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TANZANIA'S NEW INTEGRITY PLEDGE FOR MINING COMPANIES: DOES IT MEET INTERNATIONAL BEST PRACTICE?

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Legal Briefings – By **Peter Leon, Paul Morton and Ernst Müller**

Since July 2017, the Government of Tanzania has introduced significant regulatory reforms to the mining industry (as well as the nascent upstream oil and gas industry). See our previous notes on these reforms here, here and here.

Among the first of these changes was the enactment of important amendments to the Mining Act, 2010 ("**the Act**"),[1] including (among other things):

establishing a new Mining Commission to regulate the industry;[2]

requiring mining companies to divest between 16 and 50 per cent of their equity to the Government;[3] and

introducing a chapter on "local content, corporate social responsibility, and integrity pledge",[4] and mandating the Minister for Minerals ("**the Minister**") to issue regulations setting out the "principles and procedures" relating to each of these.[5]

On 13 July 2018, the Minister issued regulations on the "integrity pledge" ("**the Regulations**")[6] (following regulations on "local content" and other matters, issued in January 2018; see our previous note here). As was the case with the Mining (Local Content) Regulations, 2018, mining companies are afforded three months to satisfy the Mining Commission that they are compliant with the Regulations (i.e. by 13 October 2018).[7]

The Regulations are aimed at encouraging good corporate citizenship in Tanzania's mining industry, noting that "unethical business practices, corruption and other malpractices are potential impediments to sustainable economic growth".[8] The stated objectives of the Regulations thus include to "promote integrity, accountability and proper management of anti-corruption programme[s], for adoption by the corporate community operating in the mining industry".[9]

Owing to the imprecise wording of the Regulations, however, they risk being applied inconsistently. This, in turn, could frustrate the achievement of their laudable objectives. The indeterminate scope of the duties imposed under the Regulations may also contribute to greater regulatory uncertainty and affect the rule of law (the pillars on which investor confidence rests).

OBLIGATIONS

The use of the term "pledge" in the Regulations appears inapposite. The Act defines "integrity pledge" as a "formal and concrete expression of commitment by [a] mineral right holder to abide [by] ethical business practices and support a national campaign against corruption".[10] This is consistent with the ordinary understanding of a pledge as a solemn promise or undertaking given voluntarily, rather than something done under compulsion or regulation.

The Act's operative provisions on the "integrity pledge", however, impose a mandatory set of binding obligations, no different in nature from any other obligations imposed by statute. The Regulations, similarly, prescribe a set of binding obligations, as well as a standard form "pledge",[11] which any "holder of a mineral right that carries out prospecting or mining activities *shall sign*".[12]

The Act obliges mineral right holders "to comply with the integrity pledge", which in turn requires them to:

conduct mining activities “with utmost integrity”;

maintain insurance against damage to the environment, communities, individuals and properties; and

refrain from any “arrangement” that:

undermines or prejudices national security;

undermines or prejudices the country’s tax, financial or monetary systems (which, “in particular”, requires that all mining-related “earnings, payments or receivables” must be “received in and accounted for in Tanzania” (that is, in domestic bank accounts); or

“is inconsistent with the country’s economic objectives, policies and strategies”.[13]

The first and last of these elements are imprecise, and thus warranted refinement in the Regulations. Regrettably, however, the Regulations provide no definitions for key terms, such as “utmost integrity”, “national security”, and “economic objectives, policies and strategies”. Similar to the requirements under the Mining (Local Content) Regulations, 2018, restricting the use of non-Tanzanian banks, the requirement for all earnings to be “received in and accounted for in Tanzania” is also likely to impose practical difficulties on mining companies, particularly those seeking financing from international lenders.

The Regulations impose a range of further obligations on a mining company, including to:

comply fully with “the Laws, Regulations, Rules and Policies”[14] (without specifying to which rules and policies they refer, and whether this is intended to elevate policies to the status of binding law);

refrain from “dealing with unethical companies”[15] (without specifying how such companies will be identified);

ensure compliance with the integrity pledge by “any person it engages with in undertaking any activity in connection with mining activities”[16] (which is defined to include activities “outside Tanzania”).[17]

Furthermore, while the Act aims the integrity pledge at “mineral right holders”,[18] the Regulations purport to cast the net far wider, imposing obligations on “any contractor, sub-contractor, licensee, or any other person conducting mining activities”.[19] These terms are not defined, so it is difficult to identify who is meant to be bound by the Regulations.

It is critical that all of these concepts are more clearly defined, so that they can be appropriately enforced by the authorities, and also so that mining companies (and anyone else affected) can understand precisely what they are expected to do, and not to do, especially considering the severe penalties imposed for non-compliance.[20] The principle of legality (a pillar of the rule of law) requires that laws must be defined as clearly as possible, to minimise the scope for ambiguity and abuse.[21]

PENALTIES

The amended Mining Act provides that non-compliance with the integrity pledge constitutes a breach of a company’s mining licence, which is then “deemed to have been withdrawn”, and entitles the Government to “exercise the right of takeover” (effectively, to expropriate a company’s mining operations).[22]

The Regulations were expected to set out a procedure for determining whether a mining company has failed to comply with the integrity pledge, and should thus suffer these penalties. Unfortunately, they do not outline any procedure at all, but simply empower the Mining Commission to:

conduct an “investigation”, “at any time”;[23]

"summon any person to submit or provide any information that the Commission deems necessary";[24]

"suspend or revoke any licence on grounds of failure to comply with … these Regulations";[25] and

"do all things which are necessary or desirable to give effect to … these Regulations".[26]

The Regulations prescribe even more severe penalties than the Mining Act itself:

A contravention of the Regulations carries a *minimum* penalty of ten years imprisonment or a fine of 100 million Tanzanian Shillings (roughly US$ 44 000), if it takes the form of a "malpractice" (which is not defined, except that it includes "tax evasion, double taxation, under or overpricing, transfer pricing and corruption").[27]

The latter practices are already criminalised and penalised under existing laws.[28] The inclusion of these penalties in the Regulations thus seems otiose, especially considering that "malpractice" is not defined with any of the precision required of a criminal statute, or indeed defined at all.

It also appears to exceed the authority conferred on the Minister by the Mining Act, which limits the penalties that may be imposed for a breach of any regulations to a *maximum* of twelve months imprisonment or a fine of two million Tanzanian Shillings.[29]

The penalties of licence revocation and property "takeover" (without due process) undermine security of tenure, which is key to investment in the mining sector. Furthermore, the prospect of criminal prosecution and punishment, for undefined "malpractices", may well exert a chilling effect on investment.

BEST PRACTICE

There are alternative methods for Tanzania to achieve the important goals of the "integrity pledge", including through a number of existing mechanisms within the natural resources industry. In fact, most major mining companies operating in Tanzania have already made "a formal and concrete expression of commitment … to abide [by] ethical business practices"[30] through one or more of these mechanisms.

Most salient is the commitment made by members of the International Council of Mining and Metals ("**ICMM**")[31] to its Ten Principles (distilled from international best practice),[32] which include to "apply ethical business practices and sound systems of corporate governance and transparency to support sustainable development". ICMM members also automatically subscribe to the Extractive Industries Transparency Initiative ("**EITI**"), of which Tanzania has been a member since 2009.

Importantly, it is mandatory for ICMM members to report regularly on, and submit to consistent, rigorous and independently verified assessments of, their compliance with the Ten Principles, through the Global Reporting Initiative.[33]

ICMM members already expend considerable financial and human resources on maintaining and reporting their compliance with the Ten Principles as well as the requirements of EITI. Rather than implementing a new, unclear and untested "integrity pledge", the Government could hold mining companies to their existing commitments, and use the compliance mechanisms already administered by the ICMM and EITI to ensure that mining companies in Tanzania abide by ethical business practices (potentially incorporating in binding domestic law).

Alternatively, the Government could look to the guidance of the African Minerals Development Centre ("**AMDC**")[34] and enter into an "African Mining Vision Private Sector Compact" with individual mining companies or the Chamber of Minerals and Energy.[35] The Compact comprises twelve reciprocal commitments, aimed at balancing the state's development priorities with the industry's commercial needs.[36]

By contrast, the Regulations' imposition of unilateral and open-ended obligations, on pain of criminal punishment, does not appear to strike an appropriate balance. Rather, the Regulations increase costs and complexity both for the Government and the mining industry, and are likely to deter investment, while doing little to cultivate good corporate citizenship. A more effective approach would be to build on the existing frameworks of international best practice.

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[1]Under the Written Laws (Miscellaneous Amendments) Act, 2017.

[2]See section 21 of the Mining Act, 2010, as amended ("**the Act**").

[3]Section 10 of the Act.

[4]Part VIII of the Act.

[5]Section 112(2)(t) to (v) of the Act.

[6]The Mining (Integrity Pledge) Regulations, 2018, published in Government Notice No 304 on 13 July 2018.

[7]Regulation 15.

[8]See clause 1 of the Schedule to the Regulations.

[9]Regulation 4(b).

[10]Section 3 of the Act.

[11]Schedule to the Regulations.

[12]Regulation 8(1) (emphasis added).

[13]Section 106(2) of the Act.

[14]Regulation 9(g).

[15]Regulation 5(g).

[16]Regulation 8(2).

[17]Regulation 3 (definition of "mining activities").

[18]Section 106 of the Act.

[19]Regulation 5.

[20]See PJ Kabudi, *Human Rights Jurisprudence in East Africa: A Comparative Study of Fundamental Rights and Freedoms of the Individual in Tanzania, Kenya and Uganda* (Nomos Verlagsgesellschaft, Baden-Baden, 1995), 179: "[T]he rule of *nulla crime sine lege, nulla poena sine lege* … is based on the 'presumption that citizens should be guided in their behaviour by pre-announced rules which can be ascertained with due diligence'."

[21]See BD Chipeta, *Administrative Law in Tanzania: A Digest of Cases* (Mkuki na Nyota Publishers, Dar es Salaam, 2009), xxviii: "The rule of law embraces the principle of legality, that is, that no executive or administrative action shall be taken except in accordance with the law; that every person, including the Government, is subject to law; that the question of the legality of an act by the Government or public or administrative body shall be determined by the Judicature which exercises its powers independent of Government or other bodies; that the law must be ascertainable; and that there be equality before the law."

[22]Section 106(4) of the Act. While this provision states that "the Government shall exercise the right of takeover facilities provided for under this Act" (our emphasis), the Act itself does not offer any definition or other provision for such "takeover". However, section 106(4) of the Act appears to have been copied verbatim (and perhaps erroneously) from the integrity pledge provisions (section 223(4)) of the Petroleum Act, 2015. In turn, section 195 of the Petroleum Act entitles the Government to "take over facilities of the licence holder" where *inter alia* a licence is cancelled, for which compensation must be paid if this amounts to expropriation of private property rights.

[23]Regulations 10 and 12.

[24]Regulation 13(a).

[25]Regulation 13(b).

[26]Regulation 13(c).

[27]Regulation 7.

[28]See, for example, Part III [Corruption and Related Offences] of the Prevention and Combating of Corruption Act, 2007.

[29]See section 112(6) of the Act.

[30]The definition of "integrity pledge" in section 3 of the Act

[31]Twenty-seven multinational mining companies are members of the ICMM, including AngloGold Ashanti (founding member), Anglo American (founding member), Barrick Gold Corporation (since 2008), BHP (founding member), Glencore (since 2014), Newmont (founding member), Rio Tinto (founding member), South32 (joined 2015) and Vale (re-joined in 2017). A similar commitment is required by the Diamond Producers Association, of which Petra Diamonds is a member.

[32]The ICMM's Ten Principles, adopted in 2003 and refined in 2015, have been benchmarked against leading international standards, including the Rio Declaration, Global Reporting Initiative, United Nations Global Compact, OECD Guidelines on Multinational Enterprises, World Bank Operational Guidelines, OECD Convention on Combating Bribery, ILO Conventions 98, 169 and 176, and Voluntary Principles on Security and Human Rights.

[33]See ICMM, *Sustainable Development Framework: Assurance Procedure*, May 2008.

[34]The AMDC was jointly established by the African Union ("**AU**"), the United Nations Economic Commission for Africa and the African Development Bank, to promote implementation of the African Mining Vision ("**AMV**"), which was adopted by the AU Summit of Heads of State and Government in 2009, with the aim of promoting "*transparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socio-economic development*".

[35]See AMDC, Looking beyond the Vision: An AMV Compact with Private Sector Leaders, January 2017.

[36]*Id*, 17: the AMDC advises that: expectations should be clearly defined to avoid open-ended demands; there should be no uncertainty or shifting of goalposts; and there should be no reporting obligations to be compliant to the AMV Compact [which] would be viewed as adding to the cost of doing business."

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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