Tanzania's new mining laws signal sweeping changes

By Peter Leon

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Three new laws, enacted by the country's national assembly in July 2017 under a certificate of urgency, will have a profound impact on Tanzania's resources sector. These are the Natural Wealth and Resources (Permanent Sovereignty) Act, 2017, the Natural Wealth and Resources (Review and Renegotiation of Unconscionable Terms) Act, 2017, and the Written Laws (Miscellaneous Amendments) Act, 2017, which amends the Mining Act, 2010, the Petroleum Act, 2015 and the Insurance Act, 2009, among others.

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Key elements include:

- sweeping powers for the national assembly to review and instruct renegotiation of previous arrangements or agreements concluded by the government;
- new requirements for state participation in all mining companies, including at least a 16% free carried interest, which may be increased up to 50% to match the value of historical tax benefits granted to the company; and
- an immediate blanket ban on the export of unprocessed minerals, which must in future be processed domestically prior to export.

Six months later, on 10 January 2018, the minerals minister promulgated a suite of new regulations under the amended Mining Act, 2010, which included the Mining (Local Content) Regulations, 2018. The regulations impose onerous local content requirements for companies operating in Tanzania, requiring them to restructure significantly the way they procure goods and services. Given the shortage of sector-specific skills in the country, as well as inadequate domestic support for the extractives sector in the provision of key goods and services, many of the requirements of the Mining Regulations do not appear to be immediately workable. This is exacerbated by the near immediate effect of the Mining Regulations, which only gave companies until April 10 to comply.

Once implemented, the new restrictions will also have significant consequences for service providers to the mining sector, including specific restrictions on procuring services in the banking, financial services, insurance and legal sectors, with the result that these sectors will be particularly affected by the new requirements.

The changes are part of a worrying trend of sweeping legislative and policy changes, implemented without consultation with stakeholders, combined with an increasingly hostile approach by the Magufuli administration towards the private sector.

These reforms have begun to have a serious impact on investor confidence and the business climate in Tanzania. Although the country has experienced healthy economic growth in recent years, the deteriorating business climate has led a number of analysts to revise the country's growth forecasts significantly downward. The financial sector in particular will have detected troubling trends underlying the headline macroeconomic figures, such as the decline in private sector credit and increases in non-performing loan ratios.

Most recently, Moody's issued its first country rating for Tanzania, giving it a sub-investment grade of B1, citing an increasingly unpredictable policy environment. Moody’s said: "Uncertainty over the regulatory environment and policy stance of the government, particularly as it relates to the mining sector, could have a long-term negative impact on the country's growth potential and ability to attract foreign investment."

Impact of finance sector

The Mining Regulations provide that a mining company requiring financial services in relation to a mining activity shall only retain the services of a Tanzanian financial institution or organisation and may only engage the services of a foreign financial institution with the approval of the Mining Commission. It also requires that companies must maintain a bank account with an indigenous Tanzanian bank and transact business through such banks in Tanzania.

As a result of the Mining Regulations, mining companies in Tanzania will be required to terminate existing relationships with foreign-owned financial institutions and procure services only from those institutions issued licences by the Bank of Tanzania, of which there are only eight; and relocate their business banking accounts from foreign-owned Tanzanian banks to banks that are majority-owned by Tanzanians.

It is likely to be difficult for mining companies to comply with these requirements in the near term, given the limited number of majority Tanzanian-owned banks within the Tanzanian banking sector.

Impact on insurance sector

On the insurance front, the Mining Regulations require that a mining company had to by no later than April 10: comply with the provisions of the Insurance Act; insure insurable risks relating to mining activities through an indigenous brokerage firm or, where applicable, an indigenous reinsurance broker; and only obtain offshore insurance services for a mining activity in Tanzania with the approval of the Commissioner of Insurance, who may grant such approval only if he or she is satisfied that local capacity in Tanzania is fully exhausted.

The Insurance Act was recently amended by the Written Laws (Miscellaneous Amendments) Act, 2017. These amendments increased the Tanzanian ownership requirement for registration as an insurance broker from one third to two thirds of the 'controlling interest' in such broker.

It is likely that the Tanzanian insurance market may simply not have the necessary capacity to insure mining companies effectively.

The Mining Regulations impose penalties for non-compliance, applicable to mining companies as well as insurance brokers and insurers, of fines of up to five billion Tanzanian shillings or imprisonment of up to five years.

Impact on legal services

Under the Mining Regulations, a mining company engaged in a mining activity requiring legal services in Tanzania may only retain the services of a Tanzanian legal practitioner or a firm of Tanzanian legal practitioners whose principal office is located in Tanzania.

Again, the Mining Regulations impose penalties for non-compliance, applicable to mining companies as well as legal practitioners and law firms, of fines of up to five billion Tanzanian shillings or imprisonment of up to five years.

Wider economic impact and the need for private sector dialogue

Provided it continues to invest in the development of Tanzania's natural resources, the extractives sector could contribute significantly to the development of the Tanzanian economy, not least the services sector. Well-designed local content policies can play an important role in ensuring that the exploitation of the country's natural resources has a multiplier effect through the creation of linkages to other sectors of the economy. The potential for such a positive contribution applies equally to the banking, insurance and legal services sectors. Tanzania's banking sector, for instance, remains small in relation to the overall economy and is less developed than other countries at similar levels of development.

The new requirements created by the Mining Regulations ostensibly attempt to achieve this multiplier effect by introducing hard quotas for the procurement of goods and services from Tanzanian providers, combined with blanket prohibitions on the procurement of certain services from non-Tanzanians (notably banking, insurance and legal services).

Unfortunately, these restrictions fail to take into account the current reality of the domestic economy and its capacity to meet the requirements of the extractives sector. Such a complex and rigid system of quotas, implemented with immediate effect and without consideration for what is currently feasible, instead risks creating a regime where compliance becomes impossible. Rather than supporting the growth of local businesses, the result will be to increase regulatory uncertainty for investors and deter further investment in the sector, particularly given the wider context of the changes brought about by the 2017 legislation.

In order for any local content regime to succeed, it must be tailored to develop the capacity of local industries, as well as transfer skills and technology.

Designing such a policy necessarily requires input from the companies implementing as much as benefitting from them. Unfortunately, the Mining Regulations requirements were imposed without any consultation with stakeholders. This follows the administration's approach to similar legislation and policy changes to the extractives sector which appears grounded in mistrust as much as a lack of dialogue with the private sector.

There is an urgent need for open and constructive dialogue between government, the mining sector, as well as those providing services to the sector, to resolve uncertainty around the new mineral regulatory regime. The alternative is continued mutual suspicion between government and business and further deterioration in the business climate, with potentially serious consequences for the Tanzanian economy.

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