its private powers to claim and where the HC changes its legislation and directly affects the project this is the HC exercising its public powers.<sup>64</sup> Thus, in the exercise of its public powers the HC contracts for the sake of public interest. In doing so it endeavours to achieve its public policy goals of development, which are in the state's public or administrative area.<sup>65</sup> The contract is concluded to advance economic, social and development goals that are vital to the HC as a country.

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<sup>58</sup> Ibid at 215.

<sup>59</sup> Ibid.

<sup>60</sup> P Leung & G Wang 'State Contracts in the Globalized World' (2006) *Journal of World Investment & Trade* 829 at 836.

<sup>61</sup> J Salacuse op cit (note 15) at 23.

<sup>62</sup> A Kulick 'Global Public interest in international investment Law' (2012) 98.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> J Salacuse op cit (note 15) p 23.

The description of EDAs is attributed to their nature and characteristics.<sup>66</sup> They are long-term contracts between the HC and a locally registered MNC for the exploitation of mineral resources where the MNC will provide the capital to fund the project.<sup>67</sup> In return the HC will give the MNC incentives like 'freedom from export and import duties, exemption from taxation and in some cases special facilities with regard to foreign exchange and exemption or reduction in rates.'<sup>68</sup> Lastly, the rights that the parties have against each other are based on the contract.<sup>69</sup>

EDAs are sui generis contracts in that they contain characteristics that are unique to them.<sup>70</sup> The parties choose the law that governs EDAs. This follows the principle of party autonomy that is found in private contract law. In this transaction the state contracts with the MNC as a private entity.<sup>71</sup> The law of the HC does not automatically govern the contract; the parties must choose it as the law that will govern the contract. The automatic application of any national law will only be possible where the parties have not made any choice on the law applicable to the contract and the application of any national law is the result of the application of private international law.

EDAs are therefore private contracts; that are concluded with the state as a contracting party. Private international law principles may also be applied to EDAs.<sup>72</sup> These principles include the principle of party of autonomy, which allows the parties to make a choice of applicable law to their contract.<sup>73</sup> This choice leads to the contract being governed by different

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<sup>66</sup> Ibid.

<sup>67</sup> ADM McNair op cit (note 50.)

<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

<sup>70</sup> AFM Maniruzzaman op cit (note 18) at 295.

<sup>71</sup> T Walde & G Ndi 'Stabilizing International Investment Commitments: International Law Versus Contract Interpretation' (1996) 31 *Texas International Law Journal* 215 at 224.

<sup>72</sup> N Horn 'Arbitration and the Protection of Foreign Investment: Concepts and Means' in Norton Horn's (ed) *Arbitrating Foreign Investment Disputes* (2004) 14.

<sup>73</sup> Ibid at 13.

possible systems of law.<sup>74</sup> There is no cemented definition for EDAs, what are used to identify mining agreements as EDAs are the characteristics the agreement has.<sup>75</sup> However, after much work in the area, AFM Maniruzzaman has offered one that comes close to capturing what EDAs are. He says that EDAs are

‘a legal framework of relationship purporting to create, in general, a suitable legal environment for a long-term investment and to delineate, in particular, the mutual rights and obligations between the contracting parties i.e. the conceding State, on the one hand, and the foreign entity, on the other.’<sup>76</sup>

#### 4. The applicable law to drafting EDAs

The law of the HC traditionally governed state contracts in the mineral resource sector.<sup>77</sup> The application of the principle of autonomy is now rooted in these contracts.<sup>78</sup> Once the parties have made a choice the dispute resolution body that will resolve the contractual disputes between the parties must give effect to this chosen law.<sup>79</sup> The principle also allows parties to choose the dispute resolution body and the rules in which such a dispute will be resolved.<sup>80</sup>

The parties can choose national legal systems or international commercial law but it is a more advisable course of action to include both systems of law.<sup>81</sup> Where the parties choose international commercial law, the

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<sup>74</sup> Ibid.

<sup>75</sup> AFM Maniruzzaman op cit (note 18.)

<sup>76</sup> Ibid at 265.

<sup>77</sup> United Kingdom v Iran [1952] ICJ Report 93 112.

<sup>78</sup> HE Kjos (ed) *‘Applicable Law in Investor State Arbitration: The Interplay between Nation and International Law’* (2013) 158.

<sup>79</sup> T Begic (ed) *‘Applicable Law in International investment disputes’* (2005) 13.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid at 20.

mandatory provisions in the national law are still applicable.<sup>82</sup> In the event that the provisions clash and the parties must include in the clause which provisions will prevail.

Currently the trend is to move the contract from local laws and regulation and to instead use laws that are neutral or general principles of international commercial law. The arbitral tribunals have demonstrated this approach in many cases. Examples are the arbitration of *Anaconda -Iran INC v Government of Iran and the National Iranian Copper Industries Company* it was stated that the tribunal has to pay considerable attention to the party's choice of law being found in the choice of law rules.<sup>83</sup> *Maritime International Nominees Establishment (MINE) v Republic of Guinea*,<sup>84</sup> the arbitral tribunal had to determine which party had failed to perform in the shipment of bauxite.<sup>85</sup> The tribunal gave effect to the party's choice, the parties had chosen that disputes would be dealt with by referring to the investment contract and in the case of gaps the tribunal had to refer to Guinean law.<sup>86</sup> In *Zeevi Holdings Ltd v The Republic of Bulgaria and The Privatization Agency of Bulgaria* in this matter the dispute arose from the acquisition of the national carrier Balkan airlines.<sup>87</sup> The tribunal applied Bulgarian law because the parties in the Privatization Agreement expressly chose it.<sup>88</sup>

## 5. The legal framework provided by EDAs

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<sup>82</sup> M Blessing 'Mandatory Rules of Law versus Party Autonomy in International Arbitration' (1997) 14 *Journal International Arbitration* 23.

<sup>83</sup> 13 IRAN-U.S. C.T.R. 1986 at 199 et seq.

<sup>84</sup> ICSID Case No. ARB/84/4 January 1988.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

<sup>87</sup> UNCITRAL Case No. UNC/39Dk October 2006.

<sup>88</sup> Ibid.

The laws of a country are one of the determinants to an investment.<sup>89</sup> The investment project will be governed but the contract as the principle document of the project. The party's interests and goals motivate the investment as the legal regime that regulates the project.<sup>90</sup> EDAs contain the economic development goals of a country. This means that they contain some the country's policies and development strategy.<sup>91</sup> When a dispute arises the first point of reference is the agreement this is where the tribunal will start in order to identify the applicable law and determine the matter.

The contract is taken as part of the legal framework that regulates the investment and the project because it contains the specific issues that the parties have agreed to. The relevance of national law is that it offers guidance to the parties; the parties must ensure that they draft the contract in line with the provisions in national law. The importance of this is that national law contains the HCs development agenda, which is a goal they are trying to meet in commencing the project. Thus national mining laws must be flexible enough to adapt to the changes that usually arise in the sector and they must be updated to ensure that the contract that is concluded reflects this.

The value the contract serves as a legal document is also seen where if there are inconsistencies; the contractual provisions may supersede national law if those provisions are inconsistent with the contract provision.

## **6. Conclusion of EDAs**

### **6.1 Procedure**

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<sup>89</sup> M Kene Omalu & A Zamora 'Key Issues in Mining Policy: a Brief Comparative Survey on the Reform of Mining Law' (1999) 17 13 *Journal of Energy & Natural Resources Law* 13.

<sup>90</sup> *Ibid* at 18.

<sup>91</sup> P Leung & G Wang *op cit* (note 60) at 833.

The first point of reference when an investor is interested in a mineral is the HC's national mining law. As previously mentioned most mining laws in Africa are incentive focused and favourable to the investor. In the mining industry exploration usually happens through a concession system.<sup>92</sup> In brief, the investor will apply for a prospecting license using the national mining law; this license allows the investor to study the area in order to determine if there are minerals that can be explored for development and economic profit.<sup>93</sup> When the mineral is discovered, they then the investor can apply for a mining license,<sup>94</sup> which then allows the exploitation of the mineral. The right that the HC gives the investor is a concession, as a concessionaire the investor is the holder of the mining rights and will be the owner of what it produces from the mine.<sup>95</sup> Concession agreement is what governs the concessionaire's operations in terms of exploration. In these agreements the parties employ a tax and royalty system but unlike before the HC has direct participatory and management role.<sup>96</sup>

In order to conclude the contract the investor primarily focuses on the economic returns.<sup>97</sup> While the HC considers the value that this project will add to its economic, social and development goals.<sup>98</sup> The parties' interests are crucial to the drafting of the contract so before the parties negotiate they must establish their interests. Interests determine the terms and conditions of the

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<sup>92</sup> M Likosky op cit (note 40) at 2.

<sup>93</sup> EI Sourcebook Report (2010) 'Granting Mineral Rights; A Good Practice Note' December 2010 available at <http://www.eisourcebook.org/cms/files/Good%20Practice%20Note%20for%20Granting%20Mineral%20Rights%20-%202012%20ct%209%20v2.pdf> accessed 26 February 2014.

<sup>94</sup> Ibid.

<sup>95</sup> N Miranda 'Concession Agreements: From Private Contract to Public Policy' (2008) 117 *Yale Law Journal* 510.

<sup>96</sup> EI Sourcebook Report op cit (note 100.)

<sup>97</sup> A KoLo & T Walde 'Renegotiation and Contract Adaption in International Investment Projects Applicable Legal Principles and Industry Practices' (200) 1 *Journal on World Investment* 5 at 9.

<sup>98</sup> UNCTC Report (1992) op cit (note 30) at 6.

contract.<sup>99</sup> The state and the MNC, jointly participate in the decision-making process with regard to the contract.<sup>100</sup>

Practice has shown that contracts are important devices that allow the HC to properly regulate them.<sup>101</sup> Accordingly, EDAs control the investor's behaviour in ways that will benefit the HC.<sup>102</sup> As mentioned the old concession agreements were biased, they favoured investors, but EDAs balance the needs of economic development of the host state with expectations of the foreign investor that relate to commerce.<sup>103</sup> However it has become evident that HCs have a problem in identifying and evaluating the benefits to be derived from a particular foreign investment project. Some effects are indirect and may not be felt for a long time, while others may be difficult to attribute to a foreign investor because domestic conditions or government actions may be equally at fault in creating the effects.<sup>104</sup>

## 6.2 The concept of national interest

The HC has an obligation to promote national interest. This the HC government must do by making sure that the well-being and livelihood of the people are its prime objective. This also means that as guardians of the mineral resources the HCs must ensure that they serve the people and not the

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<sup>99</sup> J Weaver & DF Asmus 'Unitizing Oil and Gas Fields Around The World: A Comparative Analysis of National Laws and Private Contracts' (2006) 28 *Houston Journal of International Law* 3 at 2-7.

<sup>100</sup> Ibid.

<sup>101</sup> J Salacuse op cit (note 15) at 101.

<sup>102</sup> Ibid at 168.

<sup>103</sup> B McKern (ed) '*Transnational Corporations and the Exploitation of Natural Resources*' Vol 10 (1993) 273.

<sup>104</sup> A Miroux (ed) '*World Investment Report 2007: Transnational Corporations, Extractive Industries and Development*' (2007) 93.



government of the day.<sup>105</sup> In Africa there is a problem that the political sphere directly influences mineral resource management.

When an HC is negotiating an EDA its social, economic and development goals must always be at the forefront. The HC must make sure that it receives reasonable gains in the contract.<sup>106</sup> Most countries have failed to sign EDAs that truly exhibit this. These contractual clauses in EDAs are also supposed to deal with the social and environmental issues like environmental protection, community development, human rights protection. These are aspects that are not usually comprehensively addressed in most EDAs but are sometimes ignored. It is important to prioritize these issues in order to ensure that the MNC's operations are properly regulated through clear cut accountability measures that will ensure sustainable development.

The clauses in EDAs are not drafted isolation; at interpretation some clauses are dependent on others. For example the stability clause affects the operation of the law in the country being the applicable and the social assessment clause affects the community development clause. Thus the HC must give careful consideration of this to that ensure has prioritised its development goals. It must do so through the balancing of interests not heavy obligations to be placed on it.

The HCs must always ensure that if there is a concession it must not be at the expense of national interest and the benefits it derives from the contract must not appear unreasonable. It is the HC's responsibility to contract on terms that ensure that the country will in the long run receive a sizable share of the benefits from the contract. The HC must also make sure that the benefits

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<sup>105</sup> E Durigbo Permanent Sovereignty and peoples' ownership of natural resources in *International Law*' (2006) 38 *George Washington International Law Review* 33 at 35.

<sup>106</sup> E Laryea (note 55) at 120.

derived from the investment are used in a sustainable way; meaning that the government must put in place mechanisms that will ensure that the political leadership will not be able to remove the benefits from the country and place them in offshore accounts to be later used for their benefit.<sup>107</sup> The mechanisms will ensure that the benefits are instead be used to build infrastructure and promote other sectors in need of further development.<sup>108</sup>

The MNC should also in this regard be held accountable to what they promised in the contract. The MNC will usually state in the contract that will develop the area where the project is taking place but years go by and there is no development.<sup>109</sup> Accountability can be achieved through properly structuring the terms in the contract and provisions in national law. Most CRIMRs in Africa have a history of depending on one sector and donor aid. The conclusion of an EDA should thus reflect considerations of sustainable economic and social development that will boost other sectors.<sup>110</sup>

In its duty as a sovereign authority the HC contracts to further national interest, this is one of the pivotal reasons why it enters into these contracts, in doing so the HC is pushing forward its public policy agenda which is development and it is also this reason that gives it the right to terminate the contract when it sees that its interests are not being served. In *Texaco Overseas Petroleum Company*<sup>111</sup> it was stated that that EDAs have a

“Broad subject matter in that [they involve] more than just the transfer of sale and purchase transaction, capital and technology.

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<sup>107</sup> E Laryea op cit (note 55) at 127.

<sup>108</sup> Ibid.

<sup>109</sup> S Bryan & B Hofmann (2007) ‘Transparency and Accountability In Africa’s Extractive Industries: The Role of The legislature’ 2007 available at [http://commdev.org/files/1914\\_file\\_extractive\\_080807.pdf](http://commdev.org/files/1914_file_extractive_080807.pdf), accessed on 29 December 2013.

<sup>110</sup> E Laryea op cit (note 55) at 127.

<sup>111</sup> YCA 1979 at 177.

To the length of the project close cooperation between the parties is important the investor takes a lot of risk, for the state the contract is ended into for the sake of national interest there is need for the parties to then balance the responsibilities in the contract and the interests mentioned and usually contain broad terms that protect the investor.”<sup>112</sup>

## CHAPTER III

### THE NEGOTIATION PROCESS

#### 1. Introduction

As more countries in Africa signed EDAs in the extractive industry concern grew on the inability of these contracts to achieve sustainable economic development. There was need to determine what stage between the

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<sup>112</sup> Ibid.

negotiation process and the conclusion of the contract problems arose. African leaders and concerned organizations met and came up with the African Mining Vision [AMV].<sup>113</sup> In 2009 the leadership in different sectors on the continent and internationally saw it necessary to deal with the issue of Africa's failure to capitalize on its resource endowment.<sup>114</sup> The agenda of the AMV was to take Africa's mining industry to another level with the hope that this would lead to greater development of the economies of countries in such positions.<sup>115</sup> To achieve this, the AMV sought to address a very crucial area - negotiation of EDAs.<sup>116</sup> Overtime the navigation and understanding of EDAs has become complex and more and more technical in terms of what is involved in the conclusion of the contract.<sup>117</sup> There was therefore a need to equip and improve the negotiation capacity of negotiators in the African states.<sup>118</sup> The AMV outlined what the African states hoped to achieve in the extractive industry and the areas of concern.<sup>119</sup> One of the areas mentioned as hampering economic development was the contract itself and this was with regard to its conclusion but more specifically the negotiation process that led to the conclusion of the contract.<sup>120</sup> This chapter shall identify and critically analyse the factors that affect the process of negotiation of EDAs.

## 2. How negotiation is done

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<sup>113</sup> International Study Group Report (2011) 'Minerals and Africa's Development' November 2011 Mining' available at <http://www.africanminingvision.org/amv-resources/AMV/ISG%Report-eng.pdf>, accessed on 29 December 2013.

<sup>114</sup> Ibid.

<sup>115</sup> L Tamufor 'The African Mining Vision and the Continents Development; extractive Sector- Mining' 10 July 2009 available at [http://twnafrica.org/index.php?option=com\\_content&view=article&id=173:the-african-mining-vision-and-the-continents-development&catid=54:mining&Itemid=60](http://twnafrica.org/index.php?option=com_content&view=article&id=173:the-african-mining-vision-and-the-continents-development&catid=54:mining&Itemid=60), accessed 29 August 2013

<sup>116</sup> The African Vision on Mining available at <http://www.africanminingvision.org/amv-resources/AMV/ISG%Report-eng.pdf> accessed on 29 December

<sup>117</sup> L Cotula 'Quality Investment: Reshaping contracts for quality natural resource investments' March 2013 available at <http://pubs.iied.org/1714IIED>, accessed on 25 June 2013.

<sup>118</sup> The ISG Report (2011) op cit (note 117) at 134.

<sup>119</sup> Ibid at 1.

<sup>120</sup> Ibid at 181.

Negotiation is a process that involves each party's skills and powers to tactfully influence the conclusion of an agreement.<sup>121</sup> It is a process where the parties bargain with each other and the success of the outcome is highly dependent on the preparation beforehand.<sup>122</sup> When the party's meet to negotiate, the process is influenced by several factors; some exist before the negotiation takes place and others come up during the negotiations due to the party's reactions to circumstances.<sup>123</sup> There are therefore factors that have a huge push and significant pull for either party.

For a negotiation process to be effective there are preliminary things that have to be set. Firstly, the parties' preparedness; Secondly, the parties' strategy; thirdly, the agenda of what will be discussed and fourthly the parties have to have knowledge of the other party's strengths and weaknesses.<sup>124</sup> The careful consideration of these in the context of what is available to the parties has the potential to produce the desired success. However, the preliminary steps cannot be set without consideration of the issues that surround the negotiation. When the parties negotiate each party comes with something to offer the other, these are necessary components for the contract to be operational.<sup>125</sup> These are things like the capital, the technology, the technical and legal know-how, and various sets of information that span from the subject matter to the dealings in the negotiations and capacity.<sup>126</sup>

Ideally the HCs should be aware of the situation that they are in and this awareness should lead to how they negotiate in order to use these factors

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<sup>121</sup> L Cotula (ed) *Human Right, Natural resource and Investment Law in Globalized World: Shades of grey in the Shadow of the Law* (2012) 25.

<sup>122</sup> M B Kamuwanga (note 22) at 131.

<sup>123</sup> D Ayine, H Blanco, L Cotula et al 'Sustainable Markets Briefing 6: Lifting the lid on Foreign Investment Contracts: The real Deal for Sustainable Development' September 2003 available at <http://www.pubs.iied.org/pdfs/16007IIED.pdf>, accessed on 3 December 2013.

<sup>124</sup> M B Kamuwanga op cit (note 22) at 143.

<sup>125</sup> B Land op cit (note 11) at 160.

<sup>126</sup> N Kofele-Kale op cit (note 2) at 625.

in a way that is advantageous to them.<sup>127</sup> It is customary for an HC to wait for the renegotiation to fight for better terms after the contract has been operating for decades.<sup>128</sup> This procedure of acquiring leverage after the contract is operational and has not produced the desired results in that it has proven to be an ineffective way to negotiate.<sup>129</sup> The negotiation process is more than a discussion where the parties agree on the terms of the contract. It serves as proof of the HC's intentions, that the political rhetoric for development was more than just talk but an actual agenda for development.<sup>130</sup>

### 3. Factors that influence the process

#### 3.1 National policy and law

The contract and the national law perform different roles in the conclusion of EDAs. The contract is the document that embodies the specific interests of the parties that national law failed to address. While national law regulates mining in the country, it manages the administration and development of the mining.<sup>131</sup> In the contract the parties' deal with the specific project that they are contracting on and national law refers to general principles that will be applicable between the parties, thus the use of national law is of general application.<sup>132</sup> In some instances national law can also have provisions that refer to specific mining contracts. In conclusion, the contract is a document tailor made by the parties to apply to a specific project,<sup>133</sup> while national law has general application.

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<sup>127</sup> B Land op cit (note 11) at 170.

<sup>128</sup> P Kuruk 'Renegotiating transnational Investment agreements: lessons for developing countries from the Ghana-Valco experience' (1992) 13 *Michigan Journal International Law* 43 at 44.

<sup>129</sup> Ibid at 58.

<sup>130</sup> M Kene Omalu & A Zamora op cit (note 91) at 25.

<sup>131</sup> T Akabzaa 'Mining in Ghana: Implications for National Economic Development and Poverty Reduction' in Bonnie Campbell's (ed) '*Mining in Africa: Regulation and Development*' (2009) 33.

<sup>132</sup> W Peter op cit (note 48) at 23.

<sup>133</sup> Ibid at 18.

The relevance of national law to the contractual negotiations is that, the parties must ensure that the terms and obligations agreed upon must be in line with the principles set out in national law.<sup>134</sup> However, they do not have to apply all the provisions in national law unless these provisions are mandatory. These they cannot evade. The problem that exists in the negotiation of the contract is that the contract supersedes national law because the terms and obligations do not follow the principles in national law.<sup>135</sup> They go beyond what is set in national law and are unreasonable because they achieve less or are less effective compared to what is said in national law.

The inadequacy in national law is what leads to this. It does not only affect the parties earlier of choosing to sign a contract but also the clauses that are drafted in the contract. Most mining laws in Africa were reformed because they did not consider issues like community development, transparency, public participation and human rights protection. These have changed how the clauses in EDAs are drafted. They have to be balanced with the other clauses like the fiscal regime clause and the stability clauses. Since the negotiations of EDAs have to be in line with national law it means that the clauses are to some extent influenced by national law. However, where national law does not comprehensively provide for transparency, public participation or human rights protection the contract will in turn not have this as part of its focus. This will then lead to a contract that supersedes national law and also fails to bring economic and social development.

In the 1990's African governments formulated policies and national mining laws to attract investment.<sup>136</sup> They were flexible because incentives were drafted in the law and risk free environments were created for

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<sup>134</sup> LE Sachs, P Toledano, J Mandelbaum et al 'Impacts of fiscal reforms on country attractiveness: Learning from the facts' (2012) *Yearbook on International Investment Law & Policy* 346 at 353 fn 28.

<sup>135</sup> J Otto, C Matthews, F Cawood et al (eds) '*Mining Royalties: A global Study of their impact on investors, Government and Civil Society*' (2006) 248.

<sup>136</sup> *Ibid* at 18.

investors.<sup>137</sup> These incentives were usually in the form of tax reduction, rebates and exemptions. The laws that were enacted in CRIMRS had gaps and created many loop holes, which meant that they could not adapt to the changing circumstances that later followed.<sup>138</sup> The need to properly regulate social concerns in the contract has been ignored in most countries. The failure to include such provisions has led to the drafting of EDs that later fail to provide the HC with sustainable development. The end result is that benefits that are derived for the project do not last long to meet the demands of development and help in the growth of other sectors.

Examples are the 2003 and 2007 gold mining contracts between the Government of Tanzania and Pangea Minerals Limited.<sup>139</sup> These agreements did not include protection the social and environmental concerns that may arise.<sup>140</sup> This is because section 10 (c) of the Mining Act of 1998 of Tanzania made the inclusion of these provisions optional, the parties may include them.<sup>141</sup> The absence of these provisions met that the government ignored its development policy, as it failed to protect the local communities and regulate the MNC through the contractual provisions.<sup>142</sup> Incorporating the provisions would have ‘reinforced’ what is stated in national law and given strength to the regulation of the MNC, in that they would have been held accountable if they breached the provisions.<sup>143</sup> Contracts like these that failed to achieve social and economic development are one of the reasons why Tanzania then enacted a new mining law in 2010.

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<sup>137</sup> J Otto ‘Global Changes in Mining Laws. Agreements and Tax systems’ (1998) 24 No.2 *Resource Policy* 79 at 80.

<sup>138</sup> B Campbell ‘Factoring in Governance is not enough: Mining Code in Africa, Policy Reform and Corporate Responsibility’ (2003) 18 1 *Mineral & Energy* 2 at 8.

<sup>139</sup> Policy Forum Report (2010) ‘Demystification of Mining Contracts in Tanzania’ <http://www.sdsg.org/wp-content/uploads/2010/01/Articel-re-Mining-Contracts-in-Tanzania.pdf>, accessed on 1 February 2014

<sup>140</sup> *Ibid* at 8.

<sup>141</sup> *Ibid*.

<sup>142</sup> *Ibid*.

<sup>143</sup> *Ibid*.



### 3.2 The Regulation and Monitoring of the MNC

The MNCs receive immense international protection. As private companies their main concern is profits and not necessarily national interest.<sup>144</sup> The gaps and loop holes in the laws relating to mining especially those on taxes have made it easier for these companies to manipulate the system.<sup>145</sup> They come up with calculated and strategic ways to do this.<sup>146</sup> This is done after the company has an understanding of the mining codes in the country and it solidifies this strategy in the negotiation process where it negotiates with the full knowledge of what the concluded terms will bring.<sup>147</sup>

MNCs are not fully regulated in the area of international investment law on how to deal HCs at beginning of the contract.<sup>148</sup> Most of the current regulations applicable to MNCs are based on soft law, which is not binding on the MNC where accountability is concerned.<sup>149</sup> MNCs operating in Africa will usually opt out of applying them. This is partly also because of the HC governments behaviour in creating negotiating environments that allow the MNC to act like this from the beginning of the contractual process.<sup>150</sup> It is only recently that mechanisms have been created to hold MNCs accountable for their omissions in the areas of labour, human and environmental rights.<sup>151</sup> The poor regulation of MNC's behaviour during the negotiation of EDAs reduces the HC's negotiating power. The lack of regulation is one of the

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<sup>144</sup> J Salacuse op cit (note 15) at 21.

<sup>145</sup> A Kolk & R van Tulder 'Poverty Alleviation as Business Strategy? Evaluating Commitments of Frontrunner Multinational Corporations' (2006) 34 No. 5 *World Development* 789–801 at 790.

<sup>146</sup> Global Witness Report op cit (note 24) at 5.

<sup>147</sup> D Ayine, H Blanco, L Cotula et al op cit (note 127) at 2.

<sup>148</sup> Ibid at 5.

<sup>149</sup> Ibid.

<sup>150</sup> J Lungu 'Copper Mining Agreements in Zambia: Renegotiation or Law Reform?' (2008) 35 *Review of African Political Economy* 403 at 407.

<sup>151</sup> B Campbell 'Good Governance, Security and Mining Africa' (2006) 21 No. 1 *Minerals & Energy-Raw Materials* 31 at 33

factors that have an impact on the negotiation of EDAs because it creates an environment that is favourable to the MNC.<sup>152</sup>

An example of an agreement where the MNC exhibited such behaviour is the previous Mittal Holdings Steel Holdings contract with the National Transition Government of Liberia.<sup>153</sup> Mittal sought to contract in a way that 'maximizes its profits by using an international regulatory void to gain concession and contracts which strongly favour the corporation over the HC'.<sup>154</sup> The problem here was that these actions were not illegal because there were no standards to hold Mittal hold accountable to, the failure of the HC to offer such regulations and there being no regulations internationally allowed Mittal to behave in such a way.<sup>155</sup>

### 3.3 The MNCs Strategy

Both parties have a strategy to the negotiations; the MNCs strategy shows more willingness to prepare and the HCs not so much.<sup>156</sup> The strategies developed are those of the parties choosing. The influential factors to the negotiations are the actions that are carried out from the strategies or in response to them. The actions influence the negotiations because the MNC negotiates based on this strategy. The MNC works out a system of how the profits are going to be handled and this is mostly by creating crafty ways to take the money out of the country.<sup>157</sup> The MNCs knows from experience that

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<sup>152</sup> Ibid 2.

<sup>153</sup> Global Witness Report (note 24) at 7.

<sup>154</sup> Ibid.

<sup>155</sup> Ibid at 8.

<sup>156</sup> DA Detomasi 'The Multinational Corporation and Global Governance: Modeling Global Public Policy Networks' (2007) 17 No. 3 *Journal of Business Ethics* 321 at 322.

<sup>157</sup> Ibid at 323.

most African states do not have tax structures that work properly, where the collection of money is properly monitored and documented.<sup>158</sup> They also know that they can evade some provisions in national law.

The strategy that is adopted by the MNC gives it the opportunity to escape liability when the contract comes into operation.<sup>159</sup> The MNC awareness on how to escape liability affects the negotiation process.<sup>160</sup> The behaviour of the MNC has more adverse effects if the MNC has global dominance. In addition, by the time the MNC negotiates the EDA with government negotiators it already has backing from the political leadership.<sup>161</sup> Thus it then works out further strategies to manoeuvre policies and applicable national legislation that will work in its favour.

### **3.4 Administrative and Institutional factors**

#### **3.4.1 Imbalances in Information**

During the exploration period the MNC collects data. The MNC collects information so that it can determine whether there is a mineral to invest in. This information will assist the MNC to determine how much capital it will need for the project, the technology and the sale price.<sup>162</sup> In comparison the HC will not have as much information, this is partly caused

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<sup>158</sup> A Kate & J Wilde-Ramsing (2011) 'Radioactive Revenues Radioactive Revenues Financial Flows between Uranium Mining Companies and African Governments' March 2011 [http://www.somo.nl/publications-en/Publication\\_3629](http://www.somo.nl/publications-en/Publication_3629) accessed on 5 May 2013.

<sup>159</sup> S D Murphy 'Taking Multinational Corporate Codes of Conduct to the Next Level' (2005) 43 *Columbia Transnational Law* 389.

<sup>160</sup> Global Witness Report (note 24) at 23.

<sup>161</sup> YA Rizopoulos & DE Sergakis 'MNEs and policy networks: Institutional Embeddedness and Strategic choice' (2010) 45 *Journal of World Business* 250 at 253.

<sup>162</sup> Africa Progress Report (2013) 'Equity in Extractives: Stewarding Africa's natural resources for oil' May 2013 available at <http://www.africaprogresspanel.org/publications/policy-papers/africa-progress-report-2013/>, accessed 16 January 2014

by the HCs lack of capacity and resources to get this information as well as its failure to update the information it already has.<sup>163</sup> In most cases at the negotiation stage, the HC will usually rely on old maps and data that were acquired by previous companies or geological experts.<sup>164</sup> This creates a disproportionality of information, as one party will have the facts as they are on the ground while the other party-the HC will not. At the negotiation table the MNC will have a lot more professional support in terms of people and data while the HC will not.

The HC will trust the MNCs quickly by relying on the information provided by the MNC. An example is the agreement between the National Transitional Government of Liberia and Mittal Steel Holdings NV. This agreement was signed in 2005 it was for the extraction of iron ore and as per the terms of the agreement it would be operational for 25 years.<sup>165</sup> The agreement was not negotiated on equitably beneficial terms because the government of Liberia made no reasonable gain from the project. The unreasonableness in the contact was that Mittal received most of the power in the project to the point that it was '...a state within a state...'<sup>166</sup> This contact had grave ramifications of the Liberian people because Mittal had more to say in how the project was handled than the government.<sup>167</sup> One of the reasons cited to this imbalance was the negotiation process. The process was influenced by several factors including the imbalance of information between the parties.<sup>168</sup> In the contract the government of Liberia gave the Company all the geological information it had in relation to the area and it is publicly available.<sup>169</sup> The company did a feasibility study at the initial stages of the

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<sup>163</sup> Ibid.

<sup>164</sup> J Strongman op cit (note 4.)

<sup>165</sup> Ibid at 7.

<sup>166</sup> Ibid.

<sup>167</sup> Ibid.

<sup>168</sup> Ibid at 44.

<sup>169</sup> Ibid.

contract to see if the project was economically viable but this was not easily accessible for the negotiators in the Liberian government.<sup>170</sup>

### 3.4.2 Weak governance

Governance is the effective and open administration and management of the state, where there is accountability and transparency.<sup>171</sup> The success of the mining industry relies on good governance; there is a link between the principles of good governance and mineral resource management, which includes contract negotiation.<sup>172</sup> Governance structures in Africa are weak; this is due to the continuous inheritance of “old political processes” that are passed down from one government to another.<sup>173</sup> In most African countries governance depends on the leadership that is running the country and therefore by extension politics.<sup>174</sup> The governance of a country, in most African countries, is very centralized, where one person who then fills the important positions in government based on loyalty and not merit runs the country.<sup>175</sup> This is so that they can acquire large sums of money for themselves fearing that they will not hold the positions for a long time or in order to remain in power longer.<sup>176</sup>

The lack of good governance creates a bad negotiating environment for EDAs. The government negotiators should be aware and deal with the

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<sup>170</sup> Ibid at 23.

<sup>171</sup> R Ako & N Uddin ‘Good Governance and Natural resources’ in Francis N. Botchway (ed) ‘*Natural Resources Investment and Africa’s Development*’ (2010) 21.

<sup>172</sup> Ibid.

<sup>173</sup> JC Ribot et al ‘recentralizing while decentralizing: How National Governments Reappropriate Forest Resources’ (2006) *World Development* 34 at 1878.

<sup>174</sup> Africa Progress Report (2013) op cit (note 179) at 54.

<sup>175</sup> S Bryan & B Hoffman ‘Transparency and Accountability in Africa’s Extractive Industry: The Role Legislature’ available at [http://www.ndi.org/files/21/91\\_extractive\\_080807.pdf](http://www.ndi.org/files/21/91_extractive_080807.pdf), accessed on 7 January 2014

<sup>176</sup> J Robinson, J Robinson, R Torvik & T Verdier ‘Political Foundations of the Resources Curse’ (2005) 79 *Journal of Development Economics* 447.

governance issues as they can affect the negotiation process. An example of a country that experienced this is Chad; the government signed a contract with ExxonMobil, Peltronas and Chevron.<sup>177</sup> Chad is a country that was recovering economically from civil war and even though it had a democratically elected leader, the elections were compromised.<sup>178</sup> The leader at the time was vested with immense amounts of power and he was above reproach from any one including the national assembly.<sup>179</sup> This ruling environment meant that Chad had a very weak governing structure and the negotiation of the agreement was done in such a poor environment. It was clear from this that the agreement that was signed would not benefit the People of Chad.<sup>180</sup> To counter the effects of the contract measures were taken to protect these interests; like the revenues were put in foreign accounts and there was a committee set up that included members of the civil society.<sup>181</sup>

These efforts were frustrated by the actions of the political leadership.<sup>182</sup> There creation of new legislation to cater for the agreement was seen as a way forward but it was weak and so were the institutions it created. Thus it is important to make sure that the NMLRF is drafted with a development agenda in mind and the institutions that are created from such legislation can effectively manage and monitor the sector.<sup>183</sup> Some ways would be to regulate the MNC's behaviour in the HC or introduce mechanisms that provide for flow of maximum benefits flow to the people.

### 3.4.3 Transparency

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<sup>177</sup> R Ako & U Uddin op cit (177) at 32.

<sup>178</sup> Ibid.

<sup>179</sup> Ibid.

<sup>180</sup> Ibid.

<sup>181</sup> Ibid at 33.

<sup>182</sup> Ibid at 34.

<sup>183</sup> B Campbell et al 'Factoring in governance is not enough. Mining codes in Africa, policy reform and Corporate responsibility' (2003) No. 1 *Mineral & Energy-Raw Materials Report 2*.

Transparency is simply the act of making information that affects the nation available.<sup>184</sup> This is an area in the mining industry that has received a lot of attention and increased regulation. Transparency is linked to public participation, access to information and accountability, which are all crucial to EDA negotiations.<sup>185</sup> If the government is transparent with the MNC and it allows the public access to this information it ensures that the contractual negotiations focus on sustainable development of the mineral resource.<sup>186</sup>

Transparency is crucial to the negotiation process because where contracts have been concluded and parties have not been transparent in their dealings it has had long lasting consequences on the HC.<sup>187</sup> Transparency is usually lacking in areas where the MNC applies for a license, the bidding to be awarded and license one and the negotiation process.<sup>188</sup> In the negotiation process the agreement will be negotiated in secret, in cases where there is political influence the actions of the parties will not be clear in that the public will not know what the parties agreed to and there will be no public participation in the process.<sup>189</sup> The inclusion of the public and allowing access to information pertaining to the contract and project will guarantee greater transparency in the contract and thus a deal that captures national interest at the core of it.<sup>190</sup>

The inclusion of these principles will be in the NMLRF that is drafted with development as its goal.<sup>191</sup> Transparency through public participation of

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<sup>184</sup> I Kolstad & A Wing 'Is Transparency the Key to Reducing Corruption in Resource-Rich Countries?' (2009) 37 No.3 *World Development* 521 at 522.

<sup>185</sup> L. Cotula (2007) 'Sustainable Markets: Investment Contracts' August 2007 available at <http://www.pubs.iied.org/17015IIED.pdf> accessed 20 February 2014.

<sup>186</sup> V Haufler 'Disclosure as Governance: The Extractive Industries Transparency Initiative and Resource Management in the Developing World' (2010) 10 No.3 *Global Environmental Politics* 53 at 53.

<sup>187</sup> I Kolstad & A Wiig op cit (note 191) at 523.

<sup>188</sup> Global Witness Report op cit (note 24) at 10.

<sup>189</sup> L Cotula (2007) 'Sustainable Markets Investment Briefing 4: Foreign Investment Contracts' August 2007 available at <http://pubs.iied.org/pdfs/17015IIED.pdf>, accessed on 2 February 2014.

<sup>190</sup> Ibid.

<sup>191</sup> P Rosenblum & S Maples (2009) 'Contracts Confidential: Ending Secret Deals in the Extractive Industries' September 2009 available at <http://revenuewatch.org/sites/default/files/RWI-Copntracts->

the civil societies or parliament is currently ignored in most CRIMRs.<sup>192</sup> A country that has exhibited such failures in transparency is Angola.<sup>193</sup> In Angola the government created a policy to benefit local companies but instead this policy has increased cases of secrecy.<sup>194</sup> The agreement a state owned company Sonangol and Cobalt a US company.<sup>195</sup> This contract was not transparent, Cobalt agreed to work two companies that were recommended by Sonangol.<sup>196</sup> This demonstrates the lack of transparency that takes place when these contracts are being negotiated and the influence that those in power will have.<sup>197</sup> This contract also raised the issue of corruption, which is a common result where you find that transparency is lacking.<sup>198</sup>

#### **3.4.4 Accountability**

Accountability is also a principle found within governance; it is a mechanism that allows citizens to seek explanations from those in power, to them to task by asking them to explain their actions or omissions.<sup>199</sup> This furthers transparency and strengthens good governance because when those in government are constantly asked to explain their actions relating to the management of the mineral resources it strengthens public participation and

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*Confidential.pdf*, accessed on 8 May 2013 16.

<sup>192</sup> L Cotula op cit (note 195) at 2.

<sup>193</sup> Global Witness Report op cit (note 24) at 8.

<sup>194</sup> Ibid at 10.

<sup>195</sup> Ibid at 11.

<sup>196</sup> Ibid at 13.

<sup>197</sup> J Hammond 'The Resource Curse and Oil Revenues in Angola and Venezuela' (2011) 75 No. 3 Science & Society 348 at 360.

<sup>198</sup> Ibid.

<sup>199</sup> M Genasci & S Pray Extracting 'Accountability: The Implications of the Resource Curse for CSR Theory and Practice' (2008) 11 *Yale Human Rights & Development Law Journal* 37 at 38.



the access people have to information.<sup>200</sup> In the end this will minimize behaviour that is contrary to the exploitation of the mineral resources.<sup>201</sup> Accountability is limited by weak governance structures and lack of political commitment. An environment that does not allow participation of the interested stakeholders and the exchange of information between them and the government increases the chances of corruption and bribery.<sup>202</sup>

An example of an agreement where accountability was lacking is the one National Petroleum Corporation, a state owned company of the Nigeria and Shell Corporation, a company from the Netherlands.<sup>203</sup> The agreement was for exploitation of the oil reserves in the Niger Delta. From the effects that came later it is clear that this contract was negotiated and signed in an environment that lacked accountability to the people and the company to the government.<sup>204</sup> Nigeria did not have a comprehensive regulatory framework that protected the environment and to regulate the MNCs once operation structures.<sup>205</sup> The existence of these factors meant that social and environmental issues were not taken into account when the contract was negotiated. This is evident from the reactions of the communities that surround the area of the projects.<sup>206</sup> They organized protests and threatened to sabotage shell's operations in the area, which resulted in a huge conflict in the area.<sup>207</sup> The people in the community felt that the company operations had destroyed the environment and had lessened the economic stability of the

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<sup>200</sup> D Ayine H Blanco, L Cotula op cit (note 127) at 3.

<sup>201</sup> Ibid at 4.

<sup>202</sup> P D Ochejep 200) 'The Extractive Industries Transparency Initiative (EITI): Voluntary Codes of Conduct, Poverty and Accountability in Africa' January available at [http://www.jsd-africa.com/jsda/Fall2006/PDF/Arc\\_the%20Extractive%20Industries%20Transparency%20Initiative.pdf](http://www.jsd-africa.com/jsda/Fall2006/PDF/Arc_the%20Extractive%20Industries%20Transparency%20Initiative.pdf) accessed on 1 April 2014.

<sup>203</sup> Inventory of Conflict and Environment Case Studies (2007) 'Case Number: 64 Case Mnemonic: OGOIL Case Name: Ogoni and Nigeria Conflict over Oil' November 2007 available at <http://www1.american.edu/ted/ice/ogonioil.htm>, accessed on 8 January 2014.

<sup>204</sup> Ibid.

<sup>205</sup> R Ako & N Uddin ;Good governance and Natural Resources' in Francis N Botchway's (ed) '*Natural Resource Investment and Africa's Development*' (2011) 37.

<sup>206</sup> ICE Case Study (2007) op cit (note 213.)

<sup>207</sup> Ibid.

area for farmers and other producers.<sup>208</sup>

### 3.4.5 Weak Administrative institutions

Different institutions in the government are involved in the management and exploitation of mineral resources in their countries. The effectiveness of these institutions is partly dependent on effective transparency and accountability. In the case of countries that have been in the mining industry for a long time, the efforts of these institutions are hindered by capacity, accountability and transparency.<sup>209</sup> To add to these problems the institutions are continuously undermined by political decisions and actions which cause problems for the civil servants in the institutions.<sup>210</sup> Due to these constraints the institutions are ill prepared to handle the negotiation of EDAs because they are weak in comparison with what the MNC has. They usually have several well-staffed and financed advisory institutions that have the same role as the government institutions. The institutions are also obstructed by the lack of information to fully equip themselves of the implications of the project when the contract is concluded. This further affects their advisory role to the negotiators of the contracts.

Zambia is a good example to illustrate the problems that are felt by government mining institutions. Zambia is one of the countries that established several mining institutions to administer, regulate and manage the mining industry. The Ministry of Mines and Minerals Development administer the Zambian mining sector, under this you find the Mines Safety Department.<sup>211</sup> This institution has supervisory role and makes sure that

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<sup>208</sup> Ibid.

<sup>209</sup> D Haglund 'Regulating FDI in weak African states: Case study of Chinese copper mining in Zambia' (228) 46 4 *Journal of Modern African Studies* 547 at 559.

<sup>210</sup> Ibid at 549.

<sup>211</sup> Ibid.

companies comply with 'health and safety' regulations. The Environmental Council of Zambia is in charge of evaluating and reporting on environmental issues.<sup>212</sup> These institutions have little capacity, are unable to give comprehensive reports as to what is happening in the industry and their enforcement of accountability measures is frustrated by political actions.<sup>213</sup> In 2007, a public declaration made by President Mwanawasa that a company called 'BGRIMM' should commence operations after being closed down because the project was had the potential to be harmful to the community and therefore needed more study, is example of such actions.<sup>214</sup> The duties of the institutions are also not carried out properly because there is no funding to aid in pushing their agenda.

### 3.4.6 Political influence

Politics has a very big influence on how EDAs are negotiated in Africa.<sup>215</sup> This is not only because of the proximity that the contracts have to the political leadership but also the interests and control those in power wish to exercise over the contract.<sup>216</sup> The structure of political leadership in most African states is centred on the president and not necessarily the executive as it should be.<sup>217</sup> The powers the president holds are so immense that he or she has a very direct say in the countries policy goals.<sup>218</sup> Hence the President has a lot of control in what happens, his or her decision carries a lot of weight in the ministries and their decisions are usually not questioned.<sup>219</sup> The political structure and the powers and access the political leadership have, has created

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<sup>212</sup> Ibid at 562.

<sup>213</sup> Ibid.

<sup>214</sup> Ibid.

<sup>215</sup> Ibid.

<sup>216</sup> A Bebbington, L Hinojosa & D Humphreys Bebbington et al op cit (note 46) at 970.

<sup>217</sup> PA Walker (1999) 'Democracy and environment: congruencies and contradictions in Southern Africa' (1999) 18(3) *Political Geography* 18(3) 257 at 264.

<sup>218</sup> Ibid at 561.

<sup>219</sup> H Kippin 'Copper & controversy in the DR Congo' (2008) 35 *Review of African Political Economy* 482 at 470

an environment that allows the MNC to operate unregulated especially in cases where it is the same small group of people in the political leadership that is benefiting from the project.<sup>220</sup>

An example is Zambia, where the ministries are ran by permanent secretaries who are directly appointed by the president and not by the civil servants who have experience as they have served for a long period of time.<sup>221</sup> When the mines were privatized the government attained a 'golden share' where people like permanent secretaries were given a chance to serve as a board member. This gave them direct access MNC managers and its operations.<sup>222</sup> This resulted in a conflict of interest as the permanent secretary would then make decisions to advance the MNCs agenda and not national interest.<sup>223</sup>

### 3.4.7 Bribery and Corruption

Corruption is bred by lack of transparency. It happens when officials who have been tasked with certain duties take advantage of those positions and use their power and influence there to orchestrate things for their gain.<sup>224</sup> There is another side to corruption which is bribery this is where a person who then receives money or favours in order to aid the person giving those things in achieving their goal or making a process easier is receiving a bribe.<sup>225</sup>

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<sup>220</sup> D Haglund op cit (note 219) at 561.

<sup>221</sup> Senior technical assistant (anonymous), Mining Sector Diversification Programmer (European Commission program within Zambia's Ministry of Mines), Lusaka, 1.10.2007

<sup>222</sup> Ibid.

<sup>223</sup> Ibid.

<sup>224</sup> ERE Higgins 'Corruption, Underdevelopment, and Extractive Resource industries: addressing the vicious cycle' (2006)16 No.2 *Business Ethics Quarterly* 235 at 236

<sup>225</sup> I Kolstad & A Wiig op cit (note 191) at 522.

Consequently, where the MNC is involved in giving benefits to government officials to gain favours and push their investment along it has participated in bribery.<sup>226</sup> Where the official receives his wages and the bride he is said to be corrupt.

The MNC's position gives it leverage to extend bribes to the political leadership and those in high government positions.<sup>227</sup> Corruption has a direct impact on the negotiation process. Corruption or bribery hampers the progress transparency and accountability can bring to the sector and negotiation process.<sup>228</sup> Corruption thrives in African states because of the dysfunctional political structure and management of administrative institutions.<sup>229</sup> The failure by the HC to draft laws that can properly regulate the sector adds to this problem. An example is the agreement between the Government of Guinea and Beny Steinmetz Group Resources.<sup>230</sup> This was for the mining of bauxite in Guinea.<sup>231</sup> The company acquired the license through corrupt practices and its operations were ceased because it went under investigation as a result of these issues.<sup>232</sup>

### 3.5 Capacity and Resource Factors

#### 3.5.1 Capacity

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<sup>226</sup> Ibid.

<sup>227</sup> Ibid.

<sup>228</sup> ERE Huggins op cit (note 235) at 245.

<sup>229</sup> Ibid 245.

<sup>230</sup> Global Witness (2012) 'Beny Steinmetz Group Resources must be publicly address questions over Guinea mining concession' November 2012 available <http://www.globalwitness.org/sites/default/files/library/Guinea-GW520press%20release%209%20November%202012%20pdf%20ENG.doc.pdf>, accessed on 3 March 2014.

<sup>231</sup> Ibid.

<sup>232</sup> Ibid.

To negotiate these contracts the HC must have capacity and resources. It must commit its financial resources to facilitate the building of capacity and skill to the negotiation of these contracts. Currently most HC's in Africa do not have the skills, expertise and financial resources to properly negotiate these contracts.<sup>233</sup> This has become a challenge to the negotiators when they face the MNC.<sup>234</sup> Most negotiators are not equipped to fully understand and appreciate the contracts and their implications once they have been negotiated.

The HC will strengthen its negotiating power by building its capacity by improving on the skills and expertise of the negotiators, allocating financial resources to the negotiators and the different institutions involved in the negotiation process and ensuring that there is no overlap of duties.<sup>235</sup> There is a need in Africa to improve the capacity of negotiators to these contracts.<sup>236</sup> Factors like lack of negotiating skills, technical expertise, legal expertise and specialized know how affect the negotiation process and they generate the lack of capacity.<sup>237</sup>

### 3.5.2 Negotiating Power

The power to divert the other parties' mind-set to one's own interests in an environment that has various interactions at play is negotiating power.<sup>238</sup> There is a difference between this and bargaining power which is a

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<sup>233</sup> C Biau 'The Governance Gap, or missing links in transnational chains of Accountability for extractive industry investment' (2011) 13-4 *Journal of Sustainable Finance & Investment* 251 at 256.

<sup>234</sup> Vale Columbia Center & Humboldt-Viadrina School of Governance (2012) 'Support for Developing Country Government in the Negotiation of Complex Contracts for Developing Countries' background paper July 2012 available at <http://www.vcc.columbia.edu/content/negotiation-support-developing>, accessed 3 April 2014.

<sup>235</sup> L Cotula op cit (note 8) at 4.

<sup>236</sup> W W Hogan & F Struzenegger (ed) 'The Natural Resources Trap: Private Investment Without Public Commitment' (2010) 160.

<sup>237</sup> Ibid.

<sup>238</sup> UNCTAD World Investment Report op cit (note 9) at 70.

tool used to determine between the two parties who will walk away with a greater percentage of the profits from the project.<sup>239</sup> So negotiating power establishes a party's ability to influence the other party and bargaining power is what is used to demonstrate these abilities. The MNC bargains for the protection of their investment, and a proper forum to determine disputes and to realize profits on their investments.<sup>240</sup> While, the HC bargains for a share in the investment, compliance with its laws and economic development.

At the commencement of the negotiations HC is usually the one in the weaker position compared to the MNC even though it has the subject matter and the regulating legal framework. However, with a proper strategy it can change its position because if it fails to do so the MNC will use its strategy and knowledge of being unregulated. Further the HC's negotiating power is then influenced by the social, economic and political factors that will surround the negotiations.<sup>241</sup> The HC's need for the investment is more apparent and immediate than the MNCs risk to invest in the country.

An example of an agreement that exhibited weak negotiating power on the HC's side is the agreement between the state company Gecamines of the Democratic Republic of Congo and Anvil.<sup>242</sup> The discovery of this was made when the government called for a review of all the contracts that had been signed by the state owned company.<sup>243</sup> It was discovered that Anvil had negotiated a total exemption from royalties and corporate income tax for a 20

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<sup>239</sup> Ibid.

<sup>240</sup> B Campbell 'Revisiting African Mining reform process of African Regimes' (2010) 30 1-2 *Canadian Journal of Development Studies* 197 at 201.

<sup>241</sup> LCotula op cit (note 8) at 25.

<sup>242</sup> O Gajigo, E Mutambatsere & G Ndiaye (2012) 'Gold Mining in Africa: Maximizing Economic Returns for Countries' African Development Bank Group Working paper March 2012 available at [www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/WPS%20No%20147%20Gold%20Mining%20in%20Africa%20Maximizing%20Economic%20Returns%20for%20Countries%20120329.pdf](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/WPS%20No%20147%20Gold%20Mining%20in%20Africa%20Maximizing%20Economic%20Returns%20for%20Countries%20120329.pdf), accessed on 9 January 2014.

<sup>243</sup> Ibid.

years.<sup>244</sup> This contract reflected the unfairness of the contract that was signed because the exemptions that were given were not those that were prescribed in the mining codes. This demonstrates what weak negotiating power can do faced with a company with a strong bargaining position and thus a strong negotiating power.

#### 4. How EDAs fail to cater for national interest

The management of mineral resources is a very important aspect for economic progression in mineral resource rich countries. The development and social changes through the proper and effective management of these resources is part of the country's long-term plan. Unfortunately, in Africa this is still only on paper and part of political rhetoric.<sup>245</sup> Most mining legislation focused on incentives and could not adapt to the changing circumstances that the agreements bring. These changes have led to the changes in drafting of EDAs but not the legislation that regulates the mining activities. Most mining legislation did not look to community development, transparency, access to information, public participation, protection the environment and human rights.

In focusing on attracting in the investor the HC did not consider the existence of these factors and the effect they will have on the negotiation process.<sup>246</sup> The mining laws in CRIMRs were centred on economic incentives. The economic emphasis was mainly tax related in the hope that the countries would derive revenues from the projects to add to the growth of their economies. These laws failed to consider the environmental and social impact

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<sup>244</sup> International Peace Information Service (2008) "Democratic Republic of the Congo, Mining Contracts - State of Affairs" April 2008 available at [http://www.ipisresearch.be/publications\\_detail.php?id=220](http://www.ipisresearch.be/publications_detail.php?id=220), accessed on 4 March 2014.

<sup>245</sup> O Gajigo E Mutambatsere & G Ndiaye (2012) op cit (note 237) at 15.

<sup>246</sup> B Campbell op cit (note 252) at 206.



of these projects.<sup>247</sup> The government also failed to enact and put in place regulatory and accountability mechanisms that it could use to hold the MNC accountable.<sup>248</sup> Where the government created mechanisms its efforts are hampered by political influence.

These factors go against the HC's development goals because they influence the drafting of the contracts. The HC contracts to promote economic and social development, which is its goal and it must seek to advance it. However, because the HC fails to take cognizance of the factors outlined above and their influence on the contract it does not negotiate its EDAs effectively and instead it fails to protect its national interest.

## 5. Conclusion

The negotiation process is challenged by a lot of factors aside for the legislation being inadequate and transparency and accountability measures lacking. The negotiators do not have the capacity and resources. All these factors add to lessening their bargaining power and negotiating power. The result is that these then are then put in the MNCs favour as they come to the negotiation table better prepared to handle the negotiations. The MNCs has a strategy and will achieve the results its wants. The HCs inefficiency due to lack of capacity and lack of information does not work in its favour and the HC continues to neglect this fact.<sup>249</sup>

These contracts are not negotiated without local factors influencing the process. Even though the governments change in most in CRIMRs in Africa

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<sup>247</sup> Ibid.

<sup>248</sup> SD Murphy op cit (note 163) at 392.

<sup>249</sup> VAB Davies & S Dessy (2012) 'The Political Economy of Government revenues in post-conflict resource-rich Africa: Liberia and Sierra Leone' *NBER Working paper series: Working Paper* 18539 10.

the way they run their respective governments does not. This has continued the cycle of weak governance issues because the institutions that are established to manage the mining sector are weak and this situation continues with each change of government because those in positions of leadership continue to undermine the work these institutions. This is through failing to increase the resource capacity in order to strength them. The shortcomings in the institutions then mean that make it harder for them to enforce the regulatory measures that are provide by the law.

The weakness in governance means that transparency and accountability are lacking. These factors are external to the negotiations but they have direct influence on the negotiations because they also influence them HC's actions. The negotiations between parties lack transparency because of the HCs actions and weak government structure. The MNCs takes advantage of this, when they come into the country. As a private party the MNC enters the country with intentions to comply with the laws and regulations. However, the HCs behaviour towards the MNC changes this. The HC creates an environment that will not be conducive for EDA negotiations. The HC creates an environment that will not be conducive for EDA negotiations through the direct involvement of the political leadership and how it undermines the duties of the institutions.

Thus the actions of the political leadership in government and the environment where the contract is negotiated in have an influence control on what is agreed on at the negotiations. The factors are intertwined in each other and they may also operate in the cycle in the case of the HC. These factors some of which are created by the MNC, work to its advantage and to the detriment of the HC. The existence of these factors obstructs the HC's from negotiating EDAs that look to national interest.

So the failure to safeguard national interest has its origins in the negotiation process. Questions have been asked as to why African countries that have so many minerals and contracts fail to realize sustainable economic development. One of the answers is the negotiations process that is influenced by several external and internal factors to the process. For a long time Africa has been viewed as the innocent party with the MNC as the one at fault. But this is not the case anymore; some of the factors mentioned are brought about by the HC itself by its own behaviour. Thus both parties are to blame but the HCs take a bigger share.

In summary, in this chapter we have elaborated on what the negotiation process is and have identified and outlined the factors that influence the process. These factors are external to the HC as they originate from the MNC's behaviour. There are procedural factors that create the negotiation environment. As well as internal factors originating from the HC itself, which affect the substantive content of the contract and the negotiating environment. Both parties create the factors that influence this process not just the HC. The difference however is that the state is accountable to people and not shareholders. Its commitment or negligence has extended ramifications compared to the MNC. The HC is there as regulator, enforcer and protector, not just as a profit making party. In the next chapter we shall look at Malawi a country that has signed several of these contracts and they have failed to bring about feasible development, which has led the nation to question how the benefits were agreed on. Thus bringing in to focus whether these contract are safeguarding national interest.

## CHAPTER IV

### THE MALAWI/PALADIN ENERGY LIMITED AGREEMENT

#### 1. Introduction

In chapter three the focus was the factors that influence the negotiation process in the content of the agreement and the environment in which it is negotiated. This chapter will focus the discussion on Malawi. In 2007 the Malawi government (GoM) entered into an agreement with Paladin Energy Limited (PEL) for the development of the mineral uranium in Kayelekera a

town, in the district of Karonga, in the North of the country.<sup>250</sup>The chapter will thus discuss the steps that were taken before the negotiations of the contract, in order to demonstrate each party's preparedness and behaviour towards the negotiations. This is will also demonstrate how some factors existed before the negotiations. The discussion will then move to the party negotiations of the contract itself. The focus will be to identify the clauses that were influenced by the negative factors identified in the chapter three. The factors will be identified to explain how their influences in the clauses can be traced back to the negotiation process, where they arise. The implementation of the contract will then be discussed in order to see how clauses affected the operation of the contract towards Malawi. The chapter will end with what could have been done differently for the clauses to be drafted differently and ultimately the negotiations to achieve better results for Malawi. This will then explain how Malawi could have achieved an agreement that would have led to sustainable development.

## **2. Steps leading to the Malawi Government and Paladin Energy Limited Agreement**

There were several steps that preceded the agreement. PEL first did a 'feasibility study' to see if they could manage the mine before they showed any monetary interest.<sup>251</sup>They found that the project was costly and decided not to pursue it. However, in 2000 the company went ahead and bought some shares from a company known as Central Electricity Generating Board of Great Britain that was exploring the mine at the time.<sup>252</sup> In 2005 PEL purchased the rest after completing a study to see if commencing with a mining project would bring about the desired results. The study revealed that

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<sup>250</sup> <http://www.paladinenergy.com.au/default.aspx?MenuID=29>, accessed on 15 January 2014

<sup>251</sup> W Masebo (2013) 'The Kayelekera uranium Mine and Economic Development in Malawi' Africa Portal backgrounder no.53 February 2013 [www.africaportal.org/articles/2013/02/05/kayelekera-mine-and-economic-development-malawi](http://www.africaportal.org/articles/2013/02/05/kayelekera-mine-and-economic-development-malawi), accessed on 11<sup>th</sup> December 2013.

<sup>252</sup> <http://www.paladinenergy.com.au/default.aspx?MenuID=29>, accessed on 15 January 2014.

a mining project would, as economic environment for such a project was better.<sup>253</sup>

PEL applied for a license to acquire mining rights to the mine. The company had to submit an Environmental Impact Assessment (EIA) Report in accordance with section 38 of the Mines and Minerals Act.<sup>254</sup> It submitted its EIA in October 2006. When an applicant applies for a mining license, the license cannot be issued without the EIA being approved first.<sup>255</sup> The company was issued with a mining license in April 2007 before the EIA was approved.<sup>256</sup> These actions were outside the normal procedure set out in Act.

The government's actions received opposition and the draft EIA had several faults. Some non-governmental organizations [NGOs] took an interest and had an independent report done. The report revealed that the draft EIA PEL had done had many faults.<sup>257</sup> It did not reflect that they had granted the community in which the mining activity will be done enough information.<sup>258</sup> Further the PEL's EIA did not have viable information that the public could use to evaluate their assessment.<sup>259</sup> The main focus in the PEL's EIA were economic benefits and it did not elaborate on the impact the project would have on the not environment as whole.<sup>260</sup>

From the findings of the independent report the NGO's commenced court proceedings. The group asked the court to grant an injunction in order

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<sup>253</sup> Kayelekera Mine Malawi Southern Africa In Production Ramp-up September 2009 available at <http://www.paladinenergy.com.au/getfile.aspx?Type=document&ID>, accessed on 11 December 2013.

<sup>254</sup> 1 of 1981 (*herein after* the MMA).

<sup>255</sup> *Ibid* section 29(4)..

<sup>256</sup> Global Business Center Guide Malawi: Mineral, Mining Sector Investment and Business Guide' Vol 1 *Strategic Information and Regulations Mineral* (2007) 48.

<sup>257</sup> G Mudd & H Smith (2006) 'Comments on the Proposed Kayelekera Uranium Project Environmental Impact Assessment Report' November 2006 1.

<sup>258</sup> *Ibid* at 19.

<sup>259</sup> *Ibid*.

<sup>260</sup> G Mudd & H Smith *op cit* (note 285) 1.

to halt PEL from commencing operations whilst they waited for the substantive issues to be determined.<sup>261</sup> The substantive issues were a review of the PEL's EIA that was approved by the GoM.<sup>262</sup> In the pleadings the NGO's wanted the court to stop the Kayelekera project from proceeding based on the current EIA and they wanted an independent authority to hold public consultations so that PEL takes these into account in order to redesign the course of their operations<sup>263</sup> The case did not go further; it was withdrawn in 2007 because the NGO's and the GoM reached a settlement. In the settlement the GoM agreed to develop legislation to deal with the hazardous substance that the project would produce.<sup>264</sup> The government however did not take the report seriously. It was only given attention by the court but since the matter was withdrawn there was little they court could do.<sup>265</sup> The GoM entered into the agreement called a development agreement [DA with PEL in April 2007 after the company had acquired the mineral rights and the EIA was approved.

The government's action in issuing the license before the EIA was approved was the beginning of the problems it would have in handling PEL and its operations in Malawi.<sup>266</sup> The GoM was willing to bypass national law in order to give PEL favourable conditions to operate. In doing so the government was creating an environment that would make it difficult to regulate and manage PEL's behaviour. The GoM should have insisted on an elaborate and comprehensive EIA taking into account the mineral that was going to be mined the area in which the mine would operate and the level of

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<sup>261</sup> Centre for Human Rights and Rehabilitation (CHRR) and 5 Others v The Attorney General (AG) and Paladin (Africa) Ltd Civil Cause No 457 of 2007 High Court Lilongwe Registry (unreported)

<sup>262</sup> M Kachale ' (2010). The efficacy of international regulation of uranium mining: Malawi as a case study' (2010) 36 4 *Commonwealth Law Bulletin* 653 at 654.

<sup>263</sup> CHRR case op cit ( note 276) at n12.

<sup>264</sup> R Hajat (2007) 'Kayelekera and the Uranium Saga in Malawi' in 'Towards the Consolidation of Malawi's Democracy' Essays in honor of work of Albert Gisy German Ambassador to Malawi *Konrad-Stiftung Occasional Paper* No.11 Malawi February 2005 - June 2008 available at [http://www.kas.de/wf/doc/kas\\_13979-544-2-30.pdf](http://www.kas.de/wf/doc/kas_13979-544-2-30.pdf) , accessed 15 January 2013.

<sup>265</sup> M Kachale op cit (note 276) at 655.

<sup>266</sup> CHRR Report (2005) 'CHRR Concerns on Uranium Mining' 2005.

competence and capacity that the government had to handle environmental problems and the communities safety.

PEL operates in other countries and in Australia the regulations that PEL has to abide by are more stringent. Australia is more developed so than Malawi so it can be argued that it has the means to set such regulations and accountability measures to monitor MNCs like PEL. However, this argument is not strong because the project is regulated by the contract and not national law; the contract contains the specific obligations that are applicable to the parties. Thus it is in the contract that an HC can insist on proper management of the mineral resource if national law does not afford enough regulatory measures. In this regard, a report that properly outlined what measures a company will take would have given the GoM a better understanding of what obligations to get from PEL in the contract.

### **3. Malawi Government and Paladin Energy Limited negotiations in the context of influential factors**

#### **3.1 An overview of the agreement**

The DA was an agreement that was signed based on the concession system. It was concluded in accordance with section 10 of the Mines and Minerals Act. The parties agreed that the agreement would serve national interest, which is the promotion of the social and economic needs of the people of Malawi.<sup>267</sup> They also agreed that it would give PEL a stable investment in the country.<sup>268</sup> The GoM received a 15 per cent share in the

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<sup>267</sup> The Development Agreement between The Government of the Republic of Malawi & Paladin (Africa) Limited and Paladin Energy Mineral NL on Kayelekera Uranium Project (*herein after* The Malawi/Paladin Energy Agreement).

<sup>268</sup> Ibid.



issued capital and agreed to the following; to build and upgrade roads around mine contract area and space for airplanes to land in the area close to the project.<sup>269</sup> The GoM had the obligation to enforce the regulations that are set out in National law and other regulatory documents if PEL did not comply with them.<sup>270</sup> The GoM agreed to a fiscal regime that was not limited and it agreed to amend the legislation that relates to this in order to reflect the clauses in the agreement.<sup>271</sup>

Further, the GoM agreed to do all it can to ensure that government notices are made to reflect the clauses in the agreement if the national law relating to the fiscal regime cannot be amended.<sup>272</sup> This clause was subject to the stability clause and if during this period the laws are amended by the GoM that are better for that those in the agreement, the agreement should be amended to reflect these changes.<sup>273</sup> The GoM agreed to non-discrimination during the stability period.<sup>274</sup> Both parties agreed to settlement disputes through negotiations and arbitration.<sup>275</sup> They also agreed to have the law of Malawi apply to their agreement.<sup>276</sup>

PEL agreed that it would operate within the approved program of operation and best mining, ore processing.<sup>277</sup> That it would make efforts to promote and develop local business in Malawi in order to supply it goods and services.<sup>278</sup> To employ and train Malawians to help run the project and only employ non-Malawians if they did not possess the skills required.<sup>279</sup> PEL was to give the GoM reports on its operations, finances, and geological

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<sup>269</sup> Ibid at Clause 6 & 7.

<sup>270</sup> Ibid at Clause 18.

<sup>271</sup> Ibid at Clause 21

<sup>272</sup> Ibid.

<sup>273</sup> Ibid at Clause 21.

<sup>274</sup> Ibid at Clause 26.

<sup>275</sup> Ibid at Clause 32 and 33.

<sup>276</sup> Ibid at Clause 37.

<sup>277</sup> Ibid at clause 2.1.

<sup>278</sup> Ibid at Clause 5.

<sup>279</sup> Ibid at Clause 12.

discoveries, transactions with independent parties and was agreed that all this information was to be classified as confidential.<sup>280</sup> The company had to comply with environmental laws, abide by the environmental management plan and assist in establishing the administration of this plan.<sup>281</sup> In addition, the company had social responsibilities, they had to develop the area around Kayelekera by building primary and secondary schools, houses for the teachers and give USD10 million to other agencies to ensure this development happens in other areas.<sup>282</sup>

### 3.2 How the factors influenced the clauses

#### i) The applicable law

The parties agreed that laws of Malawi would be the applicable law to the contract. At the time of the negotiations Malawi did not have a national mining policy. It had development goals but this not specific to the mining sector.<sup>283</sup> Thus some of the laws that applicable to the negotiation of EDAs in Malawi are the Constitution of the Republic of Malawi,<sup>284</sup> Mines and Minerals Act [MMA]<sup>285</sup>, The Energy Regulation Act<sup>286</sup>, Environmental Protection Act<sup>287</sup>, and the Corrupt Practices Act.<sup>288</sup> The most important is the MMA because this is the agreement that regulates the mining activities in the country. A country's mining law embodies its policy towards the sector and

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<sup>280</sup> Ibid at Clause 16.

<sup>281</sup> Ibid at Clause 18.

<sup>282</sup> Ibid at clause 20.

<sup>283</sup> The Malawi Growth and Development Strategy I available at <http://www.mtc.mw/attachments/article/360/Malawi%20Growth%20%20&%20Developemnt%20Strategy%20August%202006.pdf> accessed 15 January 2014.

<sup>284</sup> Act 20 of 1994.

<sup>285</sup> The MMA op cit (note 268.)

<sup>286</sup> Act 20 of 2004 .

<sup>287</sup> Act 23 of 1996.

<sup>288</sup> Act 18 of 1995.

is a guide to the government and the investor on what standard is expected from the exploration and exploitation.

Having a mining policy helps the negotiations of EDAs.<sup>289</sup> It offers guidance to what the country expects to achieve in the sector, it forms the expectation for the negotiators in the countries development and it also helps in capacity building between the different institutions so that issues that need to be legislated can be identified and better regulated.<sup>290</sup> It was therefore very important for Malawi to have had a mining policy at the time of the negotiations. The problems that are associated with not having a mining policy became evident when the contract started to operate and the clauses in the contract were enforced. The policy would have served as a guide and substantiated the law where it had gaps. The GoM started formulating a mining policy after much planning and consultation and it only came up with a concrete document in April 2013 due to many delays.

The MMA was enacted in the 1980's the trends in mining then were different to what they were in 2007 and what they are now. The MMA does not embody Malawi's development objectives. EDAs are now drafted with social and environmental concerns in mind. This means that issues like transparency; access information, public participation and community development are part of the focus when drafting these contracts. The problem that Malawi faced here is that the clauses that were then drafted based on Malawian law were not elaborate; they failed to deal with some issues comprehensively.

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<sup>289</sup> J Otto 'A national mineral policy as a regulatory tool' (1997) 23 No. 1-7 *Resources Policy* 1 at 2.

<sup>290</sup> Ibid.

The principle is to ensure that the contractual clauses are in line with national law but this is cannot be done if national law is inadequate in terms of the social and environmental issues. The parties agree to what they want to put in the contract but with national laws are incoherent or do not deal with some issues it increases the chances of the contract being a contract that supersedes national law and not offer development. If the MMA is compared to the laws of other countries like Tanzania and Ghana, there are many loopholes and gaps that can be seen in the MMA. The Mining Acts of Ghana and Tanzania have provisions that deal with access to information, principle of transparency and community development. The MMA does not have this.

The MMA influenced the negotiation process because it is the legislation that regulates the mining activities in the country and also the law that the parties had to abide by when drafting the contract. Its importance is further evidenced by the parties choice in having the Laws of Malawi as the applicable law, which includes the MMA. This reflects a lack of negotiating power and capacity on the part of GoM because the national mining legislation was not suitable for the negotiation of such an agreement. The GoM should have insisted the contract contains a specific clause on the applicable law.<sup>291</sup> There should have been Laws of Malawi and general principles like the UNIDROIT principles applicable to commercial contracts and international best practices set out for the different areas.<sup>292</sup> These would then fill in the loopholes and gaps that national legislation has failed to address. The clause also reflects PEL negotiating skills, bargaining skills and strategy, they opted for laws that were not up to date to and managed to get the GoM to agree that such laws should be used. This is what MNCs like PEL do in order to evade the stricter provisions present in other legal systems.

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<sup>291</sup> The Malawi/Paladin Agreement op cit (note 282) at Clause 37.

<sup>292</sup> C Biau 'The 'Governance Gap', or missing links in transnational chains of accountability for Extractive Industry Investment' (2011) 13 *Journal of Sustainable Finance & Investment* 251 at 252

ii) Confidentiality

The agreement does not specifically state that the agreement is confidential. It's the wording and the interpretation of the clauses that brings this conclusion.<sup>293</sup> The clause deals with recording and operations, the clauses are drafted in such a way that the GoM is restricted in how it should treat the information that is supplied by the company.<sup>294</sup> A critical interpretation of the clause demonstrates that the GoM has an obligation to treat all information supplied by the company confidential. This is given more force section 7 of the MAA, which prohibits the disclosure of information. However, the section qualifies in which instances information may be disclosed which are; in connection with the administration of the Act or for court proceedings or for investigation in terms of the Act.<sup>295</sup> In another clause dealing with accounting records, the GoM would have to ensure that any information they acquire from the company in this regard is confidential.<sup>296</sup> This includes the revenues the company pays to the GoM.

The clause on operations and recording was drafted in such a way that all the information relating to the company's operations was confidential and this was used as a justification in order not to publicize some aspects of the companies. From this interpretation the GoM went even further and stated that the agreement was therefore also confidential.<sup>297</sup> The GoM cited a confidentiality clause as its reason for not disclosing the agreement to parliament.<sup>298</sup> This justification is taken from legislation that is old in content

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<sup>293</sup> The Malawi/Paladin Agreement op cit (note 282) at Clause 16 and 22.5; Vale Columbia Center Comments on the Development Agreement between Paladin and the Government of Malawi on the Kayelekera Uranium Project 19.

<sup>294</sup> Ibid at Clause 16.

<sup>295</sup> Section 7(2) of the MMA.

<sup>296</sup> The Malawi/Paladin Energy Agreement op cit (note 282) at Clause 6.

<sup>297</sup> Interview with Commissioner for Mines, 2011.

<sup>298</sup> R Hajat (2007) op cit (note 79) at 5.

because it fails to adapt to the changes that have taken place in the negotiation and drafting of these contracts.<sup>299</sup>

It cannot be ignored that when the agreement was drafted Malawi was under a dictatorship and disclosure was not something the GoM promoted.<sup>300</sup> This refusal by the GoM then meant that the agreement was confidential and the public did not have access to it.<sup>301</sup> The GoM held a press briefing stating that it was removing the confidentiality clause and making it public in order to allow openness.<sup>302</sup> Further reasons were that GoM wants greater community participation in the negotiation process and transparency.<sup>303</sup> This transparency, access to the agreement and community consultation would then ensure better negotiation of future EDAs.<sup>304</sup>

The issue has led some controversy because the GoM says there was a clause while PEL disputes this fact and states that the reason why the agreement was kept confidential was ‘...at the request of the government’ not under a clause of the agreement.<sup>305</sup> This means that it is the GoM that chose to interpret the agreement like this because the political leadership that was ruling at the time stood to gain immense from the agreement. PELs also stated that it had no problem with making the agreement open and stated that it would not affect its operations.<sup>306</sup>

The political leadership influenced the clause; section 1 of the MMA states that all natural resources are held by the president. This means that

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<sup>299</sup> PJ Kamlongera ‘The mining boom in Malawi: implications for community development’ (2013) 48 3 *Community Development Journal* 377 at 385.

<sup>300</sup> *Ibid.*

<sup>301</sup> C Kandiero ‘Kayelekera secrecy provision scrapped’ *Daily Times* 2 January 2014.

<sup>302</sup> *Ibid.*

<sup>303</sup> Statement by Minister of Mines John Bande.

<sup>304</sup> C Kandiero *op cit* (note 316.)

<sup>305</sup> Statement by Greg Walker General Manager International Affairs – Paladin Energy.

<sup>306</sup> *Ibid.*

he/she will be involved in the management of the natural resources and in this case it was direct management. The presence of PEL in Malawi, the price of uranium and the global position PEL had as a uranium producer were all incentives that motivated the political leadership. This started from the way the license was given before the EIA was approved.<sup>307</sup>

Other factors include weak governance, which then means that transparency and accountability were not emphasized. The GoM did not really open up the contracting process or regulate the company to give people information. The fact that the government allowed a clause so broadly drafted and it later removes it to make the agreement public means that these factors were lacking. Further by allowing such a broad clause, which leads to wide interpretation and thus justification, is an indication the lack negotiation skills. The clause also reflects PEL's strategy, it is a company that does not promote transparency or like the EITI.<sup>308</sup>

iii) Environmental matters and employment safety

PEL has to do an environmental management plan [EMP].<sup>309</sup> The problems with this area started before the negotiation process began. In the agreement it is not clearly stated how PEL has to go about doing this plan.<sup>310</sup> The Environmental Protection Act does not give any guidance either.<sup>311</sup> So the company was not properly regulated in terms of what the plan must deal

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<sup>307</sup> AN Mzembe & J Meaton (2013) 'Driving Corporate Social Responsibility in the Malawian Mining Industry: Stakeholder Perspective' August 2012 Corporate Social Responsibility and Environmental Management available at [http://www.eprints.hud.ac.uk/18524/1/Drivers\\_of\\_CSR\\_in\\_Malawi\\_-\\_draftpaper.pdf](http://www.eprints.hud.ac.uk/18524/1/Drivers_of_CSR_in_Malawi_-_draftpaper.pdf) accessed on 4 March 2014.

<sup>308</sup> A ten Kate & J Wilde- Ramsing (2011) 'Radioactive Revenues: Financial Flows between Uranium Mining Companies and African Governments' March 2011 [http://www.somo.nl/publications-en/Publication\\_3629](http://www.somo.nl/publications-en/Publication_3629), accessed on 5 May 2013.

<sup>309</sup> The Malawi/ Paladin Agreement op cit (note 298) at Clause 18.

<sup>310</sup> VCC Comments op cit (note 308) at 8.

<sup>311</sup> Ibid.

with, how it should be prepared and approved and the review process and updates.<sup>312</sup> If the GoM had insisted of a detailed EMP it would have been easier to regulate PELs actions. The DA provides for an environmental bond, which pays compensation in instances where the company fails to meet its obligations.

The DA also deals with employment safety.<sup>313</sup> The reference to Malawian law is a limitation. The laws in Malawi are not adequate in providing protection in terms of occupational safety and health.<sup>314</sup> There was a need to include international standard and practices to provide further protection in case national law is not enough. This clause has to be read with the non-discrimination clause and it terms of that clause GoM has to protect PEL's interests before Malawi's interests or that of Malawians.<sup>315</sup>

There should have been more in the EMP because no detail is provided as to the employment and safety plan.<sup>316</sup> Further to this there is a discrimination clause, which affects the application of the employment and safety was of Malawi. This clause is tied to the on non- discrimination and like the environment clause the GoM cannot take action that is goes against the interests of PEL, it must consider these are paramount before the citizens of Malawi.<sup>317</sup>

The clauses reflects the inadequacy in the national law, because the GoM was unable to set out proper parameter in which PEL was to fulfil its obligations and they showed no concern because they did not even rely on

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<sup>312</sup> Ibid.

<sup>313</sup> The Malawi/Paladin Energy Agreement op cit (note 282) at Clause 19.

<sup>314</sup> C Chiocha, C Smallwood, J & Emuze, F 'Health and Safety in the Malawian Construction' (2011) 18 No. 1 *Acta Structilia* 68.

<sup>315</sup> The Malawi/ Paladin Energy Agreement op cit (note 289) at Clause 26.

<sup>316</sup> VCC Comments op cit (note 314) at 12.

<sup>317</sup> Ibid.



the international standards. In this clause PEL's strategy is clear to commit to minimum obligations in order to later claim that they have fulfilled the obligations and anything beyond that is not in the DA.<sup>318</sup> It thus further reflects that PEL had a stronger stance of bargaining power and negotiating skills compared to the GoM because they failed to protect the interest of the people in ensure that the environment and their livelihood from working for PEL was protected.

iv) Tax

The tax regime set forth in the DA is very different from what the MMA and the Taxation Act state.<sup>319</sup> This clause puts the DA above national law because the agreed figures on revenues are different than those in national law.<sup>320</sup> The even though they fall outside national law the obligations accepted by the GoM are too high. For example the government has to revise the Taxation Act and to recognize that the DA is outside the parameters of the Act.<sup>321</sup> The failure in the GoM to do this will mean that as a shareholder in the project it not get its equity share.<sup>322</sup> These clauses are tied to the stability clause, which will be discussed later. In terms of the fiscal regime the changes cannot take place until the stability period elapses and if there are revisions in the fiscal regime they should not be against.<sup>323</sup> So where there are changed made by the GoM if they are profitable to the Company they should be changed in the DA to reflect this.

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<sup>318</sup> AN Mzembe & J Meaton op cit (note 325) at 11.

<sup>319</sup> 2 of 2007.

<sup>320</sup> The Malawi/ Paladin Energy Agreement op cit (note 282) Clause 21 and 22.

<sup>321</sup> Ibid at clause 21.

<sup>322</sup> VCC Comments op cit (note 308) at 14.

<sup>323</sup> The Malawi/ Paladin Energy Agreement op cit (note 289) at Clause 23.

This clause reflects lack of bargaining power, negotiating skills and PEL's strategy to the negotiations. The GoM should have focused on balancing the interests of the people of Malawi and those of PEL. In giving PEL such tax incentives they lessened the revenues they were going to be getting. This clause with the environmental and social responsibility clause demonstrates that the GoM did not balance the interest as they meant to. Contracts like DA's are drafted for different reasons and in some cases they supersede national law, which was the case for Malawi. The GoM should have ensured that it balanced the interest of community development and the tax regime. In addition, the lack of transparency and limited public participation is evident from the figures in the tax regime itself. It is clear that the GoM had agreed to such a tax regime with the intention of keeping the agreement - secret.

v) Social responsibility

This clause relates to the company's obligation towards the communities. The company has several obligations which include the constructing and upgrading of different facilities and infrastructure the obligations the company has taken on to fulfil are not coherent.<sup>324</sup> The company can easily get way with doing the bare minimum because the mechanisms to regulate the company in this area are weak and the company can easily find loophole in order to fulfil its obligations.

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<sup>324</sup> The Malawi/Paladin Energy Agreement op cit (note 282) at Clause 20.

The company is meant to give the GoM a social responsibility plan, like the EMP there is no proper detail or regulation of this plan.<sup>325</sup> The clause is specific in what the company will do in some areas but it fails to build on areas and outline them properly. For example doctors will be trained in Australia and the company's obligation ends there and the GoM did not take it up to ensure that the doctors will indeed stay in Karonga.<sup>326</sup>

The DA requires a great level of attention to be given to the protection and care of the communities.<sup>327</sup> This clause does not articulate in what it seeks to achieve for the community, it is specific in the training of medical personal but even this is uncertain. The clause states that the community should have trained medical personal so that they could handle cases that arise from the mine but there is no further detail on what mechanisms will be put in place in a separate document to substantiate this. The clause creates room for minimum compliance by the company or justification on why they should not fully comply with this responsibility.<sup>328</sup>

In this clause the company's obligations are very broad and this is a problem with most of the terms that relate to the social obligations that have to be taken by the company.<sup>329</sup> This clause is the one that was supposed to provide the community with feasible development. The company had said it will fund schools but there is no further detail to this. There is no proper involvement of the community in order to develop their own area or the government direct involvement.<sup>330</sup> The only thing the government will do is

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<sup>325</sup> Ibid.

<sup>326</sup> VCC Comments op cit (note 308) at 13.

<sup>327</sup> R Hamann & N Acute 'How should civil society (and the government) respond to 'corporate social responsibility'? A critique of business motivations and the potential for partnerships' (2003) 20 2 *Development Southern Africa*.

<sup>328</sup> R Hamann & P Kapelus 'Corporate social responsibility in mining in southern Africa: fair accountability or just greenwash?' (2004) 47 3 *Development* 85 - 92.

<sup>329</sup> VCC Comments op cit (note 308) at 14.

<sup>330</sup> Tilitonse FINAL Report (2013) 'Political Economy analysis of Mining in Malawi' February 2013 available at [http://tilitonsefund.org/wp-content/uploads/2013/05/Final-report\\_minig\\_Tilitonse-\\_2\\_.pdf](http://tilitonsefund.org/wp-content/uploads/2013/05/Final-report_minig_Tilitonse-_2_.pdf) accessed on 9 December 2013.

to receive reports; there is no mention of what that will then do after receiving such reports.<sup>331</sup> The clause should outline properly what the company is obligated to do and where it does not meet these obligations mechanism would be in place to address this. The failures reflected are weak negotiating skills, PEL strategy and poor regulation and weak intuitions.

This clause reflects the inadequacy in national law, the law failed to provide the GoM with a proper standard that would have added to the detail of the clause. The GoM chose not to use international standards to fill in the gaps. This clause reflects a lack of negotiation skills. PEL' strategy is evident here; even though they made detailed undertakings of what they would do it was minimal where the DA is viewed holistically. The clause also demonstrates that the GoM failed to regulate PEL and the fact there are no stringent regulations to hold companies like PEL to internationally or locally, may be if they were they would have been included.<sup>332</sup>

vi) Stability

In this clause the GoM agreed not to change the laws in a way that negatively obstructs the company's operations.<sup>333</sup> The clause is tied to other clauses in the agreement. The drafting of new environmental laws is affected by this clause and this affects the improvement of the EMP.<sup>334</sup> Stability clauses are still being used but it is the balancing of interests that is important. The interpretation of the stability clause and the other clauses in the contract, like the environmental clause and the non-discrimination clause fail to reflect this.

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<sup>331</sup> The Malawi/ Paladin Energy Agreement op cit (note 282) at Clause 20.

<sup>332</sup> G Eweje 'The role of MNEs in community development initiatives in developing countries' (2006) 45 2 Business & Society 93 -129.

<sup>333</sup> VCC Comments op cit (note 308) at 16.

<sup>334</sup> Ibid at 17.

The stability clause is too detailed compared to the other clauses that should have received the same amount of attention.

The clause should protect the company against arbitrary and discriminatory treatment and not limit the GoM right to make laws and regulations that will ensure that the company will meet its social and environmental area is no longer right.<sup>335</sup> To achieve proper social and economic development laws and regulations relation to these areas must be given room to be adjusted.

The problem with the stability clause is that it applies to other clauses in the agreement and it creates problems for the GoM operations. The problem with the stability clause it is that it does not balance the interests of the GoM and PEL. The clause is very much in favour of PEL. The clause demonstrates the lack of bargaining power and negotiation skills on the part of the GoM, the companies bargaining power and the PEL's strategy and lack of proper strict regulation of PELs operations in HCs

vii) Resettlement and non-discrimination

The company is obligated to resettle people but how this is to be done is not detailed.<sup>336</sup> The resettlement clause was drafted with very little consideration for the people living in these areas.<sup>337</sup> The only detail given is that when people are moved the company should resettle them. A plan should have been done by PEL explain how people will be resettle the GoM should have insisted on this as part of its conditions to the agreement.

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<sup>335</sup> Ibid.

<sup>336</sup> The Malawi/ Paladin Energy Agreement op cit (note 282) at Clause 24.

<sup>337</sup> Ibid at 17.

In resettling people the actions of PEL were not above board. They met with the chiefs and they asked them to remove the people quickly in order to start operations.<sup>338</sup> They did this by bribing them and the money they gave to the people that moved was very little to sustain their new lives.<sup>339</sup> The clause reflects the lack of adequate mining laws in Malawi, the lack of negotiating skills of the GoM, the existence of weak institutions in Malawi that would regulate PEL's actions.<sup>340</sup> It further reflects the strategy PEL had.

The non-discriminatory action clause is also a broad one; it fails to take into account the GoM rights.<sup>341</sup> The clause states that the GoM cannot take any discriminatory action against PEL during and after the stability period even after the stability period the GoM is restricted from making such discriminatory law to PEL and any company mining the same mineral as PEL.<sup>342</sup> This clause reflects the lack of negotiation skills and bargaining power, and inadequacy in the national law and weak institutions. From this clause GoM cannot take any action that interferes with PEL's operations in Malawi. Thus the GoM cannot make laws that relate to - for example - the environmental and safety standards.

The clauses reflect these different factors and what is important here is that there was no consideration of Malawi's development objectives.<sup>343</sup> If they were the GoM would have properly regulated the resettlement of the people and the non-discrimination clause would have had limited application.

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<sup>338</sup> Tilitonse Final Report op cit (note 348) at 19.

<sup>339</sup> Ibid.

<sup>340</sup> P Kamlongera op cit (note 314) at 385.

<sup>341</sup> The Malawi/ Paladin Energy Agreement op cit (note 282) at clause 26.

<sup>342</sup> VCC Comments op cit (note 308) at 17.

<sup>343</sup> R Hajat (2007) 'Malawi and its minerals: are Malawians benefiting? Resource' (2007) 2 *Resource Insight* 1 - 18.

viii) Termination

The termination clause should have been clear, the obligations that PEL has are not as stringent as they should be for such an agreement.<sup>344</sup> Currently operations have been suspended, PEL cited ‘...weak international spot prices’ for yellow cake and the losses the mine has been making.<sup>345</sup> If PEL then decides to terminate the agreement following the suspension, the obligations for such termination are in the PEL’s favour. This is not good for Malawi because even at termination the country will fail to reasonably benefit. .<sup>346</sup> This demonstrates a lack of bargaining power and negotiating skills, the GoM has conceded on several important areas by not asking for more elaborate terms and conditions. They should have considered this clause a little more, even if the parties drafted a separate document. The plan would have helped the GoM deal with any eventualities.

ix) Indemnity from the company and review of the agreement

The clause on indemnity should have been drafted in a broader way. The clause covers the claim the GoM may have in the case of non-compliance by PEL.<sup>347</sup> This clause is very important because it ties itself to the obligations PEL has undertaken relating to the environment, resettlement and social responsibility. This would have aided the institutions; it would have ensured that PEL is held accountable where it does not meet its obligations. The clause

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<sup>344</sup> VCC Comments op cit (note 308) at 19.

<sup>345</sup> T Sabola ‘ Shareholders’ approval not required – Paladin’ The Daily Times 27 February 2014.

<sup>346</sup> The Malawi/ Paladin Energy Agreement op cit (note 282) at Clause 30.

<sup>347</sup> Ibid at Clause 39.

reflects the lack of negotiation skills and information. It should have been drafted better.<sup>348</sup>

The clause on reviewing the agreement should also have been drafted better. There should have been periods set that allow for constant review. This would then ensure that the changes that each party has undergone are included in the contract. This clause was very important for the GoM. The clauses they have conceded to be broadly drafted would then be given detailed here after the contract has been reviewed. This then would justify the strategy they took in allowing PEL to commit so broadly to the social and environmental issues. This clause reflects a lack of negotiating skills and lack of information on part of GoM.

### **3.3 The clauses that were excluded**

In order to ensure that the DA added to the goal of achieving sustainable development there were other clauses that should have been included and these are:

- i) Transparency

There is a need to make transparency a priority in such agreements even if Malawi had not become an Extractive Industries Transparency

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<sup>348</sup> VCC Comments op cit (note 308) at 19.



Initiative [EITI] compliant.<sup>349</sup> The EITI is only a policy mechanism, which can only work through government efforts that needs the work of the government to enforce it in its institutions.<sup>350</sup> In order to do this the government must first emphasize the important of the principle of transparency in the agreements it signs. Thus the GoM should have started with emphasizing the principle of transparency. It would then not have had to back track and contradict itself as it has done with regards to the DA. This principle had been cemented by the time the agreement was being negotiated so it should have been included. This would then have narrowed the interpretation of the confidentiality of the agreement.

ii) Bond guarantee

This bond is given to the government of the HC in order to protect it. IT stands as security.<sup>351</sup> When the company is established in the HC, it is not the parent company and the assets that are registered within the HC.<sup>352</sup> The parent company is not the one in the HC and it is usually the one with the resource to operate the project and the assets.<sup>353</sup> This bond works, as guarantee to the GoM that it can access funds in cases where the company does not meet its obligations.<sup>354</sup>

iii) Community development

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<sup>349</sup> Extractive Industries Transparency Initiative Complaint countries list available at <http://www.eiti.org/countires>, accessed on 4 March 2014.

<sup>350</sup> G Hilson & R Maconachie 'Good Governance' and the extractive industries in sub Saharan Africa' (2009) 30 *Mineral Processing & Extractive Metall. Review*: 52.

<sup>351</sup> VCC comments op cit (note 308) at 19.

<sup>352</sup> Ibid.

<sup>353</sup> Ibid.

<sup>354</sup> Ibid.

It is now a common trend to ensure that the MNC develops the community.<sup>355</sup> There is not much in the agreement except the social responsibility assessment.<sup>356</sup> The mining operations need to include community consideration and development as a precondition. This guarantees the sufficient working of the project.<sup>357</sup> If this is not included it leaves a lot of room for PEL to escape its obligations. This clause is necessary because the communities themselves will directly influence it. The exclusion of this clause is a reflection of the GoM's failure to apply the principles of transparency and accountability as it failed to even to follow the minimal regulations it put in place for consultations to be done.

iv) Social impact assessment

These agreements should also include Social impact assessment, which are based on the assessments done in the social management place.<sup>358</sup> The company prepares this plan in consultation with the communities and government. - It gives a detailed outline of the company's plans to mitigate potential adverse economic and social impacts.

v) Compliance with human rights violations and corruption

There should have been a clause that specifically outlines how PEL would be monitored to prevent any violation of human rights and should it be found promoting corrupt practices. These would have ensured that the people of Malawi that live and work in the area of the project are protected.

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<sup>355</sup> Ibid.

<sup>356</sup> Ibid.

<sup>357</sup> Ibid.

<sup>358</sup> P Kamlongera op cit (note 314) at 385.

The fact that such clauses were not included is a reflection on the failure of the GoM to negotiate these contracts properly; it can also be attributed to the lack of information, capacity and bargaining power to effectively negotiate such contracts.

#### **4. Implementation of the agreement**

The implementation of agreement has demonstrated that it was concluded on terms that do not serve Malawi's development objectives. The clauses that were agreed upon should have been negotiated to promote these objectives. However they were not properly drafted because they fail to clearly outline what the company will do as its course of action and what mechanisms are in place to regulate the company. The unfairness in the terms agreed upon arises because they fail to meet these objectives. What makes them unfair is the content. The clauses in the agreement failed to balance the interest of the parties, they seem to favour PEL. The obligations that the GoM expects from PEL are not clearly outlined but those the GoM has to fulfil are more strict and detailed. The GoM had the opportunity to insist on better terms but it was the GoM actions at the time that led to such clauses being badly drafted. The negotiations of the agreement were done in secret, the GoM refused to provide parliament with details on the agreement and they disregarded the long term interests of community in Kayelekera.

At implementation is when the problems started to appear. There are no terms that deal with any '...potential adverse economic and social impacts on...' the community.<sup>359</sup> Implementation has revealed discrepancies in the agreement that will not produce sustainable development. The agreement

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<sup>359</sup> Ibid at 13.

does not comprehensively outline human rights and governance violations like corruption.<sup>360</sup>

In the agreement it was agreed that the government would collect revenues from the project in order to advance their development agenda. In the agreement Paladin got the following incentives; reduced corporate income tax rate, no resource rent tax, reduced royalties to 1.5 per cent amongst other tax incentives.<sup>361</sup> In comparison the GoM received a 15 percent stake in the project. So for the beginning the company is paying very little revenues than it should for such an agreement. At the negotiation the focus was on the revenues to make sure that the investor is attracted and kept interested. It was the GoM hope that this area would bring the most economical changes. Little attention was paid to the other areas like the environment and the social factors like labour and human rights.<sup>362</sup>

From the revenues it is estimated that Malawi has lost \$205 million since the project started operating and are set to lose a total of \$281 million over the next 6 years as the project has been running for 7 years.<sup>363</sup> This loss is felt in the lack of improvement in services and development in crucial sectors like health and communal development like schools.<sup>364</sup> The collection and monitoring of the revenues is not done properly. The existence of weak institutions is a part of the problem and so is the lack of transparency in the monitoring and collection of the revenues.<sup>365</sup>

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<sup>360</sup> Tilitonse final Report op cit (note 348) at 21.

<sup>361</sup> M Curtis & R Hajat 'Malawi's Mining Opportunity; Increasing Revenues, Improving legislation' 2.

<sup>362</sup> Ibid.

<sup>363</sup> Ibid at 3.

<sup>364</sup> Ibid.

<sup>365</sup> Ibid.

MNCs have the power in some instances to get the results they want and they can ensure that the government or the public will not obstruct their operations. PEL has made sure so far that the important areas or areas that are prone to probing and public criticism were drafted in its favour. MNC can also choose a particular legal system because they know that the laws do not regulate certain areas properly and with the issue of having weak governance and institutions there is a lot that will not be monitored.

## 5. The way forward

The GoM intends to enter into more EDAs because this development of mineral resources is part of its development agenda. It therefore needs to first update the current mining law to embody its development objective. The current law has too many gaps and loopholes.<sup>366</sup> The use of this law to negotiate future EDAs will not achieve social and economic development. The law fails to work with other laws to ensure that these issues ensure are comprehensively drafted in agreements with investors and the investors commit to as set of obligations that demonstrates careful consideration of these issues. The steps to amending the MMA have been slow and stagnant; the continued delays in this area will lead to more shortcomings in other EDAs the GoM plans on signing.<sup>367</sup>

Due to the in adequacy in this regard the MAA allows issues like corruption to fester and reduces transparency and accountability. The legislation should therefore be amended to reflect Malawi's development goals, there should be provisions of consultation with the public, the communities in which mining will take place must be compensated on a properly calculated scheme, there should be a commitment to protect these

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<sup>366</sup> PJ Kamlongera op cit (note 314) at 378.

<sup>367</sup> Ibid at 381.

communities and the laws and regulate the action of companies like PEL. So the emphasis should be on greater mineral resource management and governance and sustainable development through the enacting of law that reflects this commitment. An example of a country that has found a balance between attracting investors and maximizing benefits in mining to benefit the whole country is Botswana.<sup>368</sup> The law did away ministerial discretion, which has the tendency to encourage corrupt practices.<sup>369</sup> Other areas involved in mining were also updated like geological surveys; the institutions involved manage their duties because there has been a proper allocation of duties and responsibilities.<sup>370</sup> The government has managed to receive '...favourable terms...' from an agreement with De beers a South Africa company that mines diamonds.<sup>371</sup>

There should be greater emphasis in transparency from the initial stages of negotiation process to the collection and monitoring of revenues. This can happen with the amendment of the current mining laws. The GoM should really enforce its decision to make future contacts public and allow community participation. This will lessen confusion and the need to fabricate information like what happened with the confidentiality clause in the DA. There will be more information because the company will have to produce a report before it commences the project and this will be based on extensive consultations that have been monitored by the GoM.

An example is the Democratic Republic of Congo. The GoM should take lessons from Congo who insisted that several contracts it had concluded should be disclosed.<sup>372</sup> One of the agreements was between the government

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<sup>368</sup> IB Matshediso 'A review of mineral development and investment policies of Botswana' (2005) Resources Policy 30 203.

<sup>369</sup> Ibid at 205.

<sup>370</sup> Ibid.

<sup>371</sup> J Atsu Amegashie & I Kamara (200\* ' The Exceptionality of Botswana: Economics, Politics and Challenges' November 2008 ACET Working Paper no. 2

<sup>372</sup> Ibid at 12.

of the Democratic Republic of Congo and TenkeFungurume Mining. The GoM should also commit to make all other agreements signed with other companies public, where if it cannot it should outline justifiable reasons that should include the protection and advancement of national interest. The taxes that agreed upon should be reviewed in public consultation of stakeholders that would able to give a value input. Further steps should be taken to join the Extractive Industries Transparency Initiative, which lays out the standards that a country that wants to develop this sector should follow.

Malawi needs to create greater understanding for the negotiation of DA. Resources need to be put in the development of the process. There is a need to equip the negotiators with expertise and skills on how to handle such agreements. Further training needs to be done and external consultation from other countries and people in the field. The political leadership needs to commit to the development of this sector in the right way so sustainable development takes place. This therefore means that there should be a greater level of political detachment and separation of tasks. The creation of the Ministry of mining in 2012 was a good step but now this institution needs to be strengthened. The negotiators should be people who are there to further national interest for development and not to act as loyalists to the political leadership. An example is the agreement between National Transition government of Liberia and Mittal.

Malawi can take lessons from Ghana; the government signed an agreement with AngloGold Ashanti.<sup>373</sup> This company has been operating in an area called Obuasi.<sup>374</sup> The development that has been realized in the community of Obuasi is tremendous compared to the other cities in Ghana.<sup>375</sup>

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<sup>373</sup> ICMM report Ghana Case study (2007) 'The challenge of mineral wealth: using resource endowments to foster sustainable development' July 2007 18.

<sup>374</sup> Ibid at 23.

<sup>375</sup> Ibid at 48.

The reasons are that the company has committed to developing the area.<sup>376</sup> This is because the government has been able to regulate the company's operations in the country and to hold them accountable. This has been able to happen because the government was committed to the development of the sector by involving the public, aligning its development policy with the negotiation of the contracts and making the social issues one of the prominent issues in the contract. These are strategies from which Malawi can learn. The GoM cannot continue to view the NGO's as organizations that anti-development and the disregard the important of including the communities.<sup>377</sup>

## 6. Conclusion

The NMLRF in Malawi provide the basis on which EDA negotiations can be done. The problem however is that the current legislation does not properly outline Malawi's development objectives for mining, which is crucial. The problems in the legislation have led to loopholes and gaps that have added to the existence of weak institutions and accountability measures. Transparency and accountability have not been properly monitored and enforced and this has led to corruption in different parts of the negotiation process.

The policy that the government has drafted will assist the negotiators and the drafters of the new legislation. The new legislation for mining will then aid in shifting the focus from just acquiring revenues from the mining contract. It will assist the government in balancing its own interests and those of the investor. The new legislation will thus be able to regulate the MNCs that the GoM concludes contracts with. The clauses that will be drafted will

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<sup>376</sup> Ibid at 14.

<sup>377</sup> PJ Kamlongera op cit (note 314) at 381.



be in line with Malawi's development goals, which are what the GoM sets out to achieve when they negotiate such contacts.

The GoM/PEL agreement raised a lot of issues not only in terms of the legislation that was there at the time. The clauses that were drafted have revealed that the negotiation process can be influenced by other factors. The GoM was unable to negotiate and bargain for better terms because the legislation that the contract was supposed to be in line with was not adequate to reflect this. The environment that the contract was negotiated in was not conducive for such negotiations this problem is also attributed to the government's actions. The lack of concern for transparency, accountability and commitment to the separation of duties arose because the government chose to neglect them.

The failure to properly negotiate this contract is not entirely because of lack of negotiation skills and capacity. There was also a lot of influence from the political leadership. It is therefore important that the GoM updates the legislation in order to ensure that the contract that are negotiated with the legislation in mind achieve some reasonable gain for the people of Malawi as the contract is influenced by the mining legislation. In addition the government should respect the separation of duties that exist. The creation of the Ministry of mining is a good step. Institutions like this need to be strengthened in regulations with transparency and accountability measures.

## CHAPTER V

### CONCLUSION AND RECOMMENDATIONS

The aim of this dissertation was to analyse and critically discuss the factors that influence the negotiation of EDAs in Africa with a focus on Malawi as one of the countries that have signed such a contract. In order to achieve this there was need to understand of EDAs as private contracts concluded with the state. In doing so the progression of these contracts was done to explain how such contracts became to be known as EDAs. This was from the revision and restructuring that took place in the old concession contracts, which gave birth to various new forms of agreements that were used in different sectors of a country. These contracts are mostly used in the mineral resource sector. The term EDA is linked to the economic development these contracts seek to achieve as this is the primal focus of the contract. Thus the contract can still be based on the new concession system or any of the new agreements being joint ventures, production sharing contracts or service contracts. If they however have economic development as goals they will be called EDAs.

The conclusion of these contracts is based on several reasons, and the one of which is that most CRIMRs in Africa cannot finance the projects in the mining sector. A further problem, which has now arisen, is the negotiation of these contracts. The negotiation process is influenced by several factors and one of the prevalent factors that has been identified is the lack of adequate legislation that deals with the countries develop objective. The current trend when negotiating these contracts is the inclusion of provisions that deal with community development, the environment and human rights. Several CRIMRs like Botswana, Ghana and Tanzania have made this realization and the laws in their countries reflect this. The management and development of the mineral sector is a

long and hard process but these countries have shown their commitment through the enactment of such legislation.

Legislation is only one of the factors that influence the negotiation process. Most CRIMRs have weak institutions, these fail to manage the sector properly because they do not have enough resources. In the case studied weak institutions exist because proper governance in Malawi is weak. The political leadership further undermines the institutions during the negotiation process and this is one of the reasons why the institutions are weak. Those in high positions do not commit to providing capacity building measures to these institutions and then when the time comes to negotiate the EDAs they undermine the duties of the institutions. This then makes it difficult for such institutions to properly monitor and regulate the MNC.

The failure to regulate the MNC is also attributed to the fact there are no stringent laws that the MNC can be held accountable to which operations in the HC. The international framework that is available allows room for the MNC to make a choice not to comply or not. The MNC is also given room to get away with the basic minimum. This is something that PEL did in the DA. The GoM failed to also enact legislation or put in place measures that would regulate PEL behaviour in Malawi. The government could have done this by insisting on the clause that relate to Malawi's objectives to be drafted in detail. This would have ensured that they can easily hold PEL to its obligations and not allow the company to use the loophole they have found in the mining legislation as a strategy.

The mining legislation in Malawi is in need of revision if EDA negotiations are going to achieve sustainable results and to ensure proper

management of the sector. The existence of this legislation has failed to work with other areas that are affected by mining. This failure has meant that the regulation and accountability measures that were in place at the time were very weak. This is because the institutions are meant to administer such measures are weak as well. This then means that corruption and bribery take effect. The political intervention does not help the situation either. The existence of these factors comes from the fact the government does not give priority to the development and management of the sector; it does not allocate enough financial resources for capacity building and training of negotiators.

In addition within the negotiations there is also the problem of having little information; the company gave the geological information that the GoM had to them. This problem goes back to the issue of capacity. When then the negotiators start the negotiations they do so in an environment that does not help them to achieve results that will safeguard national interest. The environment created by the political leadership's interference did not help in the GoM/PEL negotiations. The existence of weak governance, institution, accountability measures and transparency added to this. This then means that the power the GoM had to negotiation was not strong, the capacity to do so was tilt in PEL's favour.

These problems are being realized now after the GoM has seen the problems that have been identified within the clauses of the agreement through the management of the project. Through the analysis of the DA it has been discovered that some of the problems were created in the negotiation process because this is where the parties met to discuss the terms. The GoM has now decided to improve the negotiation process of next agreements they sign by using external expertise, wider consultation with the public and proper assessment.

The new legislation will assist in building the sector because it will contain a balance between the need to development the sector for the nation and the desire to attract the investor. The concessions that Malawi will make will be based on its development goals and not unilateral action of the elite in government.

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