Investment in the Mining Sector: Revisiting the Challenges and Prospects in Tanzania

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Abstract

This article analyses the legal and regulatory frameworks regulating investment in the mining sector. The article notes that the Tanzanian mining sector has undergone various policy and legislative developments geared towards ensuring that the mining sector contributes greatly to national development. This article finds challenges in creating an investment-enabling environment as stipulated in the Mineral Policy 2009. The article advances the argument that Tanzania's mining legal regime poses various challenges which affect the government's ability to strike a balance between its interests to maximise revenue and protect the interests of the investors. In that regard, the article concludes that there is a need for amendments to essential laws governing mining investments in Tanzania to ensure that the rules align with Tanzania's contractual commitments with the investors. As such, it recommends that the legislative changes to ensure the balance between the need to maximise benefits from natural resources and the protection of investors following the obligations that Tanzania has freely agreed to under international agreements cannot be overemphasised.

A. Introduction

Tanzania is one of the mineral-producing countries in Africa. Mineral resources found in Tanzania include precious metals (gold and silver), iron ore, base metals (copper, nickel, cobalt, tin, lead) platinum group metals, rare earth elements, coal, uranium, diamonds, coloured gemstones (tanzanite, ruby, sapphire, tsavorite, rhodolite, tourmaline) and industrial minerals (limestone, kaolin, kyanite, magnesite, phosphate, and gypsum).[1] With these resources, as it is for other countries, Tanzania has been devising mechanisms geared towards attracting investors. Based on these resources, Tanzania has been and continues to

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1 Minerals available in Tanzania, available at https://www.tumemadini.go.tz/statistics/minerals-available-in-tanzania/ (accessed on 8 August 2024).

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host various investment projects in the mining sector. Despite these investment projects, Tanzanians are concerned about the distribution of benefits from their resource extraction.[2]

These concerns have existed for several years, and there has also been political pressure that foreign investors are benefiting from the mining sector at the country's expense.[3] The people, civil society and opposition political parties have advanced strong calls for renegotiation of Mine Development Agreements (MDAs) to ensure Tanzania benefits from the mining operations.[4] In response to that, the Government of Tanzania has at various times formed various commissions and committees, such as the Mboma Report of 2002; Jonas Kipokola Report of 2004; Mark Bomani Commission of 2008, a commission whose report led to the adoption of the Mineral Policy 2009 and the Mining Act 2010. Despite all these policies and legislative developments, the public dissatisfaction with the benefits flowing from the mining sector to the country persisted. This led to the formation of the sector under the Presidential Probe Committee of Experts to investigate economic and legal issues related to the exportation of mineral concentrates in 2017. The reports escalated the demand for further reforms to ensure Tanzania enjoys benefits derived from mining investments.[5]

As a result of the investigation, reports and recommendations made, in July 2017, the Government of Tanzania amended the Mining Act vide the Written Laws (Miscellaneous Amendments) Act 2017;[6] the Natural Wealth and Resources (Permanent Sovereignty) Act 2017;[7] and the Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act 2017.[8] These reforms had implications on the existing MDAs.[9] For example, as this article indicates later, the reforms came with, among others, new dispute resolution approaches; the requirement for state participation in mining operations, and restrictions on the exportations of raw minerals.

2 Mwakaje, S.J, and Nyang'anyi, T.M., "Reclaiming Sovereignty over Natural wealth and Resources in Tanzania: Legal and Regulatory Implications on Investments", *ICSID Review*, 2023, pp. 1-3.

3 *The Citizen*, "Key Challenges, New Directions in Tz Mining Sector, available at https://www.thecitizen.co.tz/tanzania/oped/key-challenges-new-directions-in-tz-s-mining-sector-2585698 (accessed on 28 August 2024).

4 Dailynews, "Stakeholders discuss ways to improve the Mining sector," available at <https://dailynews.co.tz/mining-stakeholders-discuss-ways-to-improve-the-sector> (accessed on 27 August 2024).

5 The Citizen, 'Legal Issues with Review of Mining Development Agreements", *The Citizens*, available at https://www.thecitizen.co.tz/tanzania/open/-legal-issues-with-review-of-mining-development-agreements-2647078 (Accessed on 18 June 2024).

6 Act No. 7 of 2017.

7 Act No. 5 of 2017.

8 Act No. 6 of 2017.

9 Mwakaje and Taragwa, 2023, p. 2.

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B. Tanzania's Mining Legal and Regulatory Framework

The Tanzania Mining Legal and Regulatory framework is composed of various pieces of legislation and regulations. It is also guided by the Mining Policy, 2009. The Mining of 2010 is the framework legislation in the mining sector. This Act is complemented by other sector-specific law addressing various aspects such as environment management, fiscal management and business to mention a few. This part discusses the legal and regulatory framework by presenting an overview of selected key legislation governing the Mining sector. As such, this part adopts a descriptive approach in analysing these laws, the analysis which informs the critical analysis in other parts of the article.

I. The Mining Policy, 2009

The Mineral of Tanzania Policy, 2009 (Mining Policy) was adopted in 2009 to replace the Mineral Policy of 1997. This Policy, as quoted in its text, seeks to address the challenges of the mineral sector; to attract and enable the private sector to take the lead in exploration, mining, mineral beneficiation and marketing; to increase the mineral sector's contribution to the GDP and alleviate poverty by integrating the mining industry with the rest of the economy.[10] Other objectives include (a) to improve the economic environment to attract and sustain local and international private investment in the mineral sector.[11] In fulling these objectives, the Government enacted the Mining Act of 2010 and further undertook reforms in 2017 by two key legislations which changed the legal regime governing the mining sector. These changes, as it will discussed later, have had implications on the overall object of creating an investment enabling environment.

II. Constitution of the United Republic of Tanzania, 1977

The Constitution of the United Republic Tanzania, 1977 (the Constitution)[12] is superior over all laws, and any law inconsistent with the same is rendered null and void.[13] The Constitution provides for the management of natural resources on its directive principles of state policy by requiring activities of the Government to be conducted in such a way as to ensure that the natural wealth and heritage are harnessed, preserved and applied for the common good and also to prevent exploitation of one person by another.[14] This provision shows that mining investments in Tanzania should comply with the same because mineral resources are part and parcel of natural wealth and heritage. While the Directive Principles

10 The Mining Policy, 2019, para. 4(a).
11 Ibid.
12 Cap. 2 of the Laws of Tanzania.
13 Constitution of United Republic of Tanzania, 1977, Art. 64(5).
14 Ibid, Art. 9(c).

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are not enforceable, they form the spirit encore of the Constitution.[15] This is attested by the reference made in the preamble of the Natural Wealth and Resources (Permanent Sovereignty) Act to the directive principles, setting out the clear intention of the legislature, that natural wealth and heritage must be harnessed to benefit the Tanzanian people.

The Constitution further provides for the duty of every person to protect the natural resources of the United Republic of Tanzania.[16] This duty extends to the duty to ensure natural resources are exploited in such a manner that they benefit people and contribute to national development. It is noteworthy that the dictates of the Constitution suggest that investment in all sectors of natural resources should be for the betterment of the people and economic development and not otherwise.

III. The Mining Act, 2010

In Tanzania, the mining sector can only be accessed through a licensing process.[17] This process and the accompanying conditions are contained in various laws and regulations that together form the legal and regulatory framework for Tanzania's mining sector. The Mining Act of 2010 is the principal statute regulating the mining sector in Tanzania. It provides various mineral rights through which the holders can access the mining sector. The application for mineral rights is made to the Mining Commission in the prescribed form and accompanied by the prescribed fee.[18] In this regard, the investors can access mineral rights in Tanzania through a licence application. The licence is what entitles the investor to mining rights. The following paragraphs delve into a review of the various laws and regulations regulating the mining sector.

As indicated above, the Mining Act is the main legislation regulating mining operations in Tanzania. The Act addresses how the mining sector is accessed by providing for various mineral rights such as prospecting licences, mining licences, special mining licences, primary mining licences and other licences for various activities in Tanzania, including smelting, processing and refining minerals. It also addresses renewals of these mineral rights; transfer of these mineral rights; termination of mineral rights; payments of royalties, fees and other charges and any other relevant matters.[19]

Although the Act provides for licensing as the only mode through which investors can access the mining sector, it is supplemented with the MDAs concluded before the coming into force of the 2017 amendments to the Mining Act; the Natural Wealth and Resources Contracts (Review and Renegotiation of Unconscionable Terms) Act; and the

15 See *Akhil Bharatiya Soshit Karmachari Sangh v. Union of India*, [1981] 1 SCC 246; Zachary Olum and Another v. The Attorney General, (Constitutional Petition No. 6 of 1999) [2000] UGCC 3.

16 Id, Art. 27.

17 See Mining Act, [Cap. 123 R.E 2019].

18 Mining Act, [Cap. 123 R.E 2019], s. 49(1).

19 Mining Act, [Cap. 123, R.E 2019], Preamble.

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Natural Wealth and Resources (Permanent Sovereignty) Act 2017.[20] That is to say, all MDAs are subject to review and renegotiation.

IV. The Natural Wealth and Resources (Permanent Sovereignty) Act, 2017

The Natural Wealth and Resources (Permanent Sovereignty) Act 2017 (the Act) proclaims permanent sovereignty over natural resources. Under the Act, permanent sovereignty over all natural wealth and resources belongs to the people, while the Government exercises the ownership and control over natural wealth and resources on behalf, and for the benefit of, the people and the United Republic. **[21]** The Act restricts beneficiation outside the Republic of Tanzania.[22] Further, it provides the National Assembly with the mandate to review all arrangements or agreements entitling extraction, exploitation or acquisition and use of natural wealth and resources. Furthermore, the Act provides that disputes arising out of investments in natural wealth and resources should be adjudicated by judicial bodies or other organs in Tanzania and per the laws of Tanzania.[23] These reforms essentially changed several aspects that directly affected MDA concluded by the Government with various investors.

V. The Natural Wealth and Resources (Review and Renegotiation of Unconscionable Terms) Act, 2017

The Natural Wealth and Resources (Review and Renegotiation of Unconscionable Terms) Act makes comprehensive statutory provisions that require all arrangements or agreements on natural wealth and natural resources to be tabled for review by the National Assembly for purposes of ensuring that any unconscionable term is rectified.[24] The Act defines an unconscionable term as any term in the arrangement or agreements on natural wealth and resources which is contrary to good conscience and the enforceability of which jeopardises the interest of the United Republic.[25] When the National Assembly determines that there are unconscionable terms, it should recommend that the Government initiate renegotiation of the terms.

20 Ibid, s.11.

21 Natural Wealth and Resources (Permanent Sovereignty) Act, 2017, s.4.

22 Ibid, s. 9.

23 Id, s. 11(2).

24 The Natural Wealth and Resources Contracts (Review and Re-negotiation of Unconscionable Terms) Act, 2017, the Preamble of the Act.

25 Ibid, s. 3.

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C. Regulatory Measures in Mining Investments

I. State Participation

Under section 10 of the Mining Act, the Government is entitled to have not less than 16% non-dilutable free carried interest (FCI) shares in the capital of a mining company depending on the type of minerals and level of investment. FCI applies in any mining operations under a mining licence or a special mining licence.[26] In addition to FCI, the Government is entitled up to 50% of the shares of the mining company commensurate with the total tax expenditures incurred by the Government in favour of the mining company. Provisions relating to state participation imply that Government equity may be increased up to 66%.

It should be noted that the FCI requirement does not apply to existing MDAs until they are renegotiated. This is due to the existence of stabilisation clauses in such MDAs. The government has taken the initiative to implement the requirements for existing MDAs. For example, on 24th January 2020, the Government and Barrick Gold Corporation reached an agreement to settle their protracted disputes, one of the terms of the contract being that the Government would acquire a free carried shareholding of 16% in each of the mines operated by Barrick Gold, namely Bulyanhulu, North Mara and Buzwagi.[27]

The provision about state participation should be respected by the investors and is put into place to ensure that the Government of Tanzania benefits from the natural wealth and resources. However, one of the challenges of FCI is that mining operations are capital-intensive projects and that they take long to generate profits. Thus, it may take up to 12 years for the profits to be generated and the government to start benefiting.[28] Also, the fact that government equity may increase by up to 66% may not be attractive or favourable to investors.

II. Local Content Requirement

Local content is defined as a quantum of composite value added to, or created in, the economy of Tanzania through deliberate utilisation of Tanzania's human and material resources and services in the mining operations to stimulate the development of capabilities of indigenous Tanzania and to encourage local investment participation.[29] Local content requirements mainly ensure that local citizens and companies participate and benefit from mining operations. Mining investors must provide that local content is a component of their

26 Id, s. 10(1).

27 Luhende, B., "Examining the New Local Content Regime in the Mining Sector in Tanzania",47(2) *EALR*, 2020, p. 48.

28 Ibid.

29 Mining Act, Cap. 123 [R.E 2019].

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mining activities. This requirement is provided under section 102 of the Mining Act and the Mining (Local Content) Regulations of 2018.

It is provided that, the mineral right holder should give preference to goods which are produced or available in Tanzania and services which are rendered by Tanzanian citizens and or local companies. If the goods required by the mineral right holder are not available in Tanzania, the same should be provided by a local company which has entered into a joint venture with a foreign company. In the joint venture, the local company should own a share of at least 5%.[30] The mineral right holder is also required to submit to the commission a procurement plan for at least five years indicating, among others, the use of local services in insurance, financial, legal, accounts, security, cooking, catering, health and other services provided or available in Tanzania; and works, goods and equipment. Manufactured, produced or available in Tanzania.[31]

Local content requirement is also provided under the Mining (Local Content) Regulations, 2018 and its amendments through the Mining (Local Content) Amendments Regulations, 2019. It should be noted that instead of local content requirements being very useful to ensure direct employment of local citizens, technological and skills transfer, procurement of local goods and services and local beneficiation so that the government and its people to obtain benefits beyond taxes and royalties paid by the holder of mineral rights, but the requirement poses some legal challenges. It has been argued that local content provisions are inconsistent with the 'national treatment principle' which imposes an obligation on member countries to treat one another as they would treat their nationals, this is an international measure applicable to the World Trade Organization (WTO) members, and Tanzania is bound with the same.[32] Also, implementation of local content requirements faces other challenges like lack of capacity from the locals.

III. Corporate Social Responsibility

The law requires a mineral right holder to prepare an annual basis, a credible corporate social responsibility plan jointly agreed upon by the relevant local government authority in consultation with the Minister responsible for local government authorities and the Minister responsible for finance.[33] To ensure implementation of the corporate social responsibility. On 23 June 2023, vide Government Notice No. 409 of 2023, the Minister issued Mining (Corporate Social Responsibility) Regulations, 2023; which among others, require a Corporate Social Responsibility (CSR) plan to take into account environmental, social, economic and cultural activities based on local government authority priorities of the host community and the plan should be viable and capable of being implemented within the

30 Id, s. 102(1),(2) and (3).

31 Id, s. 102(4).

32 Luhende, 2020, p. 58.

33 Mining Act, Cap. 123[R. E 2019], s. 105(1).

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agreed timeframe. Failure to comply with the provision of the regulations is an offence whose penalty includes suspension or cancellation of a licence.

It is worthy of arguing that CSR is essential to ensuring that the benefits relating to mining investments are given back to the community and enhance development in the place where the natural resources are found; that is, through CSR, people enjoy the benefits of their resources.

D. Legal and Practical Challenges Faced by Investors

I. Dispute Settlement

The law requires disputes arising out of investments in natural wealth and resources to be adjudicated by judicial bodies or other organs in Tanzania and per the laws of Tanzania.[34] The term in the natural resources-related agreement is deemed unconscionable if it contains any provision or requirement subjecting the state to the jurisdiction of foreign laws and fora.[35] It is a fact that investors prefer international arbitration as a forum in which the neutrality of proceedings is guaranteed as compared to domestic arbitration. This is because allowing judges who are servants of states with the obligation to protect public policy stands to affect the independence and impartiality of the dispute adjudication process.[36] Also, between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Tanzania[37] an agreement between the Government of Canada and the United Republic of Tanzania for Protection and Reciprocal Protection of Investments.[38] Under the jurisdiction of Tanzania, domestic forums are outstared by BITs. For example, the Agreement said BITs, parties consent to submit their investment disputes the International Centre for Settlement of Investment Disputes (ICSID) or any other international tribunal.[39]

The attempt to restrict disputes relating to mining investment to be adjudicated by foreign fora is inconsistent with Tanzania's contractual commitments under BITs and MDAs and is hence likely to drive away potential investors in the mining sector.

It has been reported that the 2017 reforms led to many disputes between Tanzania and foreign investors, hence cases against the country in international tribunals. For example, Indiana Resources Limited the majority Shareholders of Ntaka Hill and Nachingwea Nickel

34 Natural Wealth and Resources (Permanent Sovereignty) Act, 2017, s. 11(2).

35 Natural Wealth and Resources Contracts (Review and Re-negotiation of Unconscionable Terms) Act, 2017, s. 6(2)(i).

36 Rwebangira, G., "The Legal Dilemma of Stabilization Clauses in the Renegotiation of Standard Mining Agreements in Tanzania: Challenges and Prospects," 2(2) *LST Law Review*, 2019, p. 81.

37 Dated 7th January 1994.

38 Dated 16 May 2013.

39 Longopa,E., "Re-Affirming the Permanent Sovereignty over Natural Resources; Implications of Emerging Legislative Trends in Tanzania," *2(2) LST Law Review*, 2019, p. 68.

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Limited, instituted the matter in International Centre for Settlement of Disputes.[40] The decision of the case was pronounced in July 2023, where Tanzania lost the matter and was ordered to compensate the company USD 109 million for breach of contract. [41] With these concerns and disputes, the Government should rethink on how to regulate mining investments in view of avoiding the disputes that stand to expose the country into foreign tribunals and result into huge amount of compensation.

II. Unilateral Change of Mining Contracts

The Natural Wealth and Resources (Review and Renegotiation of Unconscionable Terms) Act 2017, allows unilateral change of terms of existing MDAs. It is provided that if the investor fails to agree to re-negotiate the unconscionable terms or to reach an agreement, the term ceases to have effect to the extent of unconscionable terms and is treated as having been expunged.[42] Automatic nullification of the term of the contract amounts to a breach of contract. This is the settled position in the case of *Biwater Gauff (Tanzania Limited) v. United Republic of Tanzania,*[43] where it was held that the Government of Tanzania was in breach of contract by unilaterally terminating the contract.

A critical question is whether negotiation can involve the power of one party to decide and unilaterally amend or expunge the contract. This trend threatens the enabling environment for investors. Therefore it is, not a palatable provision of law insofar as the attraction of investors is concerned.

III. Retrospective Application of Laws

The Natural Wealth and Resources (Review and Renegotiation of Unconscionable Terms) Act allows retrospective application against the well-celebrated principle against retrospective application. It is provided that all development agreements concluded before the coming into force of the section are subject to the provisions of the Natural Wealth and Resources (Review and Renegotiation of Unconscionable Terms) Act.[44] It is argued that PSNR laws contradict the fundamentals of the rule of law and the constitutional tenets which discourage the retroactive application of laws.[45] The retroactive application of PSNR laws is not favourable to the investors especially the investors with MDAs with the govern-

40 Case No. ARB/20/38.

41 Rwechungura, G.C.," Sanctity of Contracts in Foreign Investment Regime: Case of Tanzania Foreign Investment Practices", *Beijing Law Review*, 2023, pp. 1841-47.

42 The Natural Wealth and Resources Contracts (Review and Re-negotiation of Unconscionable Terms) Act, s. 7(1).

43 ICSID Case No. ARB/05/22 Award (24 July 2008).

44 Mining Act, Cap. 123[R.E 2019], s.11.

45 Mwakaje and Nyang'anyi, 2023, pp. 14-16.

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ment of Tanzania. The MDAs contain stabilisation clauses which freeze the application of new laws.

E. Reflection on the Principle of Pacta Sunt Servanda

The principle of '*pacta sunt servanda'* requires the States to observe and perform all obligations under international agreements in good faith.[46] This principle traces its origins from the principle of the sanctity of contracts and has been adopted at the international law level to emphasize the importance of fulfilling treaty obligations. Tanzania is obliged under the EAC Treaty to pursue the creation of an enabling environment for investment in the mining sector.[47] Given the fact that the legal framework governing investment in the mining sector does not sufficiently honour the obligation of creating an enabling environment for investment in mining, it is with no doubt that Tanzania violates the principle of '*pacta sunt servanda'* which is the critical international principle governing international agreements.

It has been argued that 2017 laws are inconsistent with BITs and MITs in which Tanzania is bound to fulfil its obligations.[48] This is against the principle of *'pacta sunt servanda'* and can be invoked by instituting legal cases against Tanzania at international tribunals.[49] The fact that Tanzania does not honour the commitment under international agreements hampers the flow of investors to invest in Tanzania.[50]

F. Conclusion and Recommendation

The regulation of mining investments in Tanzania was highly affected by the changes brought about by the 2017 laws. The said enactments were to reassert permanent sovereignty over natural resources and ensure that people and the government benefit from their natural resources and wealth. However, the implementation of the said laws poses many concerns concerning Tanzania's commitments and obligations under international law, international agreements and MDAs which were freely entered into. The issues of retrospective application of 2017 laws, unilateral amendments of the contract and the restriction of dispute resolution outside Tanzania must be addressed by legislative changes that will ensure that enforcement of 2017 laws complies with Tanzania's international obligations.

It is also recommended that the legal framework regulating mining investments in Tanzania be structured to balance the state's interest in maximising benefits acquired from natural wealth and resources and the investor's duty to protect their interests against unfair

46 Vienna Convention on the Law of Treaties, 1969, U.N.T.S 1155, Art. 26.

47 Treaty for Establishment of East African Community, 1999, Art. 114(2)(c)(i).

48 Rwechungura, 2023, p. 1857.

49 Longopa, E., "Re-Affirming the Permanent Sovereignty over Natural Resources; Implications of Emerging Legislative Trends in Tanzania," *2 (2) LST Law Review*, 2019, p. 68.

50 Rwechungura, 2023, p. 1857.

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practices. This move will ensure the predictability and stability of the legal framework, which are among the key driving factors for investors.

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