

SIGNIFICANT RECENT CHANGES TO TANZANIA'S MINERAL LAW REGIME

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Legal Briefings

On Monday 10 July 2017, Tanzanian President John Magufuli assented to three new laws which significantly increase Government control over mining, oil and gas operations in Tanzania.¹

The *Natural Wealth and Resources Contracts (Review and Re-negotiation of Unconscionable Terms) Act, 2017* ("**Unconscionable Terms Act**") mandates the Government to renegotiate or remove terms from investor-state agreements that Parliament considers "*unconscionable*".

The *Natural Wealth and Resources (Permanent Sovereignty) Act, 2017* ("**Permanent Sovereignty Act**") requires Parliamentary approval for future investor-state agreements, which must "*fully secure*" the interests of Tanzanian citizens, and restricts investors from exporting raw minerals, repatriating funds and accessing international dispute resolution mechanism.

The Written Laws (Miscellaneous Amendments) Act, 2017 ("**Miscellaneous Amendments Act**") amends the Mining Act, 2010 ("**Mining Act**")² by (among other things): establishing a Mining Commission to regulate the industry; overhauling the requirements for the storage, transportation and beneficiation of raw minerals; and increasing royalty rates and government shareholding in mineral right holders.

The significant changes brought about by these laws are discussed in greater detail under the headings below in view of their interrelationship.

State sovereignty

Parliament premised the three new laws on the sovereignty Tanzania has over its natural resources. In support of this, the preamble to the *Unconscionable Terms Act* and the *Permanent Sovereignty Act* both invoke the United Nations General Assembly's [Resolution 1803 \(XVIII\) of 14 December 1962 \("Resolution"\)](#).

Although the Resolution declared that all nations have a right to "*permanent sovereignty over their natural wealth and resources*", which "*must be exercised in the interest of their national development and of the well-being of the people*", it has no binding force of its own.³ Authority is divided as to whether or not it reflects customary international law.⁴

Investor-state agreements

The *Unconscionable Terms Act* empowers Parliament to review any agreement concluded by the Government concerning the extraction, exploitation, acquisition or use of Tanzania's natural resources by private parties ("**investor-state agreements**"), including mine development agreements ("**MDAs**"),⁵ whether concluded before or after the Act came into force.

Parliament must assess whether investor-state agreements contain terms which "*jeopardise the interests of*" Tanzania or its people.⁶ Eleven types of terms "*shall be deemed to be unconscionable*",⁷ including those that: aim to restrict the right of the state to exercise full permanent sovereignty over the country's wealth, natural resources and economic activity;⁸ aim to restrict the State's authority over foreign investments;⁹ or are onerous to the state (see **Annex A** for the full list).

If Parliament considers an agreement (or terms within it) "*unconscionable*", it may instruct the Government to renegotiate the agreement¹⁰. Once the Government notifies the investor of this instruction, the parties have ninety days to revise the "*unconscionable*" terms, failing which they will be deemed as removed from the agreement.

- Importantly, the *Miscellaneous Amendments Act* provides that existing investor-state agreements remain in force until the Government institutes renegotiation proceedings.¹¹

The *Permanent Sovereignty Act* provides that, *in future*, all investor-state agreements must be approved by Parliament, and must ensure that the interests of Tanzania's people are “fully secured”, although this phrase is not defined.

More specifically, the amended *Mining Act* provides that investor-state agreements may not include clauses that would result in the indefinite freezing of laws or undermine Tanzania's sovereignty.¹² Stabilisation clauses will only be permitted if they are confined to specified periods (as opposed to the lifetime of a mine), fully renegotiable from time to time, and based on the “*economic equilibrium*” principle.¹³

State participation

The *Permanent Sovereignty Act* requires a mining company to grant the Government an “*equitable stake*” in its business.¹⁴ While the *Permanent Sovereignty Act* does not define “*equitable stake*”, the *Miscellaneous Amendments Act* amends the *Mining Act* such that the Government is entitled to:¹⁵

a minimum sixteen per cent non-dilutable free carried interest in any mining company operating under a mining licence or a special mining licence;¹⁶ and

increase this interest to an extent equivalent to the total tax expenditure incurred by the Government in favour of the mining company (up to a maximum of fifty per cent).

In addition, royalties are increased from four to six per cent of the gross value of minerals produced for metallic minerals, and from five to six per cent for gemstones and diamonds.¹⁷

Local content requirements

Under the amended *Mining Act*, mining companies must, when procuring goods and services, give preference to Tanzanian suppliers: any goods or services not available in Tanzania must be procured from a joint venture in which a Tanzanian company has at least a twenty-five per cent stake.¹⁸

Beneficiation and export restrictions

Under the *Permanent Sovereignty Act* and the amended *Mining Act*, mining companies may not export any raw minerals for processing outside Tanzania,¹⁹ and instead are required to develop beneficiation facilities in the country.²⁰

After extraction, raw minerals must first be stored in a secure facility²¹ and then transferred to the Government Minerals Warehouse within five days.²² From there, minerals may only be: transferred to a domestic processing plant; sold by an authorised mineral dealer; or exported with the Government's prior permission.²³

Repatriation of funds

All earnings derived from mining activities must be deposited with financial institutions in Tanzania,²⁴ and may only be repatriated in accordance with Tanzania's domestic laws.²⁵

Mineral right holders must also reinvest a portion (as yet unquantified) of the income derived from their Tanzanian operations into the growth of the domestic economy.²⁶

International dispute resolution mechanisms

The *Permanent Sovereignty Act* prohibits investors from resorting to international dispute resolution mechanisms, prescribing that natural resource related disputes “*shall not be a subject of proceedings before any foreign court or tribunal*” and shall only be adjudicated by Tanzanian judicial and statutory bodies.²⁷

Mining Commission and other organs

The *Miscellaneous Amendments Act* establishes a new Mining Commission charged with the administration of the *Mining Act*, while the Ministry of Energy and Minerals will focus primarily on developing and implementing policy.

The Mining Commission's functions include: supervising and regulating compliance with the *Mining Act*,²⁸ health and safety laws,²⁹ and environmental laws;³⁰ advising the Government on matters related to revenue generated from mining activities;³¹ and resolving disputes arising out of mining activities.³² A complete list of the Mining Commission's functions is set out in **Annex B**.

The *Miscellaneous Amendments Act* also creates the following institutions:

Mining Cadastre, responsible for: receiving and processing applications for mineral rights and mineral processing licences; administering these rights; and maintaining public cadastral maps and registers;³³

National Gold and Gemstone Reserve, into which all dividends and royalties will be deposited, and where all minerals purchased or impounded by the Government will be kept.³⁴ Importantly, one third of all royalties must be paid by depositing refined minerals into the Reserve;³⁵

Government Minerals Warehouse, the central custodian of all metallic minerals and gemstones extracted by mineral right holders in Tanzania;³⁶ and

National Mineral Resource Data Bank, the depository for all mineral data generated under the *Mining Act*.³⁷

Additional changes

Mining companies will be required to:

train and employ Tanzanian citizens in accordance with an approved local content plan;³⁸

conclude corporate social responsibility agreements with local government authorities;³⁹

abide by prescribed ethical business practices and support national campaigns against corruption;⁴⁰ and

redress damage caused by environmental pollution resulting from mining activities.⁴¹

Conclusion

Certain provisions of the *Unconscionable Terms Act*, *Permanent Sovereignty Act* and amended *Mining Act* may engage Tanzania's obligations under various bilateral investment treaties. An example of this is the [Promotion and Protection of Investment Agreement](#) between the United Kingdom ("**UK**") and Tanzania,⁴² which guarantees UK-based investors in Tanzania a range of important rights, including "fair and equitable treatment" (essentially ensuring a transparent and predictable regulatory climate); prompt, adequate and effective compensation for any expropriation; unrestricted repatriation of investments and returns; and access to international dispute resolution mechanisms.⁴³

As Tanzania is a member of the World Trade Organisation ("**WTO**"), it appears that certain provisions of the *Permanent Sovereignty Act* and amended *Mining Act* may likewise engage Tanzania's obligations under the *General Agreement on Tariffs and Trade* ("**GATT**").⁴⁴ In international trade law terms, the restrictions imposed on the export of raw minerals by the *Permanent Sovereignty Act* and amended *Mining Act* could amount to an export quota and an export licensing regime. Both measures may constitute quantitative restrictions on exports prohibited by Article XI:1 of the *GATT*⁴⁵, which could render Tanzania vulnerable to legal challenges by other WTO member states.⁴⁶

Annex A: Types of Unconscionable Terms.

Under section 6(2) of the *Unconscionable Terms Act*, a term is deemed to be unconscionable, if the term:

aims to restrict the right of the State to exercise full permanent sovereignty over its wealth, natural resources and economic activity;

restricts the right of the State to exercise its authority over foreign investments made in the country and in accordance with the laws of Tanzania;

is inequitable and onerous to the State;

restricts the ability of the government to periodically review the agreement which purports to last for the life of the mine;

secures preferential treatment designed to create a separate legal regime that will be applied in a discriminatory way to the benefit of a particular investor;

restricts the right of the State to regulate the activities of multinational corporations in Tanzania and to take measures to ensure that such activities comply with the laws of the land;

*deprive the people of Tanzania of the economic benefits derived from subjecting natural wealth and resources resulting from *beneficiation in the country*;*

by its nature empowers multinational corporations to intervene in the internal affairs of Tanzania;

*subject the State to the *jurisdiction of foreign courts and forums*;*

expressly or impliedly undermine the effectiveness of state measures intended to protect the environment or the use of environmentally friendly technology; or

allows for any other act which undermines or is injurious to the welfare of the people of Tanzania or the economic prosperity of the Tanzanian nation.

Annex B: Functions of the Mining Commission

Section 22 of the *Miscellaneous Amendments Act* provides that the Mining Commission is required to:

supervise and regulate compliance with the Mining Act;

regulate and monitor the mining industry and mining operations;

ensure orderly exploration and exploitation of mineral resources in Tanzania and the optimal utilisation of mineral resources at all mining operations in accordance with existing mining policies and strategy;

resolve disputes arising out of mining operations or activities;

carry out health and safety inspections or investigations related to mining operations or activities;

advise the Government on, and ensure compliance with all applicable laws and regulations related to the health and safety of persons involved in the mining operations or activities;

monitor and audit environmental management, the economic budget and expenditure for progressive rehabilitation and mine closure;

counteract minerals smuggling and minerals royalty evasion in collaboration with the relevant Government authorities;

advise the Government on all matters relating to the administration of the mineral sector with the main focus on monitoring and auditing of mining operations to maximise Government revenue.

examine and monitor the implementation of feasibility reports, mining programs and plans, annual mining performance reports, environmental management plans and reports of mining companies;

suspend and revoke exploration and exploitation licences and permits;

ensure general compliance with the laid down standards in the mining operations, laws and the terms and conditions of mineral rights;

monitor and audit the quality and quantity of minerals produced and exported by mining companies to determine the revenue generated in order to facilitate the collection of royalties;

audit capital investment and operating expenditure of the large and medium scale mines for the purpose of gathering taxable information and providing the same to the Tanzanian Revenue Authority and other relevant authorities;

sort and assess the values of minerals produced by large, medium and small scale miners to facilitate collection of payable royalty; and

produce indicative prices of minerals with reference to prevailing local and international markets for the purpose of assessment and valuation of minerals and assessment of royalties.

These laws follow a series of recent steps to increase the Government's control over the mining sector. In March 2017, the Government introduced a ban on the export of unprocessed gold and copper. In April 2017, the President established two committees to investigate the mining sector. The first, comprising academics and mining professionals, investigated the contents of concentrates in containers held at Dar es Salaam port. The second, comprising lawyers and economists, investigated the economic impact of exporting concentrates.

The Miscellaneous Amendments Act also amends: the Petroleum Act, CAP 392; the Income Tax Act, CAP 332; the Insurance Act, CAP 394; the Tax Administration Act, CAP 438; and the Value Added Tax Act, CAP 148.

See, for example: Crawford, *The Creation of States in International Law* (2006), 113; and Sands & Klein, *Bowett's Law of International Institutions* (2009), 28.

See the various authorities discussed in Ng'ambi, "Permanent Sovereignty Over Natural Resources and the Sanctity of Contracts", 12(2) *Loyola University Chicago International Law Review* 153 (2015), 157-159.

Section 4(1) of the Unconscionable Terms Act.

Section 3 of the Unconscionable Terms Act, definition of "unconscionable term."

Section 6(2) of the Unconscionable Terms Act.

Section 6(2)(a) of the Unconscionable Terms Act.

Section 6(2)(b) of the Unconscionable Terms Act.

Section 5 of the Unconscionable Terms Act.

Section 10 of the Miscellaneous Amendments Act, which amends section 11 of the 2010 Mining Act.

Section 25 of the Miscellaneous Amendments Act, which introduces section 100E of the Mining Act.

Section 100E of the Mining Act as amended by section 25 of the Miscellaneous Amendments Act. Unlike “freezing” clauses which exempt investors from complying with new laws, “economic equilibrium” clauses instead require the state to compensate investors for the cost of complying with new laws (for example, through adjusted tariffs, extension or renewal of rights, tax reductions, etc.).

Section 8 of the Permanent Sovereignty Act.

Section 9 of the Miscellaneous Amendments Act, which repeals and substitutes section 10 of the Mining Act.

Section 10 of the Mining Act as amended by section 9 of the Miscellaneous Amendments Act.

Section 87 of the Mining Act as amended by section 23 of the Miscellaneous Amendments Act.

Section 28 of the Miscellaneous Amendments Act, which repeals and replaces section 102 of the Mining Act.

Section 9(1) of the Permanent Sovereignty Act.

Section 9(2) of the Permanent Sovereignty Act. Also see section 100B(2) of the Mines Act.

Section 100A of the Mining Act which is introduced by section 25 Miscellaneous Amendments Act as amended by section 25 of the Miscellaneous Amendments Act.

The "Government Minerals Warehouse" is provided for under Section 27D of the Mining Act.

Section 100A(4) of the Mining Act as amended by section 25 of the Miscellaneous Amendments Act.

Section 10(1) of the Permanent Sovereignty Act.

Section 10(2) of the Permanent Sovereignty Act.

Section 100F of the Mining Act as amended by section 25 of the Miscellaneous Amendments Act.

Section 11 of the Permanent Sovereignty Act.

Section 22(a) and (b) of the Mining Act as amended by section 11 of the Miscellaneous Amendments Act.

Section 22(f) of the Mining Act as amended by section 11 of the Miscellaneous Amendments Act.

Section 22(g) of the Mining Act as amended by section 11 of the Miscellaneous Amendments Act.

Section 22(h) to (j) of the Mining Act as amended by section 11 of the Miscellaneous Amendments Act.

Section 22(d) of the Mining Act as amended by section 11 of the Miscellaneous Amendments Act.

Section 27F of the Mining Act as amended by section 12 of the Miscellaneous Amendments Act.

Section 27C of the Mining Act as amended by section 12 of the Miscellaneous Amendments Act.

Section 88(1) of the Mining Act.

Section 27D of the Mining Act as amended by section 12 of the Miscellaneous Amendments Act.

Section 27E of the Mining Act as amended by section 12 of the Miscellaneous Amendments Act.

Section 103 and 104 of the Mining Act as amended by section 28 of the Miscellaneous Amendments Act.

Section 105 of the Mining Act as amended by section 28 of the Miscellaneous Amendments Act.

Section 4 of the Miscellaneous Amendments Act, which amends section 3 of the Mining Act, defines this as "integrity pledge". Also see section 106 as amended by section 28 of the Miscellaneous Amendments Act.

Sections 107 to 112 of the Mining Act as amended by section 28 of the Miscellaneous Amendments Act.

The Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Republic of Tanzania for the Promotion and Protection of Investments was concluded in Dar es Salaam on 7 January 1994 and entered into force on 2 August 1996.

Tanzania has concluded similar bilateral investment treaties (which have entered into force) with Germany, Sweden, Finland, Italy, the Netherlands, Denmark, Switzerland, Mauritius, Canada and China.

On 1 January 1995 Tanzania became a member of the *Marrakesh Agreement Establishing the World Trade Organisation* and thus became a party to the General Agreement on Tariffs and Trade ("**GATT**") and the General Agreement on Trade in Services ("**GATS**") (respectively Annex 1A and 1B to the Marrakesh Agreement).

Article XI:1 of the GATT reads as follows: "*No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any [WTO Member] ... on the exportation or sale for export of any product destined for the territory of any other [WTO Member].*"

If the implementation of the laws causes Tanzania to act in breach of its obligations under the GATT, it will have to negotiate a modification of its obligations or face the risk of its breach being referred to the WTO's Dispute Settlement Body ("**DSB**"). If the matter is referred to the DSB, some or all of Tanzania's rights under the GATT could be suspended until the dispute is resolved. Predictably, such a suspension will have a detrimental impact on the entire economy and not just the mining industry.

KEY CONTACTS

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