

An Overview of the Legal Regime Governing Minerals in Ethiopia

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Abstract

The contribution of the mining sector to the Ethiopian economy has been dismal. This situation is being reversed with the mining sector's contribution to the Ethiopian economy growing significantly in recent years reflecting the sector's potential to spur the economic growth of the country. Many factors including the legal reforms that have taken place over the last two decades played major roles for the growth of the mining sector's contribution to the Ethiopian economy. This article addresses the current legal framework governing minerals in Ethiopia. It examines the extent to which the laws try to strike a balance between rights of investors and the public interest with a particular focus on social and environmental considerations. The overall examination and analysis reveals that while the legal reforms have undergone substantial transformation to allure investors in the sector, some problems related to implementation of rights and obligations remain a concern. Moreover, social and environmental considerations are also poorly addressed.

Key Words: Ethiopia, Minerals, Licenses, Mineral Taxes, Social and Environmental Considerations

Introduction

Though mining investments provide significant economic opportunities, they also pose immense challenges for investors as well as host states. While investors may be rewarded with huge economic benefits upon successful discovery of minerals, they may not be able to reap such perceived profits due to risks such as geological, commercial and regulatory ones, among other things. Moreover, for effective and efficient utilization of mineral resources companies in the extractive industry need huge capital as well as sound and up-to-date technology. Hence, investors assume high risk in the sector and would decide to invest when there is a legal framework that provides sufficient guarantees and protection to their investment apart from geological,

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commercial and other considerations that would be taken into account by potential investors.

Mining investments have also the potential to spur economic growth of a country. That is one of the major reasons why many countries are keen to attract investors engaged in mining investments. As a result, host states provide incentives, protection and guarantees for mining investments. However, due to adverse social, economic and environmental consequences of the mining industry, states too may not also be able to reap perceived advantages of mining investments. Thus, the biggest challenge of the mining industry is how to strike a balance between the need for promoting mining investments on the one hand and properly regulating them, on the other hand, with a view to minimize the adverse social, economic and environmental consequences so that a win-win outcome for both investors and host states can ultimately be achieved. Therefore, states have a daunting task of striking the necessary balance between rights of investors and the public interest.

With this view countries including Ethiopia have formulated different laws that are intended to ensure such a balance is struck. Ethiopia has been confronted with such challenges especially since opening the mining industry to private investments as early as the 1990s. This article intends to provide an overview on how the recent law on minerals enacted by the country tries to address some of the issues related to rights of investors on the one hand and the public interest at large on the other hand.

The article is structured as follows: the first section addresses some of the risks that investors and host states encounter in mining investments. The second section explores mineral opportunities in Ethiopia and the contribution of the sector to the Ethiopian economy. The third section is devoted to the legal regime governing minerals in Ethiopia. Finally, some concluding remarks are provided.

It is also important to note that laws governing mining investments in gas and oil are not covered under the Mining Proclamation and hence are not the subject of this article.

1. Risks in Mining Investment: General Overview

Mining investments, while presenting opportunities for investors and countries, pose significant risks. One of the biggest risks inherent in mining investment is geological risk.¹ Geological risk can be defined as “the likelihood and degree to which actual mineralization (its quantity and quality) differs from what is anticipated at the point a decision is made to undertake exploration or development.”² There is usually a huge discrepancy between what is anticipated and the actual discovery of minerals. In fact, only very few of mineral exploration efforts result in a discovery of significant mineral deposits.³ Furthermore, not all discoveries will also develop into mineral production. Only few out of the many mineral discoveries result in mineral production.⁴

Commercial risks are also other important concerns for investors engaged in mining investments. Every investor wants to make sure that the discovered minerals are commercially feasible to undertake mineral development. Not all discovered minerals are commercially feasible to mine since such investments usually require huge financial and capital expenditure. Hence, production cost, other transaction costs, mineral price instability, availability of foreign currency, exchange rates would be important considerations to determine the extent of the commercial risk involved in a mining venture.⁵

Regulatory changes are other risks that investors may face during any stages of mining investments. Legislative surprises that adversely affect rights

¹ Williams, J., ‘“International Best Practice” in Mining: Who Decides and How-And How does it Impact Law Development’, *Georgetown Journal of International Law*, Vol. 39, 2007-08, p. 694.

² Eggert, R., ‘Mineral Exploration and Mining: Risk and Reward’, (Paper prepared for the International Conference on Mining, ‘Staking a Claim for Cambodia,’ Cambodia, 2010), p. 2.

³ Hefferman, V., *Worldwide Mineral Exploration- Preparing for the Next Boom*, Financial Times Energy, London, 1998.

⁴ *Id.*

⁵ Kwabe, H., ‘How Can Mining Law Balance Public and Private Interests in the Face of Regulatory Change? The Fiscal Regime under the World Bank Strategy for African Mining 1992 and the ECOWAS Mining Directive 2009’. Available at: <http://ssrn.com/abstract=1654717> (Accessed on July 10, 2012).

of investors are important factors that are taken into account for investment decisions. The interference of the state on the anticipated right of investors through legislative surprises will have huge consequences on making profits from mining investments. Hence, a risk on stable regulatory framework has been one of the most important considerations for investment decisions.

The need for stable regulatory environment in mineral exploration and mining has been termed security of mineral tenure. Security of tenure is defined as the length of time for which an investor will have mineral rights.⁶ The rights of investors in mineral resources may, however, be interrupted or limited as a result of regulatory actions on the part of governments. Issues related to security of tenure, among other things, includes duration and right to renew prospecting and development of minerals, the linkage between right to explore and thereafter to mine, cancellation of exploration and mining rights, security against unlawful expropriation, and any other decisions of the government that can have an impact on the anticipated rights of investors.⁷

A security of mining rights has been considered essential precondition for investment decisions in mineral development.⁸ Investors entitled to secured and long-term mining rights would be encouraged to undertake investment in the mining sector.⁹ Of course, it has to be noted that the primary consideration of investors to make decisions is mineral potential and availability of infrastructure.¹⁰

States understand that these are some of the major considerations that are taken into account by investors. Accordingly, they try to minimize risks with a view to create conducive environment for mining investments.¹¹ This is

⁶ Dale, M., 'Security of Tenure as a Key Issue Facing the International Mining Company: A South African Perspective', *Journal of Energy and Natural Resources Law*, Vol. 14 No. 3, 1996, p. 299.

⁷ *Id.*

⁸ The World Bank, 'Strategy for African Mining', (World Bank Technical Paper Number 181, Africa Technical Department Series, Mining Unit, Industry and Energy Division, the World Bank, Washington DC, 1992), p. 17.

⁹ *Id.*, p. 21.

¹⁰ *Id.*, p. 17.

¹¹ A state can play an important role in ensuring security of mineral tenure. A state has control over regulatory framework governing minerals. A state can create stable and long-term

because if there are successful mineral exploration and development, states would benefit from mining investment through job creation, development of infrastructure, raising government revenue which in turn can be used for improving education and health services and poverty alleviation.¹² Because there are no many mining companies which can satisfy the demands of all states, countries compete for attracting investors.

However, mining investments also pose risks for states. The potential for mining investment contributing for long-term environmental, social and economic welfare may be questionable if not harnessed in a way that can promote sustainable development. Mining investments do have such negative impacts as degradation of the local environment, displacement of local people, depletion of the environment, misallocation of revenues derived from mining, etc. Hence, for states the biggest challenge would be to grant sufficient incentives, guarantees and protections for investors without compromising the social, economic and environmental concerns. The main issue then becomes how to strike a balance between these two competing interests.

2. Mineral Resources in Ethiopia

Ethiopia is endowed with rich mineral resources.¹³ The country is believed to have excellent opportunities for investors looking to engage in the mining industry. However, the country's mineral resources remain largely unexplored.

mineral rights so that it can induce investors to locate their mineral investments in its territory. Apart from government's role in ensuring stable legal framework, governments can take appropriate measures to minimize commercial risks. A government may take appropriate measures on exchange rates, inflation, availability of foreign currency, and other measures that may minimize risks for investors. However, not all risks are controllable by the government. For instance, risks related to geological potential are beyond the control of a state.

¹² Eggert, *supra* note 2, p.1.

¹³ Embassy of the Federal Democratic Republic of Ethiopia in London *et al.*, 'Investing in Ethiopia' (A conference Paper presented at Ethiopian Investment, Trade and Tourism Promotion Forum, organized in partnership between the Embassy of the Federal Democratic Republic of Ethiopia in London, Africa Matters Ltd, Developing Markets Associates and Wafa Marketing and Promotion Plc.), 2011, p. 20.

In fact, the history of mining in Ethiopia dates back to ancient times when gold had been mined through traditional means.¹⁴ Though gold has been the most explored and developed type of mineral in Ethiopia, the country is also rich with other mineral resources. Minerals such as platinum, nickel, tantalum, copper, lead and zinc, phosphate, iron ore, and stones such as marble, granite and other coloured stones are discovered in the country.¹⁵ The country also hosts kaolin, diatomite, feldspar, quartz, silica sand, potash and soda ash.¹⁶ However, only few of these resources are developed and being mined.¹⁷ While gold is being mined on small as well as large scale levels, other minerals that are being developed are at a relatively small scale level.¹⁸

The participation of private companies in mineral development was virtually absent prior to the 1990s.¹⁹ With a shift of ideology towards a market-oriented economic policy, private companies started investing in the mining sector as of the 1990s. However, the number of private companies was few even after the introduction of the market-oriented economic policy. This started to change only recently when many international and local companies began mineral exploration and development activity. Hence, mineral potential of Ethiopia largely remains underexplored.²⁰

Be this as it may, it is believed that Ethiopia has huge mineral potential opportunities for investors looking to invest in the industry. Recent

¹⁴Ministry of Mines of the Federal Democratic Republic of Ethiopia, *Mining Journal*, 2011, p. 2.

¹⁵Ministry of Mines and Energy of the Federal Democratic Republic of Ethiopia, 'National Report on Mining to the United Nations Commission on Sustainable Development', New York, 2009, p. 2.

¹⁶ UK-Ethiopia Forum, 'Investing in Ethiopia', 2011, p. 20.

¹⁷ Ministries of Mines, *supra* note 14.

¹⁸Ministry of Mines and Energy, *supra* note 15, p. 2. Currently the largest gold development in the country is the Lege-dembi gold mine that is operated by Midroc-Gold, A private company. Other mineral developments undertaken at a small scale level include open pit mine of columbo-tantalite at Kenticha in the Adola belt, Soda ash at Lake Abiyata in the rift valley, Kaolin, quartz and feldspar from the Adola belt in southern Ethiopia by a government enterprise. For further details on the type of minerals and level of mining see Ministry of Mines and Energy, *supra* note 15, pp. 2-3.

¹⁹ Ministry of Mines, *supra* note 14, p. 11.

²⁰ Sinkinesh Ejigu (Minister, Ministry of Mines) in *Mining Journal*, 2011, p. 2.

discoveries of minerals are indicative of the fact that the country has the potential to offer investors with an opportunity to develop large amount of such resources. For instance, the Ethiopian National Mining Corporation has discovered the largest gold deposits to date.²¹ Nyota Minerals Limited(Ethiopia) also discovered gold deposits in the Tulu Kapi Area, South West Ethiopia, and is expected to become the second largest company in gold development after MIDROC Gold Ethiopia which is currently the only company engaged in the production of gold at large scale level.²² A Canadian based Allana Potash Resources has also discovered potash deposits in the Dallol Depression of the Afar region.²³

Furthermore, there are many other international and local companies that are currently engaged in mineral exploration or mineral development. Such companies include Aberdeen International Inc.(exploring for primary gold), ASCOM Mining plc (exploring for gold and base-metals), Stratex International (exploring for gold deposits), Ezana Mining Development plc, G and B Central African Resources Ltd and India's Saink Potash (both focused on exploration and development of potash resources).²⁴ The total number of international and local companies that are engaged in prospecting, exploration, and development of minerals has now surged to more than one hundred thirty.²⁵

Despite the country's potential of mineral resources, the overall contribution of the mining sector to the Ethiopian economy has been dismal

²¹See, 'Ethiopia Strikes Large Gold Deposits', The Africa Report, 09 January 2012.

Available at: <http://www.theafricareport.com/East-Horn-Africa/ethiopia-strikes-large-gold-deposits.html> (Accessed on August 5, 2012)

²²'Nyota Minerals Seeks Gold Mining License', The Reporter, June 2011. Available at:

<http://www.thereporterethiopia.com/News/nyota-minerals-seeks-gold-mining-licens.htm>, (Accessed on August 10, 2012).

²³'Allana Potash discovers 1.2 billion tons of potash', The Reporter, June 2012. Available at:

<http://www.thereporterethiopia.com/News/allana-potash-discovers-over-12-bln-tons-of-potash.html> (Accessed on August 10, 2012)

²⁴Ministry of Mines, *supra* note 14, p. 4.

²⁵'Mineral Export Generates \$ 654 mln', Walta Information Center, 24 July 2012. Available at:http://www.waltainfo.com/index.php?option=com_content&view=article&id=4347:mineral-export-generates--654-mln-&catid=52:national-news&Itemid=291_ (Accessed on July 30, 2012)

until recent years. The overall contribution of the mining sector to the national economy has also been insignificant.²⁶ The GDP Contribution of the sector was lower than 1 percent a couple of years ago.²⁷ However, the sector's contribution is growing over the years. While the mining sector's contribution to the GDP was 0.6 percent in 2006, the sector's contribution to the GDP grew to 1.7 percent in 2011.²⁸ Even though the sector's contribution to the GDP is not yet significant, it has shown a rapid improvement registering almost a three-fold growth in just five years in terms of its GDP contribution.

The sector's contribution to foreign currency earnings has also been growing over the years. The amount of foreign currency earned from the export of minerals (such as gold, tantalite concentrate platinum, decorative dimension stones and gemstones) was on average \$ 135 Million from 2006 to 2008 constituting only 7-10 % of the total foreign currency earnings of the country.²⁹ However, this trend is changing in recent years. From July 2011 July 2012 (2004 E.C budget year), the country has earned \$ 654 million from the export of minerals such as gold, tantalum, platinum and gemstones- the lion's share of which was earned by artisanal miners.³⁰

Thus, there is a growing importance of the mining sector to the Ethiopian economy. In fact, last year (2004 E.C budget year) the contribution of minerals to foreign currency earnings of the country was second after agriculture. The mining sector also grew by 48 per cent in 2011 reflecting its significant potential to contribute to the Ethiopian economy.³¹ The government of Ethiopia is also keen to tap into the potential economic benefits of this industry. Its long-term objective is to enable the sector to contribute for

²⁶ Ministry of Mines and Energy, *supra* note 15, p. 7.

²⁷ Walta Information Center, *supra* note 25.

²⁸ African Development Bank *et al.*, 'African Economic Outlook 2012: Ethiopia 2012', Available at:

<http://www.africaneconomicoutlook.org/fileadmin/uploads/aeo/PDF/Ethiopia%20Full%20PDF%20Country%20Note.pdf> (Accessed on October 10, 2012).

²⁹ Ministry of Mines and Energy, *supra* note 15, p. 7.

³⁰ Walta Information Center, *supra* note 25.

³¹ African Development Bank *et al.*, *supra* note 28.

10 percent of the GDP.³² Moreover, according to the Growth and Transformation Plan of Ethiopia (GTP) (2011-15), it is envisaged that the mining sector's foreign currency earnings will increase by ten-fold at the end of 2015.³³

However, meeting such targets may not be easy. As mentioned in the first section of this paper, many factors are at play for promoting mining investment. One of such factors is the regulatory framework that is put in place in a country. The availability of conducive legal framework is essential to attract investors in the industry and thereby ensure that the projected contribution of the industry to the country's economy is met. To this effect, the country has recently introduced mineral proclamation in 2010 after several years of experimentation of previous laws governing the mining sector. The laws governing the mining sector in Ethiopia are addressed in the section that follows.

3. Minerals law in Ethiopia

3.1 Historical Background

The history of investment law in Ethiopia as incorporated in proper investment code dates back to the early 1960s. With a view to encourage investment of private capital, both from home and abroad, and with a desire to enact a special and comprehensive legislation, the Haileselassie regime came up with a Decree to Provide for the Encouragement of Capital Investment in Ethiopia in 1963.³⁴ The investment types subject to the code included mining, agricultural, industrial, transport and touristic investments.³⁵ This piece of legislation had incorporated incentives such as exemptions from income tax and customs duty for mining and other investment activities.³⁶ It is important

³² Ministry of Mines and Energy, *supra* note 15, p. 4.

³³ Ministry of Mines, *supra* note 14, p. 2.

³⁴ A Decree to Provide for the Encouragement of Capital Investment in Ethiopia, Decree No. 51 of 1963, *Negarit Gazeta, No.1,1963*.

³⁵ *Id.*, Article 3.

³⁶ *Id.*, Articles 5 and 6.

to note that investment laws in Ethiopia were enacted even before the 1960s. However, they were not incorporated in a comprehensive investment code but rather were scattered in different legislations.³⁷

In 1971 the Mining Proclamation of the Empire of Ethiopia was issued.³⁸ This was meant to formulate a separate mining legislation with a view to properly regulate mining investments. However, efforts to encourage mining investments were largely unsuccessful as limited exploration and development of minerals took place during the Imperial period.³⁹

With the coming to power of the Derge in 1974, the country adopted a policy which is fundamentally at odds with the idea of encouraging private investment to promote development. Accordingly, with the introduction of the Derge's socialist ideology, private properties were nationalized⁴⁰ and there was little room for any form of private investment.⁴¹

Following the downfall of the Derge, the country has devised different laws, strategies and incentives that were intended to foster private investment in the mining sector. These laws had to be revised time and again so that they would suit the ever changing environment in mining investments.

³⁷In the 1940s two proclamations, Proclamation No. 60/1944 and Proclamation No. 107/1949, were enacted to govern income taxes from businesses. Statement of Policy for the Encouragement of Foreign Capital Investment in Ethiopia was also issued (Notice No. 10, 1950 of Ethiopia).

³⁸Mining Proclamation of the Empire of Ethiopia, Proclamation No.282/1971.

³⁹Hundie Melka, 'The Extractive Industry in Ethiopia and Efforts Made to Join and Implement the Extractive Industries Transparency Initiative in Ethiopia (EITI)', (Paper presented to the Public Dialogue on Governance and Transparency in Extractive Industries and Natural Resource Management), (Ministry of Mines and Energy of the Federal Democratic Republic of Ethiopia, 2010), p. 7.

⁴⁰A proclamation to Provide for Government Ownership of Urban Land and Extra Houses, Proclamation No. 47/1975, *Negarit Gazeta*, Year 34, No.41.

⁴¹Private investment was limited to small industrial activities with a ceiling of US \$250,000 Capital, see Mulatu Wubneh in Ofcansky, T., and Berry, L., (eds.), *Ethiopia, a Country Study*, 4th ed., Washington, D.C. : Federal Research Division, Library of Congress, 1991, p. 115. Proclamation No.39/1975 of the Socialist Government of Ethiopia limited private sector's involvements in the mining industry to construction minerals like quarrying. The operation for metallic and industrial minerals was reserved for joint state and private investment whereas mining of precious metals, radioactive minerals, commercial scale salt production, and thermal power were exclusively reserved for the state. See Hundie, *supra* note 39, p. 8.

Accordingly, an investment proclamation to promote development of mineral resources, formulated under the auspices of the Transitional Government of Ethiopia, came into force in 1993.⁴² A minor amendment to this proclamation was made in 1996.⁴³ These laws were repealed by a new law which was issued in 2010. As far as taxes on incomes from mining operations are concerned, a mining income tax proclamation was issued in 1993⁴⁴ which was later amended in 1996.⁴⁵ A mining regulation was also issued in 1994 which was slightly amended later by Mining Regulations No. 27/1998 and Mining Regulations No.124/2006.

3.2 General Legal Framework on Minerals

The Ethiopian government has been exerting efforts to reform its legal regime so as to make it competitive enough to attract investment in the mining sector. As explained above, the laws have undergone several experimentations to conform to international best practice on mining.

Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution) is one of the laws that provide general principles on ownership and administration of minerals.⁴⁶ A new law dubbed ‘A Proclamation to Promote Sustainable Development of Mineral Resources’ (Mining Proclamation) issued in 2010 is another important piece of legislation that governs mining operations.⁴⁷ This proclamation repealed the Mining Proclamation of 1993 and its amendment (issued in 1996) and any other laws

⁴²A Proclamation to Promote the Development of Mineral Resources, Proclamation No. 52/1993. A mining Regulation was also issued in 1994. This Regulation, unlike the repeal of the 1993 Mining Proclamation, is still in force as far as it is consistent with the 2010 Mining Proclamation. See Council of Ministers Regulations on Mining Operations, Council of Ministers Regulations No. 182/1994 (hereinafter the 1994 Mining Regulation).

⁴³ A Proclamation to Amend the Mining Proclamation, Proclamation No.22/1996.

⁴⁴ A Mining Tax Proclamation, Proclamation No. 53/1993.

⁴⁵ Mining Income Tax (Amendment) Proclamation, Proclamation No. 23/1996.

⁴⁶Constitution of the Federal Democratic Republic of Ethiopia, Proclamation of the Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, *Federal Negarit Gazeta*, Year 1 No.1, (1995).

⁴⁷A Proclamation to Promote Sustainable Development of Mineral Resources, Proclamation No. 678/2010. (Hereinafter Mining Proclamation).

which would contradict the proclamation in matters governing mineral resources.⁴⁸ However, the 1994 Mining Regulation was allowed to take force provided that it is consistent with the 2010 Mining Proclamation and until such time that it is replaced by another regulation.⁴⁹ As far as income taxes from mining operations are concerned, they are governed by Mining Income Tax Proclamation of 1993 as amended. Hence, basically these are the laws that mainly govern mineral resources in the country.

The FDRE Constitution and the Mining Proclamation provide that mineral resources existing in their natural conditions belong to the state and the people of Ethiopia.⁵⁰ The government with its obligation to deploy such resources for the benefit of the society acts as a custodian of such resources on behalf of the people.⁵¹

It is important to note that the government's general policy direction is to encourage private investment in the mining sector. However, this does not preclude the government in engaging itself in mining operations. The government has the right to undertake mining investments considered beneficial for overall economic growth either on its own or in joint venture with private investors.⁵²

The government may also acquire five percent equity participation without cost in small-scale or large scale mining operations.⁵³ Under the repealed mineral proclamation the equity participation of the government was ten percent⁵⁴ and the reduction of the equity participation to five percent under the existing legislation is meant to foster private mining investments and limit government's intervention in the private sector.

⁴⁸ Article 82(1) (2), Mining Proclamation.

⁴⁹ *Id.*, Article 82(3).

⁵⁰ Article 40(3), FDRE Constitution and Article 5 (1), Mining Proclamation.

⁵¹ Article 89, FDRE Constitution and Article 5(2), Mining Proclamation.

⁵² Article 8, Mining Proclamation.

⁵³ *Id.*, Article 70. The equity participation of the government may also be greater than five percent provided that any equity participation of the government above five percent can only be made by agreement between the government and the private investors.

⁵⁴ Article 44, 1993 Mining Proclamation. The ten percent equity participation of the government was, however, only for large-scale mining operations.

The 2010 Mining Proclamation governs operations of all minerals with the exception of natural gas and petroleum resources.⁵⁵ Thus, natural gas and petroleum resources are governed by special laws.⁵⁶

3.3 Federal and Regional Governments' Responsibilities in Regulating Mining Operations

While the federal government of Ethiopia is entrusted with formulating laws for utilization and conservation of mineral resources⁵⁷, regional states have the power to administer such resources in accordance with federal laws.⁵⁸ Regional states have also the power to levy and collect income taxes, royalties and land rentals from small-scale and artisanal mining operations.⁵⁹ The power to levy and collect income taxes and royalties from large-scale mining operations, on the other hand, is jointly exercised by both regional and federal governments.⁶⁰

Though the FDRE Constitution provides that federal and regional governments share power of taxation on revenues from large scale mining, it does not specify the percentage share of federal government and regional states. The power to determine the share of both federal and regional states on revenues from large scale mining is vested on House of Federation (HoF) as provided under Article 62(7) of the FDRE Constitution. The formula set by the House of the Federation on concurrent power of taxation on minerals may become controversial in different occasions as there is no formula in the FDRE Constitution and hence is subject to revision by the HoF itself.

⁵⁵ Article 2(19), Mining Proclamation.

⁵⁶ See Petroleum Operations Proclamation, Proclamation No. 295/1986; A Proclamation to Provide for Payment of Income Tax on Petroleum Operations, Proclamation No.296/1986; and its amendment-Petroleum Operations Income Tax Amendment, Proclamation No.226/2000, *Federal Negarit Gazeta*, 7th Year No.8 (2000).

⁵⁷ Articles 51(5) and 55(2)(a), FDRE Constitution.

⁵⁸ *Id.*, Article 52(2)(d).

⁵⁹ *Id.*, Article 97(8).

⁶⁰ *Id.*, Article 98(3).

According to the current formula, the Federal Government has 40 per cent share of mineral taxes while the rest goes to regional governments.⁶¹

As far as the licensing power is concerned, regional states have the power to issue the following licenses: artisanal mining license; reconnaissance, exploration and retention licenses with respect to construction and industrial minerals; and small scale mining licenses for industrial minerals and small and large scale mining licenses for construction minerals.⁶² The federal government has the power to issue reconnaissance, exploration, retention and mining licenses other than those to be issued by a state licensing authority.⁶³

As Article 52 of the Mining Proclamation reveals, regional states can only issue licenses for domestic investors while issuing licenses for foreign investors is within the exclusive jurisdiction of federal government. Moreover, as the cumulative reading of Article 52(1) and (2) of the Mining Proclamation reveal, large scale mining for industrial minerals and any licenses for metallic, precious and semi-precious minerals⁶⁴ except artisanal mining license are also within the exclusive jurisdiction of the federal government.

3.4 Mineral Licenses

The law states that any person may not be engaged in mining operations without first securing a mining license from the relevant government body.⁶⁵

⁶¹Tadesse Lencho, 'The Ethiopian Tax System: Excesses and Gaps', *Michigan State International Law Review*, Vol. 20, 2012, p. 330.

⁶²Article 52(1), Mining Proclamation. Article 2(11) defines industrial mineral as 'any mineral directly or indirectly used as industrial input such as kaolin, bentonite, quartz, coal, limestone, gypsum, pumice, clay and graphite.' Article 2(3) also defines construction mineral as 'any mineral directly or indirectly used as input for construction purposes such as marble, granite, limestone, basalt, sand, aggregate, ignimbrite and clay and includes any other non-metallic mineral designated as such by directives of the Ministry.'

⁶³ Article 52(2), Mining Proclamation.

⁶⁴Metallic minerals include iron, copper, zinc, lead, chromite, nickel and manganese (See Article 2(17) of the Mining Proclamation. Precious minerals are precious metallic minerals which include platinum, gold and silver or precious stones such as diamond, emerald, and sapphire (See Article 2(22) of the Mining Proclamation. Semi-precious minerals are gemstones used for jewellery such as opal, rhodolite, olivine, jadite and lazurite (See Article 2(34), Mining Proclamation).

⁶⁵ Article 7(1), Mining Proclamation.

However, there are two exceptions to this rule. First, a person who is a legitimate occupant of land may produce and use construction minerals from the land he occupies without a license provided that it should be for non-commercial purpose and does not infringe on the use of an occupant's adjacent land.⁶⁶ Secondly, an Ethiopian national is not required to have a reconnaissance license.⁶⁷

The Mining Proclamation provides six types of licenses. These are: a reconnaissance licence, an exploration licence, a retention licence, artisanal mining license, small scale and large scale mining licences.⁶⁸

Reconnaissance refers to an undertaking of general search for any minerals⁶⁹ and a license for such operation is granted when the work does not constitute of any geological activity that result in disturbance of the surface of the earth.⁷⁰ Exploration license, on the other hand, is granted for search of minerals that involve geological activity disturbing the surface or subsurface of the earth with a view to prove the existence of minerals or determine their economic feasibility.⁷¹

Retention license is granted for a person who managed to discover commercially exploitable minerals but such minerals cannot be mined immediately due to factors such as adverse market conditions, lack of technology, or any other economic factors.⁷² In other words, it is a license that entitles the discoverer, who is currently unable to mine such minerals, the right to develop the minerals in the future. However, such entitlement is temporary in the sense that such license may be revoked and such application may not also be granted if there is good reason to do so.⁷³

⁶⁶ *Id.*, Article 7(3).

⁶⁷ *Id.*, Article 7(5) .

⁶⁸ *Id.*, Article 9.

⁶⁹ *Id.*, Article 2(27).

⁷⁰ *Id.*, Article 16.

⁷¹ *Id.*, Article 2(8).

⁷² *Id.*, Article 23(1)(a) and (b).

⁷³ According to Article 23(2) of the Mining Proclamation the Licensing Authority may refuse to grant a retention license if it is established that: the required processing technology is available and the mineral deposit can be mined profitably; if it believes that granting of such

Artisanal mining license is granted to individuals and cooperatives whose mining operation is carried predominantly through manual nature and without the involvement of employed workers.⁷⁴ In other words, artisanal mining license is granted where advanced methods are not required to undertake the mining operations. That is why the law provides that artisanal mining license can be revoked where it is proved that the proper exploitation of the mineral deposits require advanced exploration and mining methods.⁷⁵ However, the licensing authority should give preference to the previous licensee if it can be proved that the licensee has the necessary financial and technical resources to undertake the required mining operations.⁷⁶

Small-scale and large scale mining operations are relatively undertaken by advanced methods and each is distinguished based on the size or amount of mining operations undertaken annually.⁷⁷ Mining operations beyond the size or amount designated for small-scale operations as stipulated under 2(35) of the Mining Proclamation are large-scale mining operations.⁷⁸ Both mining operations relatively require advanced technical ability and better financial resources.

While reconnaissance and exploration licenses are granted for activities aimed at searching for minerals, artisanal, small-scale and large-scale mining licenses are granted for activities directed at extracting already discovered

license may prevent fair competition; and if it believes that it would lead to the concentration of mineral resources in the hands of the applicant.

⁷⁴ See Articles 2(2) and 32, Mining Proclamation.

⁷⁵ *Id.*, Article 32(5).

⁷⁶ *Id.*, Article 32(6).

⁷⁷ Article 2(35) of the Mining Proclamation defines 'small scale mining' as any mining operation of which the annual run-off mine ore does not exceed:

- a) regarding gold, platinum, silver and other precious and semiprecious minerals: (1) 100,000m³ for placer operation; (2) 75,000 tons for primary deposit mining; b) regarding metallic minerals such as iron, lead, copper and nickel: (1) 150,000 tons for open pit mining; (2) 75,000 tons for underground mining operation;
- c) 120,000 tones for industrial minerals such as kaolin, bentonite, diatomite, dolomite, quartz and coal; d) regarding construction minerals: (1) 80,000 m³ for sand, gravel, pumice, ignimbrite, clay and the like; (2) 10,000m³ for dimension stones such as marble and granite;
- (f) 14,000 tons for salts extracted from brines.

⁷⁸ Article 2(12), Mining Proclamation.

mineral deposits.⁷⁹ Hence, a holder of a reconnaissance or an exploration license, if he is successful in the discovery of minerals, should apply to get either an artisanal, small-scale or large-scale mining license as the case may be.

However, it is important to note that a non-citizen of Ethiopia or any other group of people not registered as a cooperative society in accordance with the relevant law cannot be granted an artisanal mining license.⁸⁰ In other words, it is only Ethiopian nationals or cooperative societies registered under law that are eligible to get artisanal mining license. Thus, foreign nationals are entitled to get reconnaissance, exploration, and retention licenses and small-scale and large-scale mining licenses but not artisanal mining license. Article 11(2) of the Mining Proclamation provides that applicants for artisanal mining should not be required to prove the existence of financial resources and technical competence. This provision is also indicative that foreign nationals are not eligible to get such a license since foreign nationals are always required to allocate foreign capital to be able to engage in mining investment.⁸¹

Applicants should meet the conditions specified under the law so that they would be granted licenses.⁸² For instance, According to Articles 26(1) and 28(1) of the Mining Proclamation applicants for small-scale and large scale mining licenses should submit proposed work programme, any evidence that the applicant has access to financial resources, proof of technical ability and an approved environmental impact assessment apart from other requirements stipulated under the Mining Regulation.

A holder of exploration license, in the event that he discovers commercially exploitable minerals, has the prior right to apply for developing such minerals or retention license and be granted such a license.⁸³ Such

⁷⁹ *Id.*, Articles 2(18) and 2(20).

⁸⁰ *Id.*, Article 11(3)(c).

⁸¹ *Id.*, Article 2(9) .

⁸² For further details on the conditions, see Articles 11, 12, 16, 18(1), 23, 26(1), 28(1) of the Mining Proclamation and Article 3, 4 and 5 of the 1994 Mining Regulation.

⁸³ Article 20(1) (a) and (b), Mining Proclamation.

application may only be refused if the applicant fails to meet certain conditions such as proof of access to financial resources and technical ability.

Even though the law has conferred applicants the right to be granted a license upon meeting the conditions stipulated under the law, the implementation of such right has been marred by some problems. Ethiopia's Ministry of Mines suspended accepting any applications for mineral exploration in November 2011.⁸⁴ The justification behind such suspension is the country needed time to evaluate and regulate the companies already in the sector before letting new companies in.⁸⁵ Hence, the problem arose due to the Ministry's need to clear the piled up applications and lack of enough number of professionals to process applications.

Even though Minister of the Ministry of Mines promised that the suspension was temporary and that it will eventually be lifted,⁸⁶ it has already been more than a year since the suspension was introduced. Potential investors in the mining sector may be wary of filing mineral exploration applications in Ethiopia as the current situation casts some serious doubts on the implementation of rights of applicants of mineral exploration. This is a worrying sign for a country that strives to lure investors in the sector and to ensure mining investments serve as a catalyst for the economy. Even when the Ministry's decision to put a stay on new applications is based on good causes, it does have the potential to frustrate investors eyeing Ethiopia as an investment destination. Hence, serious efforts are required to solve the current problem once and for all and to make sure that similar problems do not arise in the future.

The licenses discussed above have different duration of validity period. A reconnaissance license is valid for a maximum of eighteen months and shall not be renewed afterwards.⁸⁷ Exploration license can be valid for a maximum

⁸⁴'Ethiopia Says Stay on Mining License is Temporary', Reuters, 16 December 2011.

Available at : <http://www.reuters.com/article/2011/12/16/ethiopia-gold-idUSL6E7NG2GH20111216> (Accessed on July 20, 2012)

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Article 17(1) and (2), Mining Proclamation.

period of three years and unlike a reconnaissance license, it can be renewed twice for a maximum period of one year each.⁸⁸ Likewise, a retention license would be valid for a period not exceeding three years. However, a retention license can only be renewed once for a maximum period of three years.⁸⁹ Artisanal mining license may also be valid for a period not exceeding three years and can be renewed twice for three years each.⁹⁰

Unlike the other types of license, small-scale and large-scale mining license may be renewed indefinitely. It is important to note that the validity of such licenses shall not be longer than ten years and twenty years for small-scale and large-scale mining respectively.⁹¹ Small-scale and large scale mining licenses may be renewed each for a maximum duration of five years and ten years respectively⁹² but they can be renewed even further without any limitation on the frequency of renewal. This confers investors of the right to continue their mining operations without any limit on the frequency of license renewal. Such rights are important to promote mining investment as they provide guarantee to investors that their investments may not be discontinued without good cause. Such security of mineral tenure is important to boost the confidence of investors which in turn would help the country to be a favourable destination for investors.

Mineral rights may be suspended when it is believed that the activity of the licensee is to likely cause danger to the local community, the environment and employees of the licensee with the condition that suspension is the only remedy available under the prevailing circumstances.⁹³ Licenses may also be revoked due to grounds mentioned under Article 44(2) of the Mining Proclamation.⁹⁴ However, the Licensing Authority has the duty to give notice

⁸⁸ *Id.*, Article 19(1) and (2).

⁸⁹ *Id.*, Article 24.

⁹⁰ *Id.*, Article 32(3) and (4).

⁹¹ *Id.*, Articles 29(1) and Article 27(1).

⁹² *Id.*, Articles 29(2) and 27(2).

⁹³ *Id.*, Article 44(1).

⁹⁴ The grounds to revoke a license include: Failure to comply with the financial obligations prescribed in the Mining Proclamation; conducting mining operations in a grossly negligent or willfully improper manner; breach of any material term or condition of a license, failure

in writing before taking action on suspension or revocation of licenses. The notice should specify the grounds for considering suspension or revocation, or direct the licensee to take measures to remedy any contravention or breach and the date the licensee is willing to submit any matter in writing that may prevent suspension or revocation.⁹⁵

Any person whose application for exploration or exploitation has been rejected or any licensee whose license has been suspended or revoked can appeal to officials of the Licensing Authority in order of their hierarchy.⁹⁶ The person aggrieved by the decision of the Authority may also apply to the competent court provided that all administrative remedies are exhausted.⁹⁷

3.5 Mining Income Taxes, Royalties and other Charges

The income tax on mining operations is governed by the 1993 Mining Income Tax Proclamation as amended. The income tax for large-scale mining operations was 50 percent under the 1993 Mining Income Tax Proclamation. However, Mining Income Tax Amendment Proclamation issued in 1996 reduced the income tax from 50 percent to 35 percent with a view to make the fiscal environment favorable to investors.⁹⁸ While there is a significant reduction of the income tax rate in comparison with the previous law, the rate is not lower than the average mining income tax rate of African countries. It is

to conduct mining operations in accordance with the work programme; breach of the approved environmental impact assessment, and safety and health standards; submission of false or fraudulent information in connection with any matter required to be submitted under this Proclamation, regulations or directives; failure to maintain complete, accurate and current books and records or other documents or materials required or failure to file reports or other documents or failure to give notices required; or failure to grant a duly authorized official of the Licensing Authority access into the license area, the area covered by a lease or to any other site or premises of the mining operations or to his books, records, other documents or materials, or failure to carry out a lawful order or instruction of such official.

⁹⁵ Article 44(3), Mining Proclamation.

⁹⁶ *Id.*, Article 79(1).

⁹⁷ *Id.*, Article 79(2).

⁹⁸ Article 3(1), Mining Tax Proclamation, Proclamation No. 53/1993 as amended by Mining Income Tax (Amendment) Proclamation No.23/1996.

slightly more than the African average. The average corporate income tax in Africa which applies to the mining sector is approximately 32%.⁹⁹

The 35 percent income tax as enshrined in the Mining Income Tax Proclamation is applicable only for large-scale mining operations. As the federal government does not have the constitutional right to determine the rate of income tax for artisanal and small-scale mining, such tax rates are fixed by the laws of each regional state.¹⁰⁰

Another form of payment required from investors in the mining sector is royalty. Royalty refers to payment by investors to the government just for producing minerals from any given mineral production site and the percentage share of such payment is determined by excluding the price of production and risk expenditures.¹⁰¹ Currently, the rate of royalty payment for large-scale mining operations ranges from 2 percent to 8 percent applicable for different types of minerals.¹⁰² The royalty rate for precious minerals is 8 per cent. In comparison with many African countries, Ethiopia's royalty rates in particular the royalty rate for precious minerals are high. The average royalty rate on the African continent stands at 4 per cent.¹⁰³ For instance, Ghana's royalty rate for gold is 5 per cent (amended from 6 %), Tanzania's 4 per cent, Botswana's 5 percent, Morocco's 3 per cent, Central African Republic 3 percent, and Gabon's ranges from 4 to 6 per cent.¹⁰⁴

Ethiopia's royalty rates have shown an increment from the royalty applied in the previous law which ranged from 2 percent to 5 percent.¹⁰⁵ The changes

⁹⁹ Gajigo, O., *et al.*, 'Gold Mining in Africa: Maximizing Economic Returns for Countries', African Development Bank Group Working Paper Series, 2012, p. 19.

¹⁰⁰ Article 65(2), Mining Proclamation.

¹⁰¹ *Id.*, Article 2(32). There is no definition of what may constitute risk expenditure under the Mining Proclamation. In its ordinary meaning, risk expenditure usually includes market risks of loss that may emanate from changes such as raw material prices.

¹⁰² *Id.*, Article 63(2). Royalty for precious minerals stands at 8 percent, semi-precious minerals 6 percent, metallic minerals 5 percent, industrial minerals 6 percent, construction minerals 3 percent, salt 4 percent and geothermal 2 percent.

¹⁰³ Gajigo, *supra* note 99, p. 18.

¹⁰⁴ *Id.*, p. 20.

¹⁰⁵ Article 34, Mining Regulation. This provision is now amended by the Mining Proclamation. The repealed law provided a 5 percent royalty rate for precious minerals, 3

in the royalty rates might have been made due to the constant price increases of especially precious minerals under international market and hence the government's interest to vie for a fair share of the revenues from mining investments.

Increasing tax rates when there is mineral price boom is a practice common in some countries. For instance, countries such as Zambia were under enormous pressure to review the mining contracts with companies while prices boomed.¹⁰⁶ In Tanzania too, with a promulgation of a new Mining Act in 2010 a sharp increase in the royalty rate was introduced.¹⁰⁷ A tendency to vie for a greater share of revenue at a time of mineral price boom is not peculiar to developing countries. Developed countries such as Austria and Norway have also revised their tax regimes on mining with a view to capture greater share from their respective mining sectors.¹⁰⁸

However, such fiscal regime instability has its own risks. The revisions of tax rates may bring about a reputational risk which ultimately makes the countries less attractive for mining investment.¹⁰⁹ To deal with such adverse consequences of tax rate increment, some countries incorporate stabilization clauses in their laws.¹¹⁰ For instance, Ghana's law on mining allows the incorporation of stabilization clauses in mining contracts with regard to the payment rates of royalties, taxes, fees and other fiscal imports.¹¹¹ It means

percent for metallic and non-metallic minerals including construction minerals and 2 percent for geothermal deposits and mineral water.

¹⁰⁶ Barma, N., *et al.*, *Rents to Riches?: the Political Economy of Natural Resources-Led Development*, the World Bank, Washington DC, 2012, p. 118. Zambia was under pressure from civil society organization and communities to review the mining contracts.

¹⁰⁷ *Id.* With the mining sector significantly playing a role in the economy of Tanzania, electoral politics was the main factor for the change of the law. President Kikwete promised and initiated for a change of the mining laws that finally brought about a new mining code in 2010.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Stabilization clause refers to a provision in a law or contract stipulating that subsequent legislations would not affect rights and advantages granted to investors under a previous law or contract.

¹¹¹ See Article 48, Minerals and Mining Act of Ghana (Act 703 Ratified in March 2006). See also Rutherford, L., & Ofori-Mensah, M., 'Ghana's Mining Code: in Whose Interest',

that when a government increases the royalty rates by a subsequent legislation, the new rates would not apply for companies that are already in operation. However, the mining legislation limits the duration of such privilege to mining companies for 15 years.¹¹²

Ethiopia's Mining Proclamation does not incorporate provisions allowing for stabilization clauses for royalty and income taxes. In the absence of a law that authorizes the government to enter into contracts containing stabilization clauses, it appears that the government cannot conclude a mining contract containing such a clause. Even when the government does so in the mining contracts, under Ethiopia's legal framework, a subsequent legislation would prevail over the mining contracts.

Whether stabilization clauses should be included in mining laws or contracts has been a subject of controversy in the mining investment discourse. There are some who see such commitments as necessary to ensure a long term financial commitments by companies.¹¹³ On the other hand, such commitments are viewed as problematic as they do not allow countries to increase their revenues in proportion to some of the unprecedented price hikes in minerals.¹¹⁴ Moreover, with a significant price rise, royalty rates have insignificant burden on mining operations.¹¹⁵ Hence, the variation of royalty rates during mineral price hikes may not have a significant impact on the operation and decision to invest.

The Ethiopian law in this regard arguably follows the right approach. Such an approach would give the country an opportunity to take advantage of any unprecedented mineral price increases without significantly affecting the actual mining operations and potential mining investments. However, there has to be a room for flexibility that allows the government to reduce the royalty rate in case there is a significant mineral price reduction in the world

Governance Newsletter, *A Publication of the Institute of Economic Affairs, Ghana*, Vol.17, No. 7, 2011, p. 5.

¹¹² Article 48, Minerals and Mining Act of Ghana.

¹¹³ Rutherford & Ofori-Mensah, *supra* note 111.

¹¹⁴ Ayee, J., *et al.*, 'Political Economy of the Mining Sector in Ghana', the World Bank Policy Research Working Paper, WPS5730, 2011, p. 10.

¹¹⁵ Gajigo, *supra* note 99, p. 25.

market. In fact to avoid any abuse, the law should provide a minimum rate that prohibits making deals for a rate that is below the minimum threshold.

With regard to royalty rates for small-scale and artisanal mining, the Mining Proclamation provides that the rates are to be determined by the respective regional states.¹¹⁶ This law is simply affirming the constitutional right of states to collect income taxes and royalties from artisanal and small-scale mining operations. As mentioned earlier, regional states in Ethiopia have the exclusive jurisdiction over levying and collecting income taxes and royalties from artisanal and small-scale mining operations.

Any mineral licensee shall also pay surface land rentals in accordance with the rates fixed by regional state laws.¹¹⁷ When the rates of land rentals are revised, the new rates will not be applicable to licenses issued before the revision.¹¹⁸

3.6 Mining Incentives and Guarantees

The overall benefits of incentives are to boost investments, from home and abroad, and in turn ensure that such investments play an important role to promote development objectives of a state through job creation and other positive externalities that would come along with increased investment.¹¹⁹ More specifically, incentives can be used to achieve some targeted objectives. They can be used to promote regional development through encouraging investors to locate their investment in a particular area or region.¹²⁰ Incentives may also be employed to promote export, job creation, skills, training, and domestic value addition, and transfer of technology.¹²¹

On the other hand, incentives by their nature represent revenue costs. First, incentives may not be able to attain the very goal many developing countries

¹¹⁶ Article 63(3), Mining Proclamation.

¹¹⁷ *Id.*, Article 68(1).

¹¹⁸ *Id.*

¹¹⁹ James, S., 'Incentives and Investments: Evidence and Policy Implications', The World Bank Group, 2009, p. 3.

¹²⁰ United Nations Conference on Trade and Development, 'Tax incentives and Foreign Direct Investment: A Global Survey', UNCTAD/ITE/IPC/Misc.3, 2000, p. 12.

¹²¹ *Id.*, p. 13.

are eager to achieve i.e. attracting investment. The majority of evidence is skeptical of the role of incentives in attracting investment.¹²² In many developing countries incentives have brought about serious revenue losses while the corresponding perceived advantages of incentives did not materialize.¹²³ Moreover, if incentives are granted to investments that would have been made even in the absence of incentives, the revenues that are foregone by governments become only costs as the revenue sacrifice is made unnecessarily.

Be this as it may, both developed and developing countries have continued to use incentives though to a different degree. This situation has brought about competition especially among developing countries as they are keen to attract capital.

Ethiopia has also provided different types of incentives for mining investment with a view to attract investors and enable the sector to play its role in spurring the economic growth of the country. One of the types of incentives provided under the Ethiopian law is exemption from customs duties and taxes. Any equipments, machineries and vehicles imported by holders of exploration license, small-scale and large-scale mining licenses are exempted from customs duties and taxes.¹²⁴ However, holders of artisanal mining license and holders of any construction minerals mining license are not eligible to exemption of import taxes and duty free materials.¹²⁵

The exemptions are not granted throughout any stages of small-scale and large scale mining operations because Article 73(2) of the Mining Proclamation reveals that the materials to be exempted from customs duty and taxes should be necessary to start mining operations. Once a mining operation

¹²² Barbour, P., 'An Assessment of South Africa's Investment Incentive Regime With a Focus on Manufacturing Regime', ESAU Working Paper 14, Overseas Development Institute, 2005, p. 6.

¹²³ Holland, David and Vann, Richard, Income Tax Incentives for Investment, in Thuronyi, Victor (ed.), *Tax Law Design and Drafting*, volume 2; International Monetary Fund: 1998.

¹²⁴ Article 73(1) and (2), Mining Proclamation. Equipments, machineries, and vehicles imported by contractors of the holders of the licenses are also exempted from payment of customs duties and taxes.

¹²⁵ *Id.*, Article 73(6).

is began no exemption will be allowed unless the license holder decides to undertake major expansion on his mining investment. If a holder of small-scale or large-scale mining license decides to make major expansion, equipments and machineries needed for such expansion would be exempted from customs duties and taxes.¹²⁶

Consumables may also be imported free of customs duty and taxes by a holder of exploration license during anytime of its operation while holders of small-scale and large scale mining license holders may only do so to start and sustain commercial production of minerals for three months.¹²⁷

Other types of incentives in mining investments include reinvestment deduction and losses carry forward. Any licensee who pays mining income tax is also entitled to deduct each accounting year a non-taxable amount equal to 5 percent of gross income provided that such licensee reinvests the deducted amount.¹²⁸ However, such amount shall be subject to taxation if the licensee fails to reinvest the capital.

Moreover, the law encourages mining investors through what is known as losses carry forward. Loss carry forward is an accounting principle that allows the transfer of current year's net operating losses to future year(s) profits with a view to reduce tax liability for an investor or a business person. In Ethiopia, financial losses incurred by investors engaged in mining investment may be

¹²⁶ *Id.*, Article 73(4). The Ethiopian investment law also provides exemption from payment of export taxes. Minerals produced and exported by holders of artisanal, small-scale and large-scale mining are also exempted from export taxes and customs duties. The objective of such incentive may be to promote export of such minerals and thereby earn a much needed foreign currency to the country. Moreover, it may also be to enable exporters from Ethiopia to be competitive enough at the international market. However, it is important to note that as virtually all products exported from Ethiopia are exempted from payment of export taxes, such advantage granted to investors in the mining sector may not necessarily be considered as an incentive proper.

¹²⁷ *Id.*, Article 73(1) and (3). Article 2(4) of the Mining Proclamation provides that "consumables" are anything needed for mining operations that are expendable and replaced during service including chemicals and those the Ministry of Mines may designate as consumables.

¹²⁸ Article 9(1), Mining Income Tax Proclamation. If such amount is not reinvested, it will be included in the gross income of the subsequent accounting year and hence will be taxable in the subsequent accounting year.

carried forward and deducted from gross income in the subsequent ten accounting years.¹²⁹

The duration of losses to be carried forward for minerals is similar with the duration that is allowed for petroleum resource investments.¹³⁰ However, the duration of losses carried forward for other types of businesses is three years provided that during the life span of any business losses can only be carried forward for a maximum period of six years.¹³¹ The reason why financial losses in mining investment are carried forward for longer years than other types of investments is related to the high financial and capital risks involved in mining investments. Such investments may incur huge financial and capital losses in a given accounting year and may not be able to compensate such losses in a short period of time. The nature of the investment also requires expenditure of huge capital. This would in turn have adverse consequences on the very existence of the mining investments. This necessitates a longer period of losses carry forward for such investments.

Furthermore, small-scale and large-scale mining license holders that produce exportable minerals are entitled to retain a portion of foreign currency earnings subject to rules stipulated under directives issued by National Bank of Ethiopia.¹³² Foreign investors are also allowed to repatriate capital out of Ethiopia in convertible foreign currency. Foreign investors holding small-scale or large scale mining licenses can repatriate the following capital out of Ethiopia: Profits and dividends acquired from mining investment, principal

¹²⁹ Article 10(1), Mining Proclamation. Losses or damages to physical assets not covered by insurance may be deducted from gross income in the accounting year the loss occurred (Article 10(2)). For such losses to be deductible from gross income so that they would be non-taxable, they should not arise from penalties or fines.

¹³⁰ As per Article 14 of the Income Tax Proclamation on Petroleum Operations, a loss incurred by persons engaged in petroleum resources may be carried forward for a maximum of ten consecutive accounting years following the lapse of the year in which the losses occurred. See A Proclamation to Provide for Payment of Income Tax on Petroleum Operations, Proclamation No. 296/1986.

¹³¹ Article 28(1) and (3), Income Tax Proclamation, Proclamation No. 286/2002, *Federal Negarit Gazette*, 8th year No. 34.

¹³² Article 72(1), Mining Proclamation.

and interest on a foreign loan, payment from the transfer of shares or property and proceeds from the sale of mining enterprise.¹³³

The right of investors to repatriate capital under Ethiopian law is broad. In theory this should provide sufficient guarantees to investors as far as repatriation of their capital is concerned. As the ultimate goal of foreign investors is usually to make profits and repatriate such capital out of the host state, such right is instrumental in ensuring long term investment projects are made.¹³⁴ Hence, an otherwise investment environment would frustrate investors and will ultimately have the potential to stifle foreign investment in the mining sector.

Nevertheless, the right to repatriate capital may not be a right that is always translated into action whenever the request is made. There may be circumstances especially during economic crisis that force countries to put a stay on the request of investors to repatriate their capital even when under the law such right is absolute. This should not be viewed as breach of obligations because absolute right of repatriation cannot bind a state to honor such obligation if a state is in times of serious financial difficulties.¹³⁵

Under Ethiopia's Mining Proclamation and the BITs concluded by Ethiopia the right to repatriate appears to be absolute as the law does not provide restrictions on the exercise of such right provided that documents necessary to process repatriation application are presented to the National Bank of Ethiopia (NBE). According to the Directive of the NBE, the documents required to process profit repatriation application include: Extraction of the minutes of the Board of Directors or an equivalent body distributing the profit or declaring dividend; Copy of the usual closing financial documents duly audited by an independent third party auditing institution permitted to operate in Ethiopia; a letter recognizing the foreign investment; Photo-copies of tax receipts evidencing the payment of all taxes

¹³³ *Id.*, Article 72(2).

¹³⁴ Sornarajah, M., *The International Law on Foreign Investment*, 2nd edition, Cambridge University Press, 2004, p. 237.

¹³⁵ *Id.*, p. 239.

due to the government; and any other document of evidence that the Exchange Controller may require.¹³⁶

In practice investors face delays to exercise their rights to repatriate profits even though they are not denied repatriations.¹³⁷ Foreign investors sometimes face significant delays in the repatriation of capital as the NBE does not have enough hard currency to allocate to their requests.¹³⁸ This is especially so during serious financial stringency in the country. Therefore, even though there are legal assurances on the right to repatriate, the delays to exercise the rights emanating from shortage of foreign currency can be a source of uneasiness for investors looking to make long term investments.

The government may also provide other types of incentives which are not mentioned in the Mining Proclamation under certain circumstances.¹³⁹ This provision gives the government a flexibility to grant additional incentives for mining investments that may be considered more crucial to promote the development of the country.

¹³⁶ See the Consolidated Foreign Exchange Directives of the National Bank of Ethiopia. Available at: <http://www.nbe.gov.et/pdf/Consolidated%20Forex.pdf> (Accessed on June 12, 2012).

¹³⁷ Precise Consult International, 'Investing in Ethiopia: the Question of Capital Repatriation', Accessed from: www.ethiopiainvestor.com (accessed on Oct. 2012). 'When application for repatriation is made by foreign investors, the NBE gives the permit to repatriate usually without delay and proceeds to write a letter to commercial banks permitting payment. However, commercial banks that are presented with such letters do not provide foreign currency quickly to applicants because they are faced with shortage of foreign currency.' On the repatriation application process, see Precise Consult International, *Id.*

¹³⁸ U.S. Department of State, *2011 Investment Statement Climate- Ethiopia* (2011). Available at: <http://www.state.gov/e/eb/rls/othr/ics/2011/157275.html>. (Accessed on Nov. 12, 2012). It is also important to note that all foreign currency transactions are transferred through the NBE and Birr-the local currency is not freely convertible. This can make the transfer of foreign currency a bit difficult. To minimize such problems the law entitles investors that produce exportable minerals to retain a portion of foreign currency earnings to use them for settlement of transactions in foreign currencies. This right is subject to regulations issued by the NBE. See Article 72(1), Mining Proclamation

¹³⁹ Article 75(1), Mining Proclamation. Additional incentives and assistance may be provided by the government when there is reason to believe that some of the mining operations can help address immediate socio-economic problems of the country, to encourage consumption of local goods and to support cooperatives engaged in artisanal mining.

Apart from incentives which might induce investors to undertake investment activities in a host state, the guarantees available in a country play an important role in attracting foreign investments. Investors want to see that there are sufficient protections to their investment activities that ensure they are compensated in the event of lawful expropriation.

The Mining Proclamation, surprisingly enough, fails to incorporate provisions dealing with conditions and manner of compensation in the event that expropriation takes place. This may raise some concerns unless a guarantee for compensation against expropriation is given for investors in other laws or mining contracts. In fact, as per Art 40(8) of the FDRE Constitution, private properties will not be subject to expropriation unless there is a legitimate public interest. What is more, the Constitution provides that the expropriation has to be made against payment of compensation commensurate to the value of the property. It also provides that payment of compensation has to be effected in advance.

However, Art 40 of the FDRE Constitution uses the term ‘every Ethiopian citizen (Art 40(1)) and ‘every Ethiopian’ (Art 40(7)) in specifying persons whose properties are protected. Such terminology may bring about some academic controversy. It may be interpreted that properties of foreign nationals, while protected under other laws, are not given due protection under the FDRE Constitution since the provision makes express reference to Ethiopian nationality.

On the other hand, it may also be argued that the reference to Ethiopian nationals in the provision does not exclude protection of properties of foreign investors who undertake business through legal persons (companies or entities). Ethiopian nationality is conferred not only on natural persons but also legal persons. Hence, this provision may refer to both natural and legal persons who have Ethiopian nationality. In this case, even though foreign natural persons may not have acquired Ethiopian nationality, the enterprise or the company they establish can be regarded as an entity that has Ethiopian nationality and be entitled to protection given under Art 40 of the Constitution.

Another problem regarding the issue of expropriation and compensation is the lack of a well-defined scope of expropriation in domestic legal instruments. While there is no clear indication as to the meaning of expropriation under the Constitution and the Mining Proclamation, the reading of the Amharic version of Art 40(8) reveals that the compensation is granted when a direct expropriation takes place.¹⁴⁰ It does not indicate that the same protection is accorded when a creeping or an indirect expropriation takes place.

A creeping expropriation “may be defined as the slow and incremental encroachment on one or more of the ownership rights of a foreign investor that diminishes the value of its investment. The legal title to the property remains vested in the foreign investor but the investor's rights of use of the property are diminished as a result of the interference by the state.”¹⁴¹ As direct expropriation is becoming increasingly less common¹⁴², currently creeping expropriations are viewed as a severe form of interference on investment undertakings. Therefore, even when we interpret the FDRE Constitution as providing appropriate compensation for expropriation of any private property, apparently it does not provide a protection for creeping expropriation. Hence, unless other instruments accord protection against creeping expropriation, there appears to be little room for compensation against creeping expropriation under the FDRE Constitution.

As explained above, the Mining proclamation does not also say on the issues of compensation in case of expropriation in general and creeping expropriation in particular. This is not to suggest that expropriation issues are not addressed in any legal instruments in Ethiopia. In fact, bilateral investment

¹⁴⁰ Direct expropriation constitutes the actual taking of property by a government by direct means which may comprise of the total loss or a portion of property. Direct expropriation takes place through a formal transfer of title or outright seizure. For further distinctions between direct and indirect expropriation See Subedi, S., *International Investment Law: Reconciling Policy and Principle*, Hart Publishing, 2008.

¹⁴¹ Reinisch, A., Expropriation, in Muchlinski, P., et al., (eds), *The Oxford Handbook of International Investment Law*, 2008, p.427 as quoted in Leon, P., ‘Creeping Expropriation of Mining Investments: An African Perspective’, *Journal of Energy and Natural Resources Law*, Vol. 27 No.4, 2009, p. 598.

¹⁴² *Id.*

treaties (BITs) concluded by Ethiopia have provisions dealing with expropriation and compensation. Because mining investments are within the scope of the meaning of investments as defined in all BITs signed by Ethiopia, provisions of expropriation and compensation as provided in these instruments have direct relevance for mining investment expropriation issues in Ethiopia.¹⁴³ So far Ethiopia has concluded more than 25 BITs and all the BITs have provisions that address expropriation issues in general and creeping expropriation in particular except Ethiopia's BITs signed with China, Malaysia, and Libya.¹⁴⁴

The BITs mainly use similar expressions to refer to direct and indirect expropriations. While some of them expressly use terms as 'direct or indirect measures' other employ phrases such as 'expropriations, nationalization or any other measure having the same nature or the same effect'.¹⁴⁵ These

¹⁴³ All definitions of the term Investment under BITs concluded by Ethiopia provide that investment refers to every kind of asset including concessions conferred by law or under contract to search for, explore or exploit natural resources. Please see the definition sections of BITs Concluded with Ethiopia. The list of countries that concluded BITs with Ethiopia are mentioned under *Infra* note 144.

¹⁴⁴ Ethiopia has concluded BITs with Algeria, Austria, Belgian-Luxemburg Economic Union, China, Denmark, Djibouti, Egypt, Equatorial Guinea, Finland, France, Germany, India, Iran, Israel, Italy, Kuwait, Libya, Malaysia, the Netherlands, Russia, Spain, Sweden, South Africa, Sudan, Switzerland, Tunisia, Turkey, and United Kingdom. Ethiopia's investment promotion agreement with Djibouti has more favourable terms with a view to grant special privileges to citizens of both countries. This feature makes the agreement different from the basic content found in other BITs concluded by the country.

¹⁴⁵ For further information on provisions of expropriation and compensation in BITs concluded by Ethiopia See some of them which are contained in Article 5(1) of Ethiopia—Austria BIT, Article 7(1) of Ethiopia-Belgian Luxemburg BIT, Article 5(1) of Ethiopia-Finland BIT, Article 4(2) of Ethiopia-Germany BIT, Article 5(1) of Ethiopia-India BIT, Article 5(1) of Israel, Article 5(2) of Ethiopia-Italy BIT, Article 6(1)(a) of Ethiopia-Kuwait BIT, Article 4(1) of Ethiopia-Russia BIT, Article 4(1) of Ethiopia-Sweden BIT, Article 6(1) of Ethiopia-Switzerland BIT, and Article 5(1) of Ethiopia-United Kingdom BIT. For instance, Article 5(1) of Ethiopia-United Kingdom BIT in its relevant part provides “ Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as “expropriation”) in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation.”

expressions reveal that the BITs protect and guarantee against both direct and indirect expropriation.

The BITs Ethiopia concluded with China, Malaysia, and Libya have provisions referring to direct expropriation but they do not contain expressions that tacitly refer to indirect expropriation.¹⁴⁶ A lack of direct reference to creeping expropriation may not necessarily mean that provisions on expropriation and compensation of these BITs exclude indirect expropriation. However, it opens a room for a wide range of interpretations.

Almost all BITs also stipulate that expropriations measures (whether direct or indirect) should only be taken in public interest, without discrimination and against payment of prompt, adequate and effective compensation.¹⁴⁷

Therefore, it appears that there are sufficient protections and guarantees against expropriation-both direct and indirect as provided under the BITs Ethiopia concluded. However, these protections and guarantees are extended only for investors that come from countries which have entered into a BIT with Ethiopia. This makes the incorporation of clear provisions governing expropriation under the Mining proclamation all the more important.

It is also important to note that mining operations are governed by mining contracts concluded between investors and the government apart from laws formulated by states. This provides investors opportunities to incorporate terms that sufficiently protect and guarantee their investment. Since the terms of the contracts are laws as between the contracting parties, properties of investors would also find guarantees under such contracts. Furthermore, the Mining Proclamation stipulates that disputes related to expropriation or any other disputes between investors and the government would be settled by arbitration.¹⁴⁸ Such disputes, more often than not, are submitted to international arbitration tribunals if amicable settlement is not reached. This would provide opportunities for investors to claim and enforce guarantees provided in domestic laws, BITs of the country and mining contracts.

¹⁴⁶See Article 5 of the BIT between Ethiopia and China, Article 5 of the BIT between Ethiopia and Malaysia, and Article 4 of the BIT between Ethiopia and Libya.

¹⁴⁷ *Supra* note 145 and 146.

¹⁴⁸ Article 76, Mining Proclamation.

3.7 Social and Environmental Considerations

Mining industry can present opportunities to spur economic growth of a state if properly managed. However, the industry has huge social and environmental ramifications. The potential benefits of the mining industry may actually turn out to be a curse if there is no proper regulatory framework to address the social and environmental consequences of mining investments. Hence, one of the main issues in the mining sector is how to strike the necessary balance between the need to promote mining investments on the one hand and to address social and environmental problems that would come along with such investments on the other hand. All countries that host mining investments are confronted with similar problems.

Countries hosting mining investment have a daunting task of balancing the desire to attract investors in the sector and the need to manage the adverse consequences of mining investments. Such problems though faced by all countries are more challenging for developing countries as they do not have enough leverage to set what may be considered as best social and environmental standards against big companies. They are usually caught up by a dilemma of either to raise the social and environmental standards and risk flow of mining investments or lower the standards and risk the protection of social and environmental interests.

The Ethiopian mining law has incorporated different provisions that are intended to protect social and environmental interests. One of such considerations is the protection provided to reserved areas in the country. Areas reserved for purposes that serve some national interests will not be available for mining operations. According to the Mining Proclamation, areas reserved for cemeteries and religious sites, archaeological remains and national monuments, physical infrastructure, natural habitats or national parks, areas within 500 metres from the boundary of a village, city or water reservoir or dam shall not be available for mining operations.¹⁴⁹

Exclusion of some areas from any mining operations shows the serious attention given to some social and environmental interests. However, the same

¹⁴⁹ *Id.*, Article 6(3).

provision also stipulates that such reserved areas may be open for mining investment where the government finds that it is in the national interest of the country to do so.¹⁵⁰ The law does not list which circumstances may be regarded in the national interest of the country. Hence, such stipulation gives the government the power to decide on case by case basis the circumstances that may be regarded in the national interest of the country. However, lack of clarity on such issues may ultimately have the effect of undermining social and environmental interests.

Another obligation relates to job creation requirements. Mining companies in Ethiopia are required to give preference to the employment of Ethiopian nationals than foreign nationals provided that the Ethiopian nationals have the expertise needed for the job.¹⁵¹ This is an attempt by the law to ensure that the mining investments generate jobs. If no qualified Ethiopian experts are available they are free to employ foreign experts.

Unlike the Investment Proclamation No. 769/2012 - A Proclamation that governs virtually all other investments,¹⁵² the Mining Proclamation does not impose obligations on investors to train Ethiopian nationals with a view to transfer skills to Ethiopians and ultimately replacing foreign experts by Ethiopian nationals. Thus, according to the law governing mining investments, providing training to Ethiopian nationals is voluntary. However, it is important to note that under the Mining Proclamation foreign experts can only be employed if Ethiopian nationals are not available possessing the qualifications needed for the job.

Companies should also undertake their mining activities in ways that would ensure the health and safety of their employees.¹⁵³

¹⁵⁰ *Id.*, Article 6(5).

¹⁵¹ *Id.*, Article 34(1)(h).

¹⁵² A Proclamation on Investment, Proclamation No. 769/2012, *Federal Negarit Gazeta*, 18th year No. 63. Article 37(2) of this Investment Proclamation provides that an investor who employs expatriate shall be responsible for replacing such expatriate personnel by Ethiopians by arranging the necessary training with a short period of time. This obligation does not apply to investors in mining operations as mining investments are not governed by this Investment Proclamation.

¹⁵³ Article 34(1)(b), Mining Proclamation.

Furthermore, an exploration licensee has the obligation to participate in community development and such responsibility should be undertaken through allocating money for such purpose.¹⁵⁴ However, the specific type of community development is not expressly provided in the Mining Proclamation and the manner of the participation in community development is basically determined by agreement with the licensee.

Moreover, while the Mining Proclamation envisaged the enactment of a regulation for the proper implementation of investors' obligations on community development, such regulation has not been formulated yet. The Mining Regulation which is currently in force does not provide guidelines or any other rules on how investors may be involved in community development. Such scenario would further hinder the proper implementation of investor's duty to participate in community development. The laws are also devoid of any bases to determine the amount of money that investors in the mining sector should allocate for community development. The lack of such parameters can create a situation where investors allocate little or no money for community development.

In practice, some of the investors take part in community development. They are engaged in projects such as clean water supply,¹⁵⁵ construction of schools and reforestation programs.¹⁵⁶ However, the money allocated by these investors does not get prior approval from the Ministry while the law requires that such amount is to be determined by agreement with the Ministry.¹⁵⁷ For instance, the amount of money allocated by some companies

¹⁵⁴ *Id.*, Article 60(3).

¹⁵⁵ The Shakisso Clean Water Project in Legadambi is one such a project by Midroc Gold PLC. See Midroc Ethiopia Technology Group, 'Corporate citizenship', available at: <http://www.midroc-ceo.com/?q=ccitizenship> (Accessed on November 5th, 2012).

¹⁵⁶ A secondary school is constructed by Nyota minerals in its Tulu Kapi Project area. Nyota Minerals Limited has also been operating a nursery that grows and distributes seedlings to support erosion protection and reforestation programs in Gunji Woreda. See, Nyota Minerals Limited, 'Corporate Social Responsibility', Available at: <http://www.nyotaminerals.com/corporate-social-responsibility> (accessed on October 5th, 2012).

¹⁵⁷ Article 60(3), Mining Proclamation.

in the mining sector last year ranged from Birr 100,000 to 500,000.¹⁵⁸ The data available does not include contributions from all companies in the mining sector and it appears that some have made contributions in excess of Birr 500,000 each year. Nyota Minerals Limited claims to have invested in excess of Birr 2.65 million in two years time in its Tulu Kapi Project.¹⁵⁹

However, the amount of money the companies allocated for community development was decided by the companies themselves and the differences in the amount of money each company allocated was not related to the size of the mining area, the financial capacity of the companies or any other relevant considerations. It appears that the absence of clearly defined criteria for determining the amount of money companies should contribute for community development has resulted in arbitrary allocation of fund. This situation opens a door for allocation of unfair or insignificant amount of money even by companies with large mining or exploration license areas.

The law has also incorporated local content requirements with a view to encourage local manufacturers and service providers. Local content requirement is a nontax tool forcing companies to use domestic inputs.¹⁶⁰ Many countries especially developing countries have utilized local content requirements for a long time with a view to protect domestic producers and generate local employment.¹⁶¹ Mining companies in Ethiopia have the obligation to give preference to domestic goods and services if such goods and services have competitive quality and price.¹⁶² However, Ethiopia may not

¹⁵⁸ Ministry of Mines (on file with the author). The lowest contribution from the available data was made by Ezana Mining Development P.L.C. and Derba Midroc P.L.C.(Gypsum Production) each allocating Birr 100,000, and the highest by Pioneer Cement Manufacturing with Birr 500,000 allocation and the rest made contributions that range between 100,000 to 500,000 Birr. Other companies which allocated fund for community development include Midroc Gold Mining P.L.C (Birr 120,000), Abjata Soda Ash Share Company(Birr 180,000), East Cement Share Company(Birr150,000), Capital Cement P.L.C(Birr 200,000), Samaka Marble P.L.C(Birr 250,000), CH Cleaner P.L.C (Birr 120,000), and Enchini Bedrock P.L.C (Birr 200,000).

¹⁵⁹ *Supra* note 156.

¹⁶⁰ Rivera-Batiz, L., & Oliva, M., *International Trade: Theory, Strategies, and Evidence*, Oxford University Press, 2003, p. 448.

¹⁶¹ *Id.*

¹⁶² Article 34(1)(i), Mining Proclamation.

benefit much from such requirements as the country does not currently have the capacity to manufacture many of the inputs needed for mining investments. Hence, in practice the largest proportions of the goods needed for mining investments would be imported. Be this as it may, such requirement is important to create market for services and some of the products that are being manufactured in the country and this will be more so in the future when the country's manufacturing industry grows.

Another area of concern that the Mining Proclamation tries to address is the environment. Mining investments pose significant environmental risks. Even though the degree of environmental impacts of mining would differ based on the minerals worked, the degree of working, and the location and size of the mine, it is inevitable that mining operations impact on the environment as they involve exploration for and exploitation of mineral deposits by surface or underground methods.¹⁶³ The impacts of mining include, among other things, subsidence, air and water pollution, deforestation, land degradation, and may ultimately endanger the health and life of local communities.¹⁶⁴ Especially the use of acid and other chemicals in mine operations may pollute the water resources adversely affecting the health, life and livelihood of local communities.¹⁶⁵

Thus, unless efforts are made to undertake environmentally responsible mining, mining investment could be counterproductive. However, in practice this is a difficult balance. Especially developing countries are increasingly driven to compete with each other to attract mineral investment and that as a result they have made commitments to undervalue their environment through setting lower environmental standards or through failure to enforce their environmental regulations.¹⁶⁶ Such competition is a result of the belief that

¹⁶³ Bell, F., & Donnelly, L., *Mining and Its Impact on the Environment*, Taylors and Francis, 2006, p. 5.

¹⁶⁴ *Id.*, p. 8.

¹⁶⁵ *Id.*

¹⁶⁶ Tienhaara, K., 'Mineral Policy in Developing Countries: Protecting Investors or the Environment' (Paper Presented at the Berlin Conference on the Human Dimensions of Global Environmental Change, 2006), pp. 3-4.

investors are attracted to countries with lower environmental costs.¹⁶⁷ However, the competitions should not be made in ways that compromise sustainable development as practice has shown that lack of effective environmental regulations would bring about huge ramifications not only on the environment but also on the health and living standards of local communities.¹⁶⁸

The FDRE Constitution, in general terms, provides that economic development projects shall not be undertaken in ways that damage or destroy the environment.¹⁶⁹ It also provides that the government has the duty to ensure the society is consulted on activities that affect their environment.¹⁷⁰ Furthermore, the Environmental Policy of Ethiopia provides that utilization of minerals should be undertaken in ways that can ensure the long-term usability of land and other natural resources.¹⁷¹ To this effect, it stipulates that conditions for pre-development environmental impact assessment, sound environmental management practices and mitigation measures after operation should be imposed.¹⁷² It also envisaged the enactment of specific mining environmental protection legislation that governs the operations of mining.

¹⁶⁷ *Id.*

¹⁶⁸ Mining Investments have brought about some major environmental disasters. One of the leading examples of such disasters is the Ok Tedi mine in Papua New Guinea . The project operates to extract minerals mainly copper. The mine project discharges millions of tons of mining waste annually harming the environment and livelihood of 50,000 people who live on or near the Ok Tedi River. The pollution occurred as a result of the collapse of the Ok Tedi tailings dam system and the lack of a proper waste retention facility. The environment contamination is so immense that it is expected that it will take many years to clean up. Mining investments have also brought about environmental problems in many parts of the world including Africa. For mining and its environmental impacts in Africa, see OECD, *Environmental Impacts of Foreign Direct Investments in the Mining Sector in Sub-Saharan Africa*, (2002). Available at: <http://www.oecd.org/env/1819582.pdf> (Accessed on July 15, 2012).

¹⁶⁹ Article 92(2), FDRE Constitution.

¹⁷⁰ *Id.*, Article 92(3).

¹⁷¹ The 1997 Environmental Policy of Ethiopia. The Policy stipulates that environmental control should be made on mining operation so that the land where the mining activities has been undertaking can ultimately be used for agriculture and other economic activities once the mining activity is closed.

¹⁷² *Id.*

The Mining Proclamation has incorporated some provisions that are aimed at addressing some of the potential environmental problems. It has to be noted, however, that generally environmental issues including those related to mining are governed by Environmental Impact Assessment Proclamation and other environmental regulations of the country.¹⁷³ The provisions in the Mining Proclamation are meant to add emphasis to the issue of environmentally responsible mining and to include some concerns which are specific to the mining industry.

According to the Mining Proclamation all mining license holders except reconnaissance, retention and artisanal are required to submit environmental impact assessment and they can continue the mining operations only when the necessary approval is granted from federal environmental protection authority or regional authorities as the case may be.¹⁷⁴ Reconnaissance license holders are not required to undergo environmental impact assessment because their activity does not involve disturbance of the surface or subsurface of the earth. It is a mere search for minerals without disturbing the outer or the inner surface of the earth. Thus, it does not have the potential to bring about adverse environmental consequences and hence there is no need to impose environmental impact assessment requirements.

Furthermore, companies have also the duty to conduct mining operations in a manner compatible with applicable laws pertaining to environmental protection at any stages of the mining operation.¹⁷⁵ The Environmental Impact Assessment Guidelines (Environmental Guidelines) set by Ethiopia's Environmental Protection Authority also stipulate measures that need to be taken at any stage of mining operations.¹⁷⁶ The Environmental guidelines

¹⁷³ See Environmental Impact Assessment Proclamation, Proclamation No.299/2002, The Environmental Protection Organs Establishment Proclamation, Proclamation No. 295/2002; Environmental Council Directive no.1/2008, Directive Issued to Determine the Categories of Projects Subject to the Environmental Impact Assessment Proclamation No. 299/2002.

¹⁷⁴ Article 60(1), Mining Proclamation.

¹⁷⁵ *Id.*, Article 60(1)(b).

¹⁷⁶ Environmental Impact Assessment Guidelines (Environmental Protection Authority, 2003).

specify what measures should be taken during mineral surface and subsurface exploration, mineral extraction and processing, quarry development and at the time of mine closure.

However, environmental issues in mining operations seem to have been poorly addressed. In general, there is a lack of an effective environmental impact assessment due to lack of human and financial capacity on the part of implementing organs, lack of legal and institutional arrangements for effective coordination and communication among the regional and federal offices of the government.¹⁷⁷ The mining operations are also causing some real damage to the environment. In particular, artisanal gold mining operations in Ethiopia are causing physical land degradation, open tunnels and pits and deforestation and little rehabilitation efforts are made.¹⁷⁸ Problems of air pollution due to clay and limestone mining operations in some parts of the country particularly where cement manufacturing plants are located have also been observed.¹⁷⁹

Furthermore, there are no specific environmental laws that govern the particular challenges of the mining sector. Only guidelines and standards which do not have a binding authority are available. The non-binding nature of these specific guidelines hampers an effective implementation of environmentally responsible mining. In fact, there are some general environmental laws that are intended to address environmental problems. While they are applicable to the mining operations as the case may be, they do not as such effectively address the specific problems of mining operations. Due to the unique nature of such investment, specific binding regulations that take the particular challenges of the industry into account would be desirable.

¹⁷⁷ Mellese Damtie and Mesfin Bayou, 'Overview of Environmental Impact Assessment in Ethiopia: Gaps and Challenges', MELCA Mahiber, 2008, p. 59.

¹⁷⁸ Ministry of Mines and Energy of the Federal Democratic Republic of Ethiopia, *supra* note 15, p. 10.

¹⁷⁹ Ministry of Mines (on file with the author). Clay and limestone are raw materials that are mainly used for the manufacturing of cement.

Conclusion

The contribution of the mining sector to the Ethiopian economy has been insignificant. However, this trend is changing in recent years. Cognizant of the potential contribution of minerals to the Ethiopian economy, due attention is currently being given to the development of the sector. Accordingly, Ethiopia has reformed its legal framework on minerals with a view to make the mining sector an important catalyst for the economic development of the country.

After several years of experimentation, the laws on minerals have undergone significant changes creating more favourable environment for mining investments. The laws provide sufficient protection, guarantees and incentives. This is an important step in alluring investors to locate their investments in the country. However, there have been concerns in implementing some rights of investors enshrined on paper. If these problems persist, they can have adverse impacts on the country's potential to become a destination for long term mining investments.

Even though there are many factors that determine flow of capital in mining investment, legal framework is at the core of such factors. Hence, the legal reform on minerals in Ethiopia is a step in the right direction and is expected that it would boost mining investments.

The potential benefits of the mining industry may turn out to be a curse if there is no proper implementation and regulatory framework to address the social and environmental consequences of mining investments. The Ethiopian mining law has incorporated different provisions that are intended to protect social and environmental interests. However, social and environmental issues in mining operations seem to have been poorly addressed.

There is generally a lack of an effective environmental impact assessment. The mining operations are also causing some real damage to the environment. In particular, artisanal gold mining operations in Ethiopia are causing high level of physical land degradation and deforestation and in many places rehabilitation efforts are not made.

Furthermore, there are no specific environmental laws that govern the particular challenges of the mining sector. Only guidelines and standards which do not have a binding authority are currently in use. Due to the unique

nature of such investments, specific binding regulations that take the particular challenges of the industry into account would be desirable.

The Mining Regulation which is currently in force does not also provide guidelines or any other rules on how investors may be involved in community development. Such scenario would further hamper the proper implementation of investor's duty to participate in community development. The laws are also devoid of any bases to determine the amount of money that investors in the mining sector should allocate for community development. The lack of such parameters can create a situation where investors allocate little or no money for community development. While the Mining Proclamation envisaged the enactment of a regulation for the proper implementation of investors' social obligations such as community development, such regulation is not enacted yet. The government and other stakeholder need to formulate the necessary regulations and take measures to address the practical problems on the ground.