Mining in Tanzania: Effects of the mining legal framework overhaul

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In 2017, drastic and sudden changes affected the mining sector in mainland Tanzania. The Parliament of Tanzania, in a bid to protect the country's natural resources and the employment opportunities for its citizens, passed a series of legislations in July 2017 aimed towards achieving these objectives.

The laws introduced by Parliament were:

- the Written Laws (Miscellaneous Amendments) Act, 2017 amending the Mining Act 2010 (Amendment Act);
- the Natural Wealth and Resources (Permanent Sovereignty) Act, 2017 (Sovereignty Act); and
- the Natural Wealth and Resources Contracts (Review and Renegotiation of Unconscionable Terms) Act, 2017 (Unconscionable Terms Act).

Together, these laws are collectively referred to as the 2017 Mining Laws.

The introduction of the 2017 Mining Laws formed the basis for the introduction of a number of mining regulations, including the Mining Local Content Regulations, 2018 (Local Content Regulations).

What did the changes mean for the mining industry?

For mining companies, the 2017 Mining Laws introduced a number of new conditions on the way they did business. The main features included:

- a 16% free carried interest for the government;
- restrictions on the export of raw resources for beneficiation outside Tanzania;
- giving the National Assembly the power to review all arrangements or agreements made by the government entailing the extraction, exploitation or acquisition of natural wealth and resources, including minerals;
- the prohibition of disputes over natural wealth and resources being adjudicated in any foreign court or tribunal which was not established in Tanzania and in accordance with the laws of Tanzania as well as categorizing as unconscionable any terms subjecting Tanzania to the jurisdiction of foreign laws or fora;
- the rejection and expunging of terms deemed by the National Assembly to be unconscionable;
- the requirement that when sourcing goods or services in the course of undertaking mining operations, any contractors, subcontractors and licensees undertaking mining activities give preference to indigenous Tanzanian companies; and

- incentivizing contractors, subcontractors and licensees undertaking mining activities to employ and train local citizens.

Three main areas remain a source of concern for stakeholders in the mining sector. These are: the free carried interest, the prohibition of dispute resolution in any foreign court or tribunal which was not established in Tanzania, and the introduction of the requirement to have and adhere to local content requirements. These three areas will be addressed in this article.

Free carried interest

Free carried interest (FCI) in the mining sector is a trend that has been rolled out among sub-Saharan African countries including Mali, Guinea, Democratic Republic of Congo, South Africa and Kenya. The key features of FCI are that:

i. the government would have an actual stake in the mining industry;
ii. the government has greater control over what large-scale miners are doing with the country's natural resources;
iii. the government would receive dividends in profit-making periods of a mining project;
iv. the government's FCI would be non-dilutable; and
v. the government would be able to increase its shares in the mining company with payment in kind (i.e. the mineral rights and the tax incentives could form part of the government's equity contribution for the issuance of additional shares).

Tanzania first introduced the concept of FCI through mining development agreements (MDAs). Under the earlier MDAs before the introduction of the 2010 Mining Act, FCI was not mandatory and could be negotiated by the mining company and the government. There were no set parameters for negotiations. Even where FCI was given to the government, the same was dilutable and saw the government's stake diminished through the requirement of significant capital injection. When the government could not match the capital injection, its FCI was reduced and in some cases completely extinguished.

Therefore, in order to protect the benefits Tanzania obtains from the mining industry, the 2010 Mining Act introduced a compulsory requirement for companies with a special mining license (SML) to negotiate and agree with the government the level of FCI and the state's participation. But the 2010 Mining Act failed to provide any negotiation parameters, such as the minimum level of FCI to which the government was entitled and did not specify whether such a stake was dilutable or not. The FCI levels and implementation was left entirely for the parties to agree, which did not solve the problem of the shortfalls which had previously existed.

Upon implementing the 2010 Mining Act, some shortfalls were identified, and in 2017 the government introduced changes when amending the Mining Act through the Amendment Act. The Amendment Act gave the government a minimum non-dilutable FCI in the capital of all mining companies in relation to the mining operations under not only a special mining license but also a mining license. It is important to note the changes made by the Amendment Act not only apply to new special and mining licenses issued after the Amendment Act but also affect all existing special and mining licenses, in that they were applied retrospectively. The changes made clear that the government's 16% FCI cannot be diluted. The compulsory 16% FCI means that the government's minimum stake will always be secured.

Impact on mining companies

To date, the government has been selective as to the enforcement of FCI, and in practice it is our understanding that the process for implementing FCI has affected less than 1%[1] of the mining companies in Tanzania. The lack of enforcement almost three years after the implementation of the Amendment Act has caused some concerns for investors, in particular regarding:

i. how to carve out the unclaimed/unenforced FCI;
ii. the effective date of the FCI (i.e. the date when claimed by the government or the date of the Amendment Act); and
iii. the procedure to be followed in order for the government to enforce the FCI, i.e. by increasing share capital or requiring the current shareholders of mining companies to transfer the equivalent to the FCI to the Treasury (as the government's vehicle for investments).

While these changes to the 2010 Mining Act have provided some clarity on FCI, there are still issues which may mean mining companies are uncertain when evaluating how to deal with FCI.

Stakeholders continue to engage with the government in order to clarify the practical aspects of implementing FCI in mining companies.

Prohibition of dispute resolution in any foreign court or tribunal

Prior to the introduction of the 2017 Mining Laws, parties entering into agreements relating to the extraction, exploitation, acquisition and use of minerals were free to choose the laws regulating their agreements and the way in which any dispute arising could be resolved. In 2017, the Sovereignty Act prohibited any disputes arising from extraction, exploitation or acquisition and use of minerals from being adjudicated by judicial bodies or other bodies not established in Tanzania. The Sovereignty Act required all such agreements to apply the laws of Tanzania. In addition to the provisions of the Sovereignty Act, the Unconscionable Terms Act expressly provided that certain terms are to be deemed unconscionable, which included any provision or requirement subjecting Tanzania to jurisdiction of foreign laws and fora.

Impact on mining companies

Financing is a crucial part of mining operations due to the nature and scale of mining operations and as mining is capital intensive at the beginning and throughout the life of a mine. As such, in order for investors to extend facilities to a mining company, they need assurance that such agreements can be enforced; therefore making the agreement bankable. As explained by the World Bank,[2] the inclusion of a workable dispute resolution clause is a key element to making an MDA bankable. Therefore, the dispute resolution clause in the MDA was crucial. In ensuring that a dispute resolution clause is bankable, consideration is given to the following factors:

- the mode of dispute resolution;
- the cost of dispute resolution;
- the impartiality of the mode of dispute resolution, including neutral governing law and adjudication forum;
- the speed at which a dispute can be adjudicated;
- the ability for any dispute to be adjudicated by experts in the respective industry; and
- the ability to keep any proceedings private between the parties to the agreement in order to salvage ongoing working relationships.

Bearing in mind the above considerations, most MDAs in existence prior to the 2017 Mining Laws contained clauses which allowed for dispute resolution by way of arbitration in neutral countries such as the UK or Singapore, which have international arbitration centers such as the LCIA, ICC and ICSID. Therefore, the abrupt move to prohibit the resolution of disputes through foreign courts or tribunals which were not established in Tanzania, in addition to the threat of total expulsion of any clause contravening this prohibition, gave rise to obvious concerns from stakeholders as to the bankability of the MDAs.

Following the disruption caused by the prohibition to use foreign courts and tribunals, stakeholders engaged with the government in order to voice their concerns and the potential far-reaching damage which could be caused to the mining sector. The government has since proceeded to put in place remedial measures which have included the new Arbitration Act 2020 (Arbitration Act). The Arbitration Act overhauls the entire arbitration legal framework, but is also meant to amend the Sovereignty Act and by implication the Unconscionable Terms Act by removing the word *established* from sections 11(2) and (3) of the Sovereignty Act.

By removing the word *established*, the relevant provisions will read that: “disputes arising from extraction, exploitation or acquisition and use of natural wealth and resources shall be adjudicated by judicial bodies or other organs in the United Republic and in accordance with the laws of Tanzania.”

The enactment of the Arbitration Act means that the arbitration clauses currently in the MDAs will only need to be amended to ensure that the venue for the arbitration will be in Mainland Tanzania. As the venue of an arbitration does not have any further implications as to the choice of procedure for the arbitration, the body or organ selected by the parties, this measure goes a long way towards addressing the concerns of the mining companies.

Following the introduction of the 2017 Mining Laws, the mining industry was shaken and mining companies in Tanzania saw their investments tumble.[3] This minor amendment has restored confidence in the market, meaning the mining sector's contribution to Tanzania's economy is predicted to grow steadily in the coming years. [4]

Local content requirement

Local content is one of the basic ways in which an economy, especially an emerging one, ensures that its people directly benefit from incoming investments. The requirement for mining companies to have a local content plan and to give preference to nationals exists throughout sub-Saharan Africa, including Angola, Gabon, Chad and Equatorial Guinea. The Amendment Act amended the Mining Act to include the requirement to have a local content plan. Local content has always been an integral part of the mining industry; however, historically the main aspect of local content in mining laws pertained to the employment and training of locals[5] as well as having a succession plan in place, which was to ensure that there was a clear strategy for the transfer of knowledge and preparing Tanzanians to fill positions which were at the time occupied by non-citizens.

Stemming from the amendments under the Amendment Act, the Local Content Regulations (Regulations) were introduced. The Regulations gave the relevant stakeholders three months within which to comply. The Regulations placed an obligation on contractors, subcontractors, licensees, or any other entity (relevant parties) carrying out mining activity to ensure that they had a local content plan as a component of their mining activities. In addition to the requirement to employ and train locals, the local content plan stipulated for new local content requirements in order to ensure that locally produced goods and services sourced by the relevant parties could be measured in actual monetary terms. The new aspects introduced by the Regulations included the requirements that:

- the relevant parties must adhere to the local content levels for specific mining activities as set out in the Regulations;
- the relevant parties must prepare and submit a long-term, five-year, local content plan which coincides with the entity's work program as well as an annual local content plan in respect of each year;
- where a non-indigenous Tanzanian company intends to provide goods or services to the relevant parties, they must incorporate a joint venture company in Tanzania with an indigenous Tanzanian Company and afford that indigenous Tanzanian company[6] an equity participation of at least 20% (this requirement is also now included as a condition to the mining licenses and special licenses issued);
- the relevant parties must establish and implement a bidding process for the acquisition of goods and services which gives preference to indigenous Tanzanian companies and provide the mode for evaluating bids received;
- the relevant parties must inform the Commission of every contract or purchase order which is sole sourced or which exceeds USD100,000; and
- the relevant parties must obtain approval from the Mining Commission prior to obtaining financial services from non-Tanzanian institutions.

Impact on mining companies

Mining companies with existing operations in other sub-Saharan African countries were moderately affected by the Regulations. This is because most of the requirements under the Regulations are similar to those in place elsewhere.[7] However, the biggest impact brought by the changes under the Amendment Act and the Regulations is the compulsory requirement for parties who are supplying goods and services to the relevant parties to incorporate a company in Tanzania and to further give 20% of their equity to indigenous companies. This is a problem for the following reasons:

- Tanzania does not manufacture the majority of goods required in mining operations and as such the market is supplier driven;
- most of the current suppliers of goods for mining operations were not incorporated in Tanzania;
- the Regulations only gave three months in which to implement this requirement; and
- the market had a shortfall of indigenous companies with the required capital to effectively enter into a joint venture with established suppliers.

Mining companies found themselves in a difficult position in that they were unable to source goods from many of their current suppliers without potentially being in breach of the law and their mining licenses. However, due to the niche nature of goods and services for mining operations, most mining companies have been able to initiate the procurement of goods and services not available in Tanzania through sole sourcing. The sole sourcing of goods remains a short-term solution for the issues arising as a result of the 20% equity requirement. It is our understanding that the Mining Commission has also identified the gaps created by the Regulations and as such it has been very cautious in applying the equity requirement so as not to unsettle the mining industry in Tanzania.

Conclusion

The introduction of the changes in the 2017 Mining Laws had a clear intention: to ensure that Tanzania and its citizens benefit directly and indirectly from the mining sector. The safeguarding of a nation's natural resources and ensuring locals benefit from natural resources is not a new phenomenon and globally it has been tapped into in order to ensure that there is mutual benefit derived from the mining industry.[8] The 2017 Mining Laws have had a number of stumbling points, but we believe, as practitioners in the sector, and as has been stated by authorities elsewhere in the country, "once these points of concerns have been resolved, the mining industry will continue to be a big contributor to Tanzania's GDP."

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[1] Based on our own knowledge of the mining sector in Tanzania.
[2] http://pubdocs.worldbank.org/en/508161479239656383/For-Consultation-WBG-Final-Draft-Report-on-Recommended-PPP-Contractual-Provisions.pdf at page 91
[3] https://af.reuters.com/article/investingNews/idAFKCN1C0103-OZABS
[4] https://tradingeconomics.com/tanzania/gdp-from-mining
[5] Section 44 of the Mining Act 1998 and section 41 (4) (h) of the Mining Act 2010
[6] A company incorporated under the Tanzanian Companies Act in which at least 20% of its equity is owned by a citizen or citizens of Tanzania; and has Tanzanian citizens holding at least 80% of the executive and senior management positions and 100% of non-managerial and other positions – as defined under regulation 3 of the Local Content Regulations.
[7] https://unctad.org/en/PublicationsLibrary/ditccominf2018d4_en.pdf
[8] https://unctad.org/en/PublicationsLibrary/ditcted2013d7_en.pdf (page 6)

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