



## **LAWYERS' ENVIRONMENTAL ACTION TEAM** **(LEAT)**

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December 02, 2002

Ms. Meg Taylor  
Office of the Compliance Advisor/Ombudsman  
2121 Pennsylvania Avenue, NW  
Washington, DC 20433

Dear Ms. Taylor,

### **RE: ASSESSMENT SUMMARY OF THE COMPLAINT REGARDING MIGA'S GUARANTEE OF THE BULYANHULU GOLD MINE, TANZANIA**

We are in receipt of your 11-page Summary Report dated October 21, 2002. In view of the astonishing findings, conclusions and numerous disparaging assertions contained in this Summary Report we write to request that you retract certain statements which, we believe, were outside the scope of the investigation, and several statements which are inaccurate, misleading and unfair. We wish to start at the earliest moment of our engagement with your office as we think this provides a fitting background to your Summary Report and our response.

#### **1. MISREPRESENTATION OF FACTS IN THE COMPLAINT**

As you may remember, LEAT first approached your Office with regard to the guarantee by MIGA of the Bulyanhulu Gold Mine in late August of 2001. That first meeting, held in your office, was also attended by representatives of Washington DC-based NGOs such as Friends of the Earth (FoE-US), the Center for International Environmental Law (CIEL), Oxfam America, Bank Information Center (BIC) and the Natural Resources Defense Council (NRDC). You will no

doubt recall that LEAT had wanted your Office to investigate the widespread allegations of human rights abuses including alleged killings of artisanal miners when the security forces of the Government of Tanzania and officials of Sutton Resources/Kahama Mining Corporation Ltd., moved in to evict the artisanals from the Bulyanhulu gold mines in July and August 1996. We wanted you to investigate those and subsequent events at Bulyanhulu with a view to establishing whether MIGA had undertaken proper due diligence investigation prior to its approval of political risk guarantee for the Bulyanhulu Gold Mine now owned by Barrick Gold Corporation.

However, as you may recall, you made it very clear that the issue of the killings was outside your Office's mandate, which, as you informed those present, was limited to investigating complaints related to breaches of MIGA's social and environmental safeguard policies and due diligence procedures. If, therefore, LEAT wished to submit a complaint to the CAO, it should ensure that that complaint was confined to allegations of breaches of those policies and procedures only. Your investigative team comprised of Ms. Rachel Kyte – who also attended that first meeting - and Mr. John Ambrose would reiterate this position in subsequent meeting with LEAT in Dar es Salaam and again in public meetings with the Bulyanhulu villagers and complainants in late March 2002.

As you correctly point out in your Report, an independent investigation of the allegations of killings has been and remains one of LEAT's and the Bulyanhulu complainants' key demands. That being the case, it took months of agonized discussions and wide-ranging consultations with the complainants and our international counterparts to ultimately decide to drop the allegations of killings in order to present a complaint to your Office. The complaint was finally lodged with your Office on January 15, 2002 and followed, on February 11, by a supplement detailing further grounds for the complaint.

LEAT's letter of complaint carefully followed the model letter provided in the CAO's Operational Guidelines that you provided us with. We invited you to investigate several major areas of concern with regard to the Bulyanhulu Gold Mine that we believe are within your mandate, namely:

- a. Forced evictions and displacement of potentially hundreds of thousands of Bulyanhulu villagers and complainants and failure to plan, finance and implement any resettlement or to compensate property loss.
- b. Ongoing evictions and forced displacements or threats thereof and uncompensated interference with property rights of the complainants.
- c. Negative impacts on the local economy including the destruction of the social and economic fabric of the communities, and the undermining of national poverty alleviation goals.
- d. Failure to observe the laws of Tanzania when the project sponsors took control of the Bulyanhulu Gold Mine.
- e. Submitting inadequate, inaccurate and misleading social and environmental impacts information including failure to account for material changes to the design or implementation of the Bulyanhulu Gold Mine.

- f. Non-disclosure by project sponsors of material information pertaining to the acquisition of the project.
- g. MIGA's failure to carry out any or adequate due diligence investigation in order to verify the information submitted and soundness of conclusions drawn by project sponsors prior to issuing a guarantee.
- h. MIGA's violation of its own information disclosure policies.

In support of these grounds were three volumes of documentary evidence in the form of relevant company records, government papers of both the governments of Tanzania and Canada, police records, court records of both the High Court and the Court of Appeal of Tanzania and extant newspaper reports of the events of July and August 1996 at Bulyanhulu. As well as these were a wide array of correspondence between LEAT and the government of Tanzania, the police force, MIGA and the Export Development Corporation of the government of Canada (EDC).

We are therefore deeply disappointed that you largely ignored the record before you but, instead, introduced matters or issues that you had insisted the complainants leave out as a condition to submitting the complaint. For example, you state, at page 2 of the Summary Report, that your assessment was undertaken "in relation to the complaint." Indeed, your own summary of the grounds of the complaint correctly frames the grounds and the issues that we invited you to investigate (see page 3 of the Summary Report). None of those grounds raised the issue of the alleged killings, which are nowhere even mentioned in the complaint. Yet you assert that the complaint "repeats allegations regarding events of late July and early August 1996 *that include misconduct and murder made against government authorities and the mine.*" (p. 4) More specifically, "LEAT alleges that *the manner in which the land was cleared on July 30 and following days resulted in 52 unnamed individuals being buried alive in the pits that they worked.*" (p. 5) And at page 7 we find the following: "*The complaint alleges that 52 people were killed in the process of land clearance, trapped alive in their pits by the mine and local administration staff as they plugged and filled the mine shafts ...*", etc., etc. Since the complaint does not make any of the above assertions, we, therefore, respectfully request that these comments be removed from the report because they are outside the express language and scope of the complaint.

The same applies to your entire discussion of the videotape evidence at page 4 of the Summary Report. You start that discussion by inaccurately stating that although "the allegations made and repeated by LEAT in its complaint to the CAO are not new ... *LEAT asserts that it has new evidence, namely a video which, it states, is a contemporaneous record of bodies being exhumed from small scale miners' pits.*" Yet, as the complaint clearly shows, the only reference to the videotapes in the entire complaint was made in connection with the manner in which the eviction order against the Bulyanhulu communities was made and executed by government authorities and Kahama Mining officials and

the consequent destruction of villages, settlements and property belonging to the communities! (See paragraph “e” of the background to the complaint).

That notwithstanding, you then proceed to examine this aspect of the alleged complaint: “The CAO cannot be sure that the video shows that which LEAT maintains it shows. The location, date, timing and detail cannot be verified. Therefore, it is not clear that the video shows small scale miners suffocated as a result of the clearing of the land in the days following the July 30 announcement. Further, the CAO found witnesses and other contemporaneous documentation that would refute the version of events that LEAT contends the video supports. During the field mission to Bulyanhulu small scale miners introduced to the CAO team who knew of the video were sure of the location where the events were filmed and took the CAO to the spot. However, they could not be sure that the miners shown being dragged from mine shafts had been killed as a result of that land clearance and were unable to support the version of events that LEAT alleged the video revealed.”

With regard to allegations of the 52 deaths, you inaccurately allege that *“the CAO has asked for a list of the names of the 52 people who were killed in the first days of August 1996 as stated in the complaint. Neither LEAT, nor the (Small Scale Miners’ Committee) have been able to supply the list of names.... The CAO is left to reflect that if a list cannot be produced by local people, the local administration, or the (Small Scale Miners’ Committee) that is the complainant in this case, this casts doubt on the veracity of the allegations that these people died as a result of the filling in of mine shafts in early August 1996.”* It was, however, not necessary for you to ask since LEAT had already given the list to the CAO in the supporting documentation for the complaint.

As you know, your Operational Guidelines require complainants to state other steps or actions they may have taken to try to resolve their grievances prior to approaching the CAO. In our case, we stated – at paragraph 5(a) of the complaint – that we had written to President Mkapa of Tanzania on two occasions asking him to intervene to address these matters. One of those letters, which we attached to the complaint as Annex “K”, had a list of the names of 36 persons who up to that time were alleged to have died as a result of the events of July and August 1996. You may also know that the list has been in the public domain since September 27, 2001 when our second letter to President Mkapa was published in the Tanzanian press. That list has also been made available to any and all persons who have asked for it including the Tanzanian police force. We are confirmed in our belief that your Office never asked for the list because we have also thoroughly checked our records but failed to locate any communication from your office requesting this list. Since there is no record of any communication in this connection we respectfully urge you to remove that assertion from your Summary Report because it inaccurately alleges facts whose existence is, at best, in question.

Still on the subject of the killings, you assert that your investigative team met with local people who stated that their relatives were among the 52 killed. Whereas it

is true that your investigators did meet with numerous complainants who alleged that their relations were among the missing and feared dead, you inaccurately assert that "... their neighbors took pains to tell the CAO team that these relatives were alive and well or in one case had died in a mine accident prior to August 1996. In other cases, the Tanzanian press has found people alive in other parts of the country, who it is alleged died at this time" (p. 7). As you may know, when your investigative team visited Bulyanhulu, a LEAT representative served as the team's sole interpreter. For three days that the team visited various localities and villages and talked to hundreds of villagers in public meetings, that representative was the team's sole link with the Bulyanhulu communities and the complainants. And in meeting after public meeting in which dozens of villagers narrated the mayhem and chaos that broke out following the order to disperse of July 30, 1996 not a single person came forward who contradicted the testimony that there were killings. Not a single villager came forward to contradict the story that some mothers told of how their sons perished in the Bulyanhulu goldfields that fateful August. And, we believe, our representative was in a much better position to understand the complainants' testimony than Ms. Kyte or Mr. Ambrose who did not speak or understand Swahili, the only medium of communication during those meetings. Our representative also stayed in the same hotel with the team and would have known had villagers with different testimony approached your investigators.

It may be that your investigators may have heard the testimony you allege during the team's final two days it spent inside the Bulyanhulu mine complex. That was where your investigators met with both the company and government officials. In sharp contrast to the various meetings with the complainants and the villagers, the meetings inside the mine complex were not open to the public or to the complainants or their representatives. We believe that the claims of contradictory testimony that you refer to may have emanated from those closed meetings with company and government officials. We, therefore, respectfully request that you remove your statement that inaccurately implies that the complainants' testimony was contradicted by other witnesses during the public meetings your investigators held with hundreds of Bulyanhulu villagers and complainants. Or, at the very least, we urge you to make public your sources of information or substantiation for this particular information.

Regarding your claim that the Tanzanian press has found people alive who are alleged to have died in August 1996, we have the following to say. When in early April 2002 Tanzanian newspapers reported that a person claiming to be a Turo Masanja, one of the dead miners in our list, had come forward to deny that there were any killings, we immediately became suspicious. The said person was introduced at a political rally in Kahama town organized by the ruling CCM party and addressed by a member of its National Executive Committee. Upon investigating the story, we found that this "Turo Masanja" was not only an impostor but also that he was one of about ten people who had apparently been paid or promised to be paid by senior police officers from Dar es Salaam to pose as the dead men in our list. We found others who had similarly been promised

compensation by “Canadians” for their property losses should they recant their testimonies regarding the alleged deaths of their relatives.

We also found that the political rally where this person was produced had been organized specifically for the media with the sole purpose of discrediting LEAT and thwarting calls for an independent inquiry that were then gaining greater momentum. We further learned that Barrick Gold had in fact actively participated in this subterfuge, flying several journalists from Dar es Salaam in its aircraft specifically to cover this event and then circulated the resulting press reports to various organizations in the US and Canada as evidence that the allegations of killings were fabricated.

We feared that Barrick Gold would also seek to use the press reports it had engineered to influence the outcome of the CAO’s investigation of our complaint. And so on July 10, we wrote to Ms. Kyte a lengthy expose of this event and asked her to bear this fact in mind should Barrick Gold ever seek to raise the issue with your Office. Ms. Kyte never acknowledged receipt of our letter then nor have you done so in your Summary Report. On the contrary you seem to have uncritically accepted whatever Barrick Gold operatives may have told you or your investigators regarding this matter. We would, therefore, respectfully request you to remove any reference of this matter not only because it was not germane to your investigation, but also because your version of that event has been challenged. Should you feel inclined to keep it, we respectfully urge you to acknowledge that LEAT did submit a rejoinder to the story and give reasons why you deem LEAT’s version unworthy of belief.

## 2. WHITEWASHING HUMAN RIGHTS ABUSES

Bearing in mind that you had declined to investigate allegations of human rights abuses including allegations of killings, LEAT had nevertheless requested you to lend your voice to calls “for establishment of an independent commission of inquiry agreeable to the Bulyanhulu complainants as well as the project sponsors and the Government of Tanzania to independently, transparently and thoroughly inquire into the facts and circumstances pertaining to the acquisition, possession and operation of the project and, where necessary and appropriate, make recommendations for the resolution of this complaint” (para. 9(i) of the complaint).

You have declined that request, arguing that “without a list of victims, with a video that cannot be verified as showing what it is alleged to show, and with so much contradictory evidence as to what happened on the days concerned, (you do not) ... find that the case has been made for the CAO to recommend an independent inquiry” (p. 7) In addition, you contend, “... after reviewing the material that is available (the CAO) has not found that there is a compelling case for an inquiry” (ibid.) These conclusions have to be measured not only in the light of the issues we have raised herein, but also in the light of an unsolicited admission that you “*did not undertake a full scale inquiry, nor did (you) engage in the techniques of human rights investigation which would be necessary to try*

*and prove or disprove many of the allegations repeated in the complaint, such as the exhumation of closed mine shafts, for example” (p. 2).*

Implicitly suggesting that you may not have seen or been shown all of the available evidence, your Summary Report “... *urges all sides to make public any information they may have that sheds further light on the events of July- August 1996 (as) this can help resolve the continual tension around the allegations at the core of the complaint, so that the mine and the people of Kakola and the surrounding area are able to live in peace*” (ibid.) This suggests that your conclusion that the case for an independent inquiry has not been made may have been arrived at too hastily to be considered conclusive.

In addition to bringing up matters you had expressly prohibited LEAT from raising, you disputed LEAT’s claim and the evidence that “potentially hundreds of thousands of the Bulyanhulu complainants were forcibly evicted and displaced from the Bulyanhulu area....” (para. 4(a) of the complaint) Speculating, but without offering any proofs, that gold deposits had largely been exhausted by the time of the July and August 1996 events, you expressed your confidence that the number of displaced communities “is somewhere between 200 and 2000 people” (p. 5). The evidence that LEAT submitted in this regard was taken from Barrick Gold’s own environmental impact studies of the area undertaken by a Canadian consulting firm Norecol, Dames & Moore and submitted to MIGA by Barrick Gold.

According to these documents, the discovery of the Bulyanhulu gold deposits in 1975 “... attracted some small-scale artisanal mining to the site.”(Barrick Gold and Kahama Mining (1999), *Social Development Plan for Bulyanhulu Gold Mine, Tanzania*, p.4). However, following a visit to the area by then President Ali Hassan Mwinyi in February 1993, “artisanal miners requested the right to resume artisanal activities at Bulyanhulu”, which “permission was given by the President....” As a result of this permission, that same year there was “*a massive influx, in which some 30,000 – 400,000 artisanal miners, associated entrepreneurs and ‘opportunists’ arrived*” (ibid., 21). Elsewhere in that document, Barrick Gold argued that although no records were kept of the number of artisanal miners, “*estimates range between 30,000 and 400,000*”(ibid., 20).

Barrick Gold’s high estimates of the Bulyanhulu population during this period are broadly supported by estimates given by Tanzania government sources both before and after the events of August 1996. For example, two years earlier then District Commissioner for Kahama had protested to then Minister for Water, Energy and Minerals that the grant of mineral rights to Sutton Resources would result in the eviction of over three hundred thousand people in the area who were “earning a living as well as contributing to the national economy.”<sup>1</sup>

In addition, just four days before the removals were ordered, the then Member of Parliament for the area denounced the planned eviction of his constituents,

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<sup>1</sup> See *Letter Ref. K.30/1 Vol. III/54* from Edson M. Halinga, District Commissioner, Kahama, to Hon. Jakaya M. Kikwete, Minister for Water, Energy and Minerals, dated September 5, 1994, re “Small-scale Miners at Bulyanhulu, Kahama.”

telling a session of the Tanzanian Parliament that about 200,000 artisanal miners, peasant farmers and their families were threatened with eviction in Bulyanhulu.<sup>2</sup> Hardly three weeks after the removals and with the allegations of killings making front-page news in the Tanzanian press, the Inspector General of Police issued a press release denying the allegations of killings but supporting the MP's estimate that about 200,000 people had already been evicted from the Bulyanhulu area.<sup>3</sup> Extant press reports that broke the news of the killings also estimated the population that had just been dispersed from the area at between 200,000 and 300,000.<sup>4</sup>

All this evidence was included in the three volumes of supporting documentation made available to your Office. Both Barrick Gold that paid for the EIA studies referred to above and submitted them to MIGA, and MIGA that accepted them did not object to these statistics prior to the launching of LEAT's campaign for an independent inquiry in July 2001. Since then, however, Barrick Gold has attempted to play down the number of people who were affected by the removals and, hence, the historical significance of these removals. Realizing the significance of these numbers, the company now does not want critics to make any reference to its own project documents anymore. It now accuses civil society organizations that have referred to them of "misleading people into thinking that the number of people who ... were evicted from (the Bulyanhulu) concession was 200,000"! Without first expressly disowning its project documents, the company now claims that unspecified "contemporaneous documents" show "there were fewer than approximately 15,000 people on the site at the time of the events in question."<sup>5</sup>

We are troubled by the fact that you appear to have uncritically and without any substantiation bought headlong into Barrick Gold's case. Taking aim at what you call "the numbers game", you charge that figures from studies of the area "have been embellished and exaggerated over the years" (p. 5). However, you have not disclosed the parties responsible for "embellishing and exaggerating" these figures or their reasons for doing so. We fail to understand, for instance, why would consultants commissioned and paid for by Barrick Gold seek to embellish

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2 See *Speech by Hon. Bhiku Mohamed Salehe, MP, (now deceased) to the National Assembly*, Dodoma, July 26, 1996.

3 See *Madai ya Maafa Katika Mashimo ya Dhahabu Machimbo ya Bulyankulu Mkoani Shinyanga* (i.e., "Allegations of Killings in Gold Shafts at Bulyankulu Mines, Shinyanga Region" – auth.), Press Release, August 21, 1996.

4 See M. Islam and M. Rweyemamu, "Utata watawala maafa ya Kahama: waliokufa machimboni wahofiwa kufikia 52: Picha za maiti zapelekwa Dodoma: wadaiwa kufunikwa na magreda" (i.e. "Uncertainty reigns over the Kahama Killings: The number of those dead in the mines feared to reach 52: Photos of the dead sent to Dodoma: They were allegedly buried by graders" – auth.), *Mtanzania*, Tuesday, August 13, 1996; N. Kicheere, "Wachimbaji walihamishwa Bulyanhulu kihuni" (i.e. "Miners were rudely evicted from Bulyanhulu" – auth.), *Majira*, Wednesday, October 11, 1996; N. Kicheere, "Polisi waliua watu Bulyanhulu" (i.e. "Police killed people at Bulyanhulu" – auth.), *Majira*, Saturday, October 12, 1996.

5 See letter by Vince Borg, Barrick Gold's spokesman, published in the letters section of the Canadian newspaper *National Post*, January 26, 2002, responding to an earlier letter jointly written by the Council of Canadians and MiningWatch Canada that had cited police reports of 200,000 evictees. See "Tanzanian Mines", *National Post*, Letters to the Editor, January 19, 2002.

or exaggerate the area's population figures as this would, obviously, not be in their employer's interest. Nor can we understand what an elected representative of the community, or a District Commissioner and the chief of the national police force – both government officials appointed by the President of Tanzania – would seek to gain by exaggerating these figures and thereby casting the government in a negative light. In any case, as we have argued, these figures were in circulation both before and after the evictions were effected and were never contested by Barrick Gold or the Tanzanian authorities until recently.

We are disappointed by your apparent unwillingness to examine the mass of documentary evidence we submitted to you that showed that the Tanzanian government at the highest levels was well aware of the mass displacement of people that would and did result from the removals. For example, you argue that the *“movements of thousands of people, if not tens of thousands, in caravans in the space of just a few days, would have attracted attention of central government and international agencies in the area. Yet no one can substantiate such a large internal displacement”* (p. 5). Yet had you taken the trouble to look carefully at the *Social Development Plan for the Bulyanhulu Gold Mine*, prepared by Barrick Gold after its takeover of the Bulyanhulu area in March 1999, you would have noticed the company's unsolicited admission that *“the removal of a large number of artisanal miners from the Bulyanhulu site in 1996 by the government has meant that the area has already received regional and national political attention”* (ibid., p. 41).

We are also unable to understand your disturbing reluctance to examine or comment on the documentary evidence made available to you that showed widespread concern amongst Tanzanian government officials, Canadian government representatives and senior company officials at the lengthy coverage by the Tanzanian press of the events at Bulyanhulu. We, therefore, respectfully urge you to rectify this record or, at the very least, give reasons why you think the project documents prepared by Barrick Gold and submitted to MIGA, as well as Tanzanian government sources are unworthy of belief.

### 3. SEEING OR HEARING NO EVIL ...

The LEAT complaint had alleged widespread illegal behaviour by the Canadian investors prior to, during and subsequent to the events of July and August 1996. In support of these allegations, LEAT submitted extensive documentary evidence including copies of the license that the project sponsors relied upon for their claim of right over the Bulyanhulu gold deposits; court records of proceedings in lawsuits between the companies and the Bulyanhulu communities; and excerpts of the various statutory laws that were violated when the artisanal miners and peasant farmers were driven off from Bulyanhulu. As well as this was evidence of more recent acts of illegal behaviour when, in May of 2000, Barrick Gold operatives and government authorities forcibly removed some families from the site of the Mine's current tailings dam.

Your response to these allegations was to gloss over, evade or - in certain instances - manipulate or distort well-known and uncontested facts. For example, LEAT had alleged that Kahama Mining and Sutton Resources never had a license over the Bulyanhulu concession and introduced copy of the only license that these companies ever had. That license did not even mention the Bulyanhulu area referring, instead, to another area in another district in another region. In the subsequent supplementary information filed with your Office on February 11, we provided an exhaustive legislative history of the Bulyanhulu area. This showed that these companies should never have been in Bulyanhulu in the first place, as the area had since the early 1980s been legally set aside for the exclusive and beneficial use of the artisanal miners.

Even though you were well aware of this aspect of the complaint, you completely failed to investigate or deal with it. Instead, you chose to believe, without proof or further explanation, that *"in 1994 the Government of Tanzania ... granted a prospecting license to Kahama Mining ... a subsidiary of Sutton Resources"* (p. 1). And as far the legislative history of the area is concerned, this is completely ignored in the Summary Report, which does not even acknowledge receiving the supplementary information let alone its existence.

Your attitude regarding allegations and evidence of illegality on the part of the Canadian companies or Tanzanian government authorities seems to have been to disavow any power or mandate to investigate these allegations. For example, when presented with the fact that the July 30, 1996 order issued by the Minister of Energy and Minerals most probably violated a High Court injunction issued on September 29, 1995 you dodged the issue by claiming that you had "no mandate to opine on the validity of this decree" (p. 6). Yet you showed no such hesitation in concluding that *"the issue of compensation paid to small scale miners at the time of the order to vacate the land in 1996 is one between the (Government of Tanzania) and the small scale miners and falls within the (Government of Tanzania's) exclusive jurisdiction"* (p. 7).

As with the license and other matters, the issue of compensation was governed by the 1979 Mining Act whose excerpted copies we had presented you with. For the record, paragraph 1(d) of the supplementary complaint we submitted to you on February 11 referred to section 81(1) of the 1979 Act that had obligated "the registered holder of the Mining Right or the holder of the prospecting right or claim ... to pay to the lawful occupier of any land, fair and reasonable compensation in respect of the disturbance or damage to any crops, trees, buildings, stock or works thereon ..." resulting from the activities of the holder of a mining or prospecting right or claim. On this basis, it was the sole legal responsibility of the companies that claimed mineral rights over the Bulyanhulu area to pay compensation to the complainants. Your conclusion in this regard is, therefore, wrong and we respectfully urge you to rectify the error or at the very least give reasons should you choose not to do so. We also doubt whether your disavowal of a mandate to investigate allegations of violations of Tanzanian laws with regard to the Bulyanhulu Mine can be sustained in view of the provisions of

Article 12(d) of the MIGA Convention that obliges MIGA to satisfy itself as to the “compliance of the investment with the host country’s laws and regulations.”

You also seem to have missed or ignored simple and uncontested facts. It is, for example, a well-documented fact that it was Kahama Mining and Sutton Resources that took the artisanal miners to the Tanzanian courts on June 20, 1995. It is also a well-established fact that when, in September of 1995, the High Court of Tanzania showed unwillingness to serve as a tool to achieve these companies’ ends, the latter chose – in the High Court’s memorable phrase - “to short-circuit the law by using the executive wing of government...” Once the evictions started on July 31, the miners’ leaders successfully sought the intervention of the High Court. The Court issued another temporary injunction order against both the company and the Tanzanian government on August 2.

It is a matter of historical record that this injunction was not overturned by the Court of Appeal of Tanzania until February 26, 1997, some six months after the forced removals. Copies of these court documents were made available to you. That the removals had proceeded regardless of, and in violation of, the High Court injunction order is confirmed by internal documents of the Canadian companies that LEAT was able to obtain in the course of its investigation also made available to you. For example, in an August 6, 1996 memo faxed to the Vancouver headquarters of Sutton Resources, Jim Hylands, then the company’s Exploration Manager at Bulyanhulu explains that the Inspector General of Police told the Regional Police Commander for Shinyanga Region that the police “... are to remove the miners by whatever means required; and ... that there is to be no more discussion of this operation – he had his orders, carry them out – and ignore any noise he hears from Tabora.” Tabora is the seat of the High Court of Tanzania for the Western Zone.

The LEAT complaint provided an exhaustive documentation of these matters which you ought to have considered. But surprisingly, we read in the Summary Report that “the (Government of Tanzania’s) decree (for the artisanal miners to leave the Bulyanhulu area) was challenged in court by (the Small Scale Miners Committee). On July 30, 1996, the (Government of Tanzania) announced a process of clearance, and issued a final decree that the concession area be vacated by ‘illegal miners.’ That decree was challenged by the (Small Scale Miners’ Committee) and *an injunction was issued on July 31<sup>st</sup>. This was overturned on August 2, 1996* and the process went ahead” (p. 2). No evidence is given for any of these wrong assertions nor are reasons given as to why you found LEAT’s documentary evidence unworthy of belief. We would likewise urge you to rectify this record as even Barrick Gold and the Tanzanian government authorities have, to our knowledge, not contested our version of these facts.

With regard to allegations in the complaint of illegal behavior that directly implicated Barrick Gold, we are dissatisfied by the factual basis for your conclusions. LEAT submitted documents showing that on May 13, 2000, 16 families were forcibly evicted from the current site of the mine’s tailings dam following a 24-hour notice from the Kahama District Commissioner. We presented a copy of that order as part of the supporting documentation in the

complaint. There was also evidence that the forced evictions were carried out regardless of the fact that the 16 families had challenged Barrick Gold's plans and the case was still pending in the Court of Appeal of Tanzania.

The CAO investigative team was taken to the site just outside Kakola town where these families were dumped after their eviction. It was given copies of documents showing that the mostly illiterate villagers had been made to thumb-print documents written in complex legal jargon in English stating that they had agreed to forever relinquish all rights over their ancestral lands to Barrick Gold's subsidiary in return for compensation averaging \$100 per family! The families told the team how they were unable to grow food crops for the very real fear that they would be evicted again as they were still living within the bounds of Barrick Gold's concession. They also took the team to where their boreholes were destroyed and fenced off when they were evicted and now they have no reliable water sources for their domestic use and for their livestock. The Summary Report is, however, evasive on these questions. It, instead, seeks to absolve Barrick Gold of wrongdoing by changing the facts regarding the year 2000 evictions, wrongly asserting that they took place in 1998, before Barrick Gold took over at Bulyanhulu.

You accept the fact that the evicted families were found to be living in "poor conditions" and in "insecurity", as the complaint had alleged. You found that "there was insecurity within these families as they expected to be moved again in the near future and therefore were disinclined to plant and cultivate" (p. 8). Playing down Barrick Gold's responsibility for these "poor conditions" and "insecurity" – and ignoring entirely the issue of whether or not the evictions complied with World Bank safeguard policies - you found no evidence "of a coordinated policy or opposition by the mine to people living on the concession growing crops...." (ibid.) However, the Summary Report tacitly agrees that Barrick Gold may not have adequately and meaningfully consulted with the communities. Thus we read: "There is clearly room for greater communication by the mine with these families still living on the concession and clarity on what they may or may do (sic!) on this land and on their future status" (ibid.)

In Kakola, your investigators heard testimony of how Barrick Gold was planning to demolish villagers' houses in order to expand the road going into the mine complex. The villagers testified that they were not consulted regarding the road's expansion and the planned demolitions. In fact the team was shown houses that had already been marked with red ink ready for demolition. The team was also informed of the mine's opposition to construction by the villagers of their places of religious worship within the town and that the villagers are now forced to walk for miles to bury their dead outside the concession. Barrick Gold has repeatedly boasted of supplying potable water to thousands of villagers in Bulyanhulu. However, the villagers testified to the team that Kakola, with an estimated population of 12,000, and which is the closest settlement to the mine complex was yet to see a drop of water supplied by the company. This was also the case with Stamico, another community of about 3,000 just across the river to the north of the mine complex and Nyakagwe, another settlement to the west of the Mine.

The CAO investigative team asked very pointed questions regarding these questions and took copious notes of the testimony. However, you state that you are “unable to find any basis for the allegations of present day intimidation, interference or undermining of the community by the mine.” Rather, the admittedly “severe challenges” that communities such as Kakola were suffering from were a result of “the development dynamics around an investment of this type and character in an area devoid of other economic opportunities and social services....” (p. 9) When decoded, this means the poverty evident in Kakola and other communities today resulted from the investors taking control of the communities’ main economic resource without providing them with an alternative source of livelihoods.

And this was the basis of our contention in the complaint that the investors had destroyed the local economy, impoverished communities and thereby undermined the national poverty alleviation goals. Indeed, Barrick Gold has itself admitted in project documents submitted to MIGA that “*the closure of small-scale mining had a major negative effect on economic activity, population and social development, which has been felt beyond the immediate mining area*” (see Kahama Mining (1998) *Environmental Impact Statement for the Bulyanhulu Gold Project*, Vol. 1, p. 8-2; and Barrick Gold and Kahama Mining, op. cit., p. 36). In view of these admissions in Barrick Gold’s own project documents, we respectfully request you to give reasons for your disagreement with our contention that the MIGA guarantee is inconsistent with the requirements of Article 12(d) of the MIGA Convention that obligates MIGA to “satisfy itself as to the economic soundness of the investment and its contribution to the development of the host country.”

#### 4. SLAP ON THE WRIST FOR MIGA

The LEAT complaint had drawn attention to serious flaws in the process and outcome of the social and environmental impacts assessments that had been submitted to MIGA by Barrick Gold. It was our case that these studies should have been carried out before the 1996 removals for consultations with communities to be of any meaningful value. That was not done. Instead, the companies waited until the Bulyanhulu communities were driven off from the area then purported to undertake an EIA. Even then the information based on these studies that Barrick Gold submitted to MIGA was materially inaccurate, erroneous and misleading. And MIGA, without first carrying out a thorough and competent due diligence investigation to establish the veracity of this information and the soundness of its conclusions, approved millions of dollars in political risk guarantees for the Bulyanhulu mine.

Your Summary Report acknowledges that the EIA for the project had been found not to meet the World Bank Group requirements by an earlier IFC mission. Among the areas that this EIA was found wanting related to “issues of resettlement and compensation related to the pipeline, the tailings dam and the mine....” In addition, that EIA “did not address past issues of land clearance” (p.

8). Without providing any details, the Summary Report states that the IFC team “noted in detail the remedies that would be required to bring the project into compliance with IFC policies and notes the reputational issues in the 1996 alleged incidents. The IFC recommended an addendum to the EIA be prepared detailing what would be required along the themes outlined above” (ibid., pp. 8-9).

The Summary Report also acknowledges that MIGA was made aware of these concerns after Barrick Gold approached it for guarantee. However, and crucially, *“beyond this, the CAO has been unable to find any correspondence from MIGA to Barrick Gold or to ascertain from MIGA or Barrick staff that the issues raised in the IFC back-to-office report had been acted on by MIGA.”* In other words you were not able to find evidence that MIGA and Barrick Gold had acted on any of the IFC mission’s recommendations that included resettlement, compensation, and past events of land clearance. Although you failed to explicitly say so, it is on record that Barrick Gold submitted to MIGA precisely the same EIA documents that the IFC mission had condemned as inadequate.

It is also clear from the Summary Report that MIGA did not carry out any due diligence investigation whatsoever. Nor, prior to the CAO’s visit had MIGA ever carried out a site visit or sent any environmental or social specialist to visit the area! By all accounts, it seems, all MIGA did was to be “comfortable” with Barrick’s assurances that all was well at Bulyanhulu. This, according to you, was unsatisfactory: “At issue ... is whether MIGA sought to or felt it should seek independent verification of critical issues surrounding the viability of a Category A project for guarantee. The purpose and intent of environmental and social due diligence in the World Bank Group is to provide that independent verification, precisely so that the Group is not left to ‘trust’ the sponsor” (p. 9). You also rejected the notion that the IFC mission amounted to due diligence investigation. According to the Summary Report, a back-to-office report “cannot qualify as ‘due diligence’ and IFC made clear to MIGA its status” (ibid.)

Having concluded that MIGA did not carry out any due diligence investigation, you seem to have failed or avoided to draw the obvious conclusion: That the guarantee should never have been approved, bearing in mind that the IFC mission had found the project wanting with regard to the World Bank Group policies. Although you found fault with MIGA for “trusting” the project sponsor by taking Barrick Gold’s assurances at their face value, you fell into the same trap with your conclusion that you had “no reason” to doubt Barrick Gold’s assurances to MIGA. This is especially strange considering that Barrick Gold had submitted to MIGA precisely the same project documents IFC had criticized even after the project design had been changed! It is even stranger given the allegations and evidence of wrongdoing by Barrick Gold that was presented to your investigators. We respectfully invite you to explain what is reassuring about a company that paid an average of \$100 in compensation for every family that was evicted in May 2000. We would also like to know what is reassuring about a company that sprays people’s houses with red ink to mark them for demolition without even telling the owners about its plans. Or that refuses to supply

communities nearest to it with potable water but does so to communities further from the mine. We respectfully wish to know what would amount to evidence of a coordinated policy if not the evidence presented above.

## 5. LIBEL AGAINST LEAT

You not only misrepresented what the substance of the complaint was, you also directed very sharp criticism to LEAT and our international NGO counterparts. Proceeding from the unfounded assumptions regarding the complaint, you lecture our international counterparts “to assess carefully the way in which they use information and the emphasis they place on substantiation.” Given your own abject failure to substantiate the highly contentious claims you make in the report, we find this advice ironic.

You condemn NGOs for allegedly irresponsibly “making allegations that cannot be substantiated and repeating allegations that one knows not to be true...” regardless of the cost in accuracy, strength of argument and legitimacy of the NGOs concerned (p. 11). In their defense, we can only point to the measured tone of the report of members of the NGO Fact-finding Mission on Bulyanhulu who unanimously endorsed LEAT’s call for an independent, impartial, transparent and comprehensive inquiry of the allegations of mass evictions and killings following their visit to Tanzania: *“While not prepared to make any findings of fact with respect to the allegations, the members of the mission ... thought that ... the intensity and seriousness in the telling of the stories of alleged evictions, violence and brutality of the police and mining officials, the level of detail, as well as the willingness of the Bulyanhulu residents to take significant risks to their own personal safety to come to speak to (the Mission), as did the willingness of apparently 250 others who waited several hours for (the Mission) to arrive in Bulyanhulu, ... lent weight to the credibility of the allegations.”*

These apparently irresponsible individuals also found time to look for and discuss the Bulyanhulu allegations with the former Attorney General and judge of the Court of Appeal of Tanzania, Mr. Mark Bomani, who, according to the NGO Mission, *“has been an interested observer of the allegations and denials over the past six years in the country, and who is also calling for a full and impartial inquiry into the Bulyanhulu allegations.”* Through LEAT, they had also asked in writing to be permitted to meet with police officers conversant with the events of July and August 1996. This request was turned down. To demand substantiation under these circumstances would have been unfair. But to attack them with failure to substantiate when all their attempts to do so have been thwarted by the authorities is highly unfortunate. We see that your Summary Report does not provide any evidence for the statements or positions that you attribute to the NGOs. We also understand from inquiries with our NGO counterparts from around the world that your Office did not approach any one of them for information regarding their position on the Bulyanhulu allegations. We are thus at a loss to explain the basis for these attacks and we would, therefore, respectfully request you to withdraw all the disparaging statements against our NGO counterparts.

You singled LEAT out for particularly venomous vitriol. Firstly, you accuse our organization of feeling free “to pick and choose the ethics codes from which it has worked” (p. 11). We are denounced for allegedly breaching the privileged relationship with, and the trust of, the Ombudsman. You allege that the “rash” of press reports “hampered” the work of the CAO investigators and that the complaint was one of “a scattershot of approaches mainly oriented around maximum publicity for individuals within LEAT and their domestic agendas” (ibid.) Without providing details or substantiation, you accuse LEAT of even admitting its “desire to incite hostilities around the mine for maximum advantage”, thereby allegedly putting the safety of other individuals working on this case at risk! (ibid.) Not only did LEAT allegedly recklessly put other people in danger, it also allegedly sought to gain financially from the complaint by turning it into “a fee earning enterprise”, demanding payment from local people for its services in campaigning, etc. (ibid.)

These are very serious allegations which we refute absolutely and unreservedly. Like much of the rest of the Summary Report as we have shown, they are based not on a single shred of evidence but on hearsay, innuendo and falsehoods. It is true that LEAT has carried out a spirited media campaign not only in Tanzania but also in Europe, Canada and the US to draw attention to the events of 1996 at Bulyanhulu. It has done this in the belief that public awareness and public pressure were necessary to the success of the demands for an independent and transparent inquiry into the Bulyanhulu events. The “rash” of press stories concerning Bulyanhulu did not begin with the submission of the complaint to your Office in January 2002, or with the arrival of the CAO investigators in Tanzania in late March as your Report inaccurately implies. As the evidence of press reports that we submitted to you as part of the complaint amply shows, Bulyanhulu has been in the news ever since the Canadian companies started to lay claims to its wealth in 1994 but particularly after the events of July and August 1996 and, more recently, since July 2001 when LEAT launched its current campaign.

LEAT is committed to the principle of transparency in all its dealings. It never agreed – and would not have agreed if asked – to cease informing the public of its findings until after you had finished your investigation of the complaint. Nor was there any such understanding that we would hold off our activities outside the complaint we had submitted to your office. On the contrary, we had assumed that you would be similarly committed to ensuring that the investigation was conducted in an open and transparent manner – with the public being kept informed of all new developments. As it happens, however, we were apparently wrong. As your covering letter states, in April 2002, following advice from the CAO Reference Group, you chose to change the guidelines for handling complaints by releasing your report to the parties the subject of the complaint. We are very much disappointed by your conduct in this regard. Although you found it unnecessary to inform LEAT and the Bulyanhulu complainants about the Reference Group’s advice or of your decision to adopt the new policy, you decided to apply the new procedures retrospectively with regard to the

Bulyanhulu complaint. Given all this, your complaints about broken trust, etc., ring hollow and are all the more ironic.

Regarding the allegation that media reports around the time of your investigators' visit to Tanzania hampered the work of your investigative team at Bulyanhulu, the available evidence does not bear this out. The complaint against MIGA was first reported in the Tanzanian press on January 20, barely five days after it was submitted to the CAO and over two months before your team's arrival in Tanzania. LEAT formally informed Tanzanian government officials of your investigators' impending visit on March 14, over a week before their arrival in Tanzania. After their arrival on March 22 and for the next four days, the investigators moved freely in and out of the Bulyanhulu area. They had unfettered access to, and held public meetings with, hundreds of villagers in Kakola, Stamico, Nyakagwe and other smaller localities of the Bulyanhulu area. They were throughout this period accompanied by a LEAT representative who served as their sole interpreter. They were never for once hampered by the authorities or by anybody else even though their presence was well-known to the authorities. Furthermore, their visit was not reported in the Tanzanian press until after they had already left the country.

It was only after the International NGO Fact-finding Mission on Bulyanhulu flew into Tanzania and attempted to reach Bulyanhulu that the authorities threw armed police roadblocks to prevent the mission from visiting the area. This was March 26 and the CAO team had been in the area for four days. And whereas the NGO mission was prevented by armed police from going to Bulyanhulu, your team was not prevented from completing its investigations. LEAT that you accuse of inciting hostilities with the authorities and recklessly putting the safety of the NGO mission in danger negotiated with the Regional Police Commander for Mwanza region and with police headquarters in Dar es Salaam to end the standoff in Geita. We eventually asked the NGO mission to return to Dar es Salaam once it became clear that the authorities were bent on preventing the mission from ever reaching Bulyanhulu. This information was available from LEAT as well as from the members of the NGO mission and would have been – made available to you had you asked for it.

With regard to the accusations of self-promotion and seeking personal financial gain that you make against LEAT and unnamed individuals within the organization, we would normally hesitate to respond to them lest we lend credibility and weight to this calumny. But since your Summary Report carries the weight of a World Bank Group document that may be taken at face value by many people unaware of the facts, we will simply state that *LEAT has never solicited nor has it ever received any funds from the Bulyanhulu communities in order to undertake any of the activities that we have undertaken as part of our campaign*. As for our ethical standards, integrity and personal commitment that you question, you may wish to know that the members of the NGO Fact-finding Mission whose lives we allegedly put in danger reached a very different conclusion from yours. Thus we read from the NGO Fact-finding Mission's Report: "The mission was impressed with the skill and knowledge of the lawyers

as well as their dedication and unwavering commitment to the Bulyanhulu file. It appeared to the members of the mission that their work was being done under considerable duress and even threats of harm from the authorities.”

Your characterization of LEAT and its members as unethical, reckless and driven by desire for personal gain and self-promotion is, therefore, not only offensive, malicious and unwarranted but also unfair in view of existence of facts that you could have easily obtained had you wanted to. We respectfully urge you to remove these libelous statements from your Summary Report or, at the very least, provide substantiation for these very serious allegations.

## 6. CONCLUSION

We understand from your Summary Report that you no longer desire to play any role in this matter. While we intend to respect your decision in this regard, we cannot pass the opportunity to respectfully request you to rectify the Summary Report in the manner we have suggested above. We would like to believe that it is not in the best interests of all concerned that the CAO's legacy in the Bulyanhulu matter be poisoned by the inaccuracies, factual errors, unsupported claims and unsubstantiated conclusions that have unfortunately characterized your Summary Report.

Rugemeleza Nshala  
Executive Director  
2<sup>nd</sup> December, 2002