Amendments to the Mining Act in Tanzania

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Following the extensive amendments to the Mining Act, Cap.123 of the Laws of Tanzania (Act No. 14 of 2010) (the Mining Act) by the Tanzania Extractive Industries (Transparency and Accountability) Act, 2015 (TEIA) whereby a number of changes affected mineral rights holders, the Mining Act had two further amendments in 2017 as a result of a change in the Tanzanian government's (Government) approach on the mining sector, amongst others.

The first round of amendments in 2017 were brought in terms of the Finance Act, 2017. These amendments increased the royalty rate from 4 to 6 per cent with respect to minerals exports such as gold, copper, silver and platinum. This increase has attracted some debate on how the change would affect the mining sector. In addition, the amendments introduced a clearing fee of 1 per cent (as a new requirement) on the value of all minerals exported outside Tanzania from 1 July 2017. Some stakeholders have argued that the increase in the royalty rate will have a negative impact on foreign investment in the sector.

The second round of amendments in 2017 came into effect in July in terms of the Written Laws (Miscellaneous Amendments) Act, 2017. These amendments were a result of recommendations to the Government by the President Committee established to investigate the export of metallic mineral concentrates. In particular, these amendments changed the shareholding structure requirements. It is now mandatory for all Mining Licensees or Special Mining Licence holders to give the Government at least a 16 per cent free carried interest in the capital of their companies. The Government is also entitled to acquire (in total) up to 50 per cent of the shares in a mining company, proportional with the quantified value of tax expenditures incurred by the Government in favour of the mining company.

These amendments also established the Mining Commission (Commission) which replaces the Mining Advisory Board (Board). The Commission has been empowered to perform additional functions to the Board. The Commission, apart from having advisory functions, has been empowered to (i) issue licences, (ii) regulate and monitor the mining industry and operations, and (iii) ensure orderly exploitation and exploration of minerals (as well as the utilisation of minerals). In addition, the Commission has the power to resolve disputes arising from mining activities and to carry out inspections and investigations on safety issues.

In terms of these amendments, the Government will now have a lien in all mineral concentrates. The Commission is empowered to analyse and value the concentrates and thereafter the concentrates will be processed within Tanzania. This means transportation of concentrates outside Tanzania for processing is no longer allowed. It is worth noting that this move by the Government, despite good intentions, will take some time to be implemented, as currently Tanzania does not have a smelter in place. The law is also silent on whether this particular section of the law may be suspended pending construction of the processing plant.

Moreover, the Mining Act has been amended by including provisions relating to local content. The amendments, amongst others, require the mineral right holder to buy goods which are produced in Tanzania or the services that are rendered by local companies or citizens. The amendment defines "local companies" as "a company or subsidiary company incorporated under the Companies Act, which is 100 per cent owned by a Tanzanian citizen or a company

that is in a joint venture partnership with a Tanzanian citizen or citizens whose participating shares are not less than 51 per cent". This means for a foreign company to be able to render services to the mining sector, it must enter into a joint venture arrangement with at least a 51 per cent interest held by Tanzanian companies or citizens. However, there is an exception with respect to goods that are not available in Tanzania – these goods can be provided by a majority non-Tanzanian owned company provided that such a company has a local partner company holding at least a 25 per cent interest in the company. There is uncertainty as to whether the definition of “goods” would mean to include “services”. A reasonable interpretation (when reading the definition with the other relevant sections of the Mining Act) would be for the definition of “goods” to mean that it includes “services”.

In terms of the amendments, the mineral right holder is required to submit to the Commission a procurement plan of five years indicating the local services which will be used in the insurance, financial, cooking and catering, legal and security sectors.

Notwithstanding the above, the mineral right holder in terms of the amendments will be required to comply with the necessity of lodging an integrity pledge, which will require the mineral right holder to undertake to conduct mining operations with utmost integrity, and to refrain from engaging in any manner that is prejudicial to the country’s economy. Should a mineral right holder fail to comply with the integrity pledge, their licence will be cancelled and the Government would be able to exercise its right to take over the facilities of such mineral right holder.

In addition, the Government passed new legislation: namely, The Natural Wealth and Contracts (Review and Re-negotiation of Unconscionable Terms) Act of 2017 (Natural Wealth Act), and The Natural Wealth and Resources (Permanent Sovereignty) Act 2017 (Natural Resources Act) which has had some impact on the mining sector.

The Natural Wealth Act has had a noticeable impact on the mining sector, particularly the producers of minerals and concentrates, as it allows the Government to review and renegotiate agreements entered into prior to the enactment of the Natural Wealth Act. According to certain provisions of the Natural Wealth Act, the Government may renegotiate with the mining company on the terms of the agreement which appear to be unconscionable, such as terms that restrict the Government’s sovereignty over its natural resources, amongst other things.

It is unclear whether the proposed renegotiation of contracts will affect mining projects and the mining sector in general, which generates about 3.5 per cent of Tanzania’s gross domestic product.

The Natural Resources Act and the Natural Wealth and Resources (Permanent Sovereignty) Act (Natural Resources Act) have also had a noticeable impact on the mining sector. The Natural Resources Act introduced the requirement of settling disputes, especially those that relate to the extraction, exploitation, acquisition or use of natural wealth and resources that are to be settled within Tanzania. Before the enactment of the Natural Resources Act, parties were free to choose the governing law and jurisdiction with respect to dispute resolution.

Following the changes to the Mining Act, the Government has issued a number of regulations to support the implementation of the new requirements under the law. However, of most interest are the Mining (Mineral Rights) Regulations, 2018 (Mineral Rights Regulations), which repeals the Mineral Rights Regulations of 2010, and the Mining (Local Content) Regulations, G.N No. 3 of 2018 (Local Content Regulations).

The Mineral Rights Regulations provide for how mineral rights holders can apply for mineral rights licences and the procedure, costs and requirements for such licences. It also provides for the expenditure a prospective mining licensee ought to spend, depending on the area which is being prospected.

The Local Content Regulations aim to maximise value addition, job creation and the use of local expertise, goods and services in the mining industry value chain and their retention in Tanzania.

Among the notable features of the Mineral Rights Regulations is the requirement of giving an indigenous Tanzanian

company first preference in the granting of mining licences. The Mineral Rights Regulations have defined an indigenous company as a company incorporated under the Companies Act that has (i) at least 51 per cent of its equity owned by a citizen or citizens of Tanzania and Cap. 212, and (ii) Tanzanian citizens holding at least 80 per cent of executive and senior management positions and 100 per cent of non-managerial and other positions.

The Mineral Rights Regulations impose a requirement on holders of mining licences to have a minimum of 5 per cent local shareholding. In the event that it is practically possible to satisfy the shareholding requirements, the Minister may vary these requirements. The said 5 per cent interest that shall be vested in the Tanzanian entity cannot be transferred to a non-Tanzanian/non-indigenous company.

In a situation where there are two equal bidders, the Mineral Rights Regulations place a preference on the bidder with the most local content capacity.

With respect to the employment aspects, the Mineral Rights Regulations require mining companies to have a well-documented training and succession plan, and impose increasingly stricter requirements for employing non-Tanzanians in the mining companies. Specifically, the Regulations have made it compulsory for mining companies to solely employ Tanzanians in all junior or middle level positions. However, in the event that the expertise or skills are lacking at these levels, companies would be required to provide training to Tanzanians in that field, either locally or outside Tanzania.

Another important and notable feature of the Mineral Rights Regulations is the requirement for exclusive use of insurance services being provided by Tanzanian insurers, as well as legal services being provided by Tanzanian law firms. Companies are also required to maintain operating accounts in indigenous Tanzanian banks which are either exclusively owned by Tanzanians or have majority shareholding by Tanzanians.

The Mineral Rights Regulations impose fines of between TZS 50 million to TZS 10 billion or a jail term between one to 10 years upon conviction for default or non-compliance with their requirements.

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