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Extractive Industry Code of Conduct: A step in the right direction

Though endowed with abundant minerals and hydrocarbons, there is the argument that perhaps Tanzania did not quite get the best deal possible at the timing of putting pen to paper on the Mining Development Agreements (MDAs) and Production Sharing Agreements (PSAs) when the MDAs and PSAs were being signed between investors and the Government. It is for this reason that in 2017, the Government made host of changes to the legislation revolving around the natural resources industry. These changes included amendments to existing legislation as well as the introduction of new legislation altogether. Though there was initially resistance and negative perception, reports from the Government indicate that these changes have resulted in a positive outcome for the extractive industry in Tanzania.

One of the new laws that was enacted was *The Natural Resources (Permanent Sovereignty) Act*¹ which amongst others proclaimed sovereignty and inalienability of 'natural wealth and resources', a term that has been given a broad meaning under the Act to include all materials or substances occurring in nature which can be extracted, exploited or acquired for economic gain whether processed or not. This new legislation also empowered the Minister for Constitutional Affairs to prescribe a 'code of conduct' that would govern those interested in investing in natural resources. In January 2020 the Minister exercised his powers and published *The Natural Resources*

*(Permanent Sovereignty) (Code of Conduct for Investors in Natural Wealth and Resources) Regulations*² which sets out that code of conduct. Below we set out some of the important features of this code what it means to investors.

The code introduces various requirements that investor meet, and which include general compliance with policies, laws, regulations, binding instruments and decisions. While compliance with law is debatable, the requirement to comply with policies is a striking and it basically means that potential investors in natural resources have to familiarise themselves with natural wealth and resources policies in order to ensure compliance. Equally important is compliance with *decisions* and the question would be, which decisions? By whom? One could argue that this leaves the door wide open for regulators to issue *decisions* which investor must be comply with.

Almost five years now down the line and everyone now appreciates that one of the priorities of the Government of the day is fighting corruption. The Code of Conduct is a true reflection of this as it mandates investors in natural resources not to engage in corrupt activities or any form of economic and organised crimes. This means in addition to the requirements of the Code, investors are expected to be aware of and familiarize themselves with laws that provide for and define corruption,

¹ Act No. 5 of 2017

² Government Notice No. 58 of 31st January 2020

economic crimes and organised crimes³. Other compliance requirements include avoiding of conflict of interest, respect of basic rights that are listed in the Constitution of Tanzania as well as workers' and child rights and discrimination of any form. Investors are also expected to ensure their activities are consistent with environmental best practice; and also, to exercise due care so as to avoid breach of competition laws when dealing with competitors including fixing of prices. In addition, the regulations prescribe an integrity pledge which must be signed by every investor.

What happens if there is breach of the Code? Well, where this happens the Government is entitled to terminate its business relationship with the investor without compensation or indeed provide any other remedies. This could easily mean cancellation or revocation of applicable license relating to natural resources. In order to avoid this eventuality, the regulations have put in place mechanism that if properly followed could limit this exposure. Firstly, investors are expected to put in place procedures that ensure adherence to the Code and report compliance regularly. At the moment there is no prescribed format of putting such procedures, but the minimum requirement is procedures that ensure identification of risk areas and mitigation of such risks. Also, an investor is required to conduct periodic reviews which to a minimum should address investment benefits based on survey information and agreeable deliveries and whether the investment conforms to written policies, transactions are properly recorded and the investment does not result in unconscionable behaviour that is prohibited by any law. In order to ensure compliance, the regulations entitle the Government to conduct audits including spot-on visits which do not require prior notice.

So, what does the Code of Conduct mean for investors? Most of the well-established players in the extractive industry space already have their own internal Code of Conduct which govern how

they interact with those who are affected by their operations. Consequently, their adoption and integration of this Code into their business operations should be a fairly straightforward process. However, the potential challenge could arise where the people exercising authority make *decisions* which the players in the industry need to comply with. In view, this broad discretion could result in abuse in power or unintentionally blackmail or yield the same corruption, the same vices that the Code is meant to remedy.

If you would like to learn more about this or if you have any questions, please get in touch with Thomas Sipemba at t.sipemba@ealc.co.tz

³ The main legislation on these crimes is the Economic and Organized Crimes Control Act, Cap. 200 R.E. 2002. Other applicable legislations include the Prevention and Combating of Corruption Act No. 11 of 2007 and the Anti-money Laundering Act No. 12 of 2007

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