

3 July 2017



New laws proposed on oil, gas and mining sectors

- **Proposed wording has retrospective effect to current agreements**
- **Old PSAs and MDAs will be affected**
- **All agreements can be vetted and renegotiated**
- **Proposed amendment to Mining Act, Petroleum Act**
- **No foreign arbitration clauses**
- **16% FCI in mining companies**
- **No foreign accounts**

On 29 June 2017, the Government tabled three Bills in the National Assembly namely the Natural Wealth and Resources (Permanent Sovereignty) Bill 2017, the Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Bill 2017 and the Written Laws (Miscellaneous Amendments) Act 2017. The three proposed Bills have been prompted by the reports of the two Presidential Committees of inquiry into the mining industry. For this reason, the three Bills should be read together and in the context of ongoing reforms of the extractive industry particularly the mining industry.

For one, the Natural Wealth and Resources (Permanent Sovereignty) Bill 2017 proclaims Tanzania's permanent sovereignty over its natural resources. In general, the Government wants to exert more control on the grant of extraction rights, the mining operations as well as the disposal of minerals extracted. In doing so, the Government sends a clear message that it has the right and freedom to decide the modus operandi for the exploitation of natural resources found within its territorial boundaries.

The Natural Wealth and Resources (Permanent Sovereignty) Bill 2017 contains eight principles namely (i) Proclamation of permanent sovereignty (ii) Inalienability of natural wealth and resources (iii) Prohibition of exploitation except for the benefit of the People (iv) Participation of the People and Government (v) Mandatory beneficiation within the country, (vi) Retention of earnings (vii) Prohibition of proceedings in foreign courts and (viii) Review of All Agreements by the National Assembly. These principles set the bedrock of the proposed Government reforms of the extractive industry. To implement these principles, the Government proposes amendments to the Mining Act (and other related laws) under the Written Laws (Miscellaneous Amendments) Bill 2017 as well as the Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Bill 2017. In a nutshell, these three proposed Bills have the following legal implications specifically for the extractive industry.

Proclamation of permanent sovereignty

The Natural Wealth and Resources (Permanent Sovereignty) Bill 2017 proclaims Tanzania's sovereignty over its natural resources. In its original form, the doctrine of permanent sovereignty over natural resources implies that the state has the freedom to decide the economic policies on the exploitation of its natural resources without interference from other states.

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Although the Bill is not so detailed in enunciating the doctrine of permanent sovereignty over natural resources, its provisions, when read together with the Written Laws (Miscellaneous Amendments) Bill 2017 as well as the Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Bill 2017, demonstrate that the Government is determined to exert more control on the extraction of its natural resources. For example, the prohibition of proceedings in foreign courts and tribunals demonstrates that the Government does not want to be subjected to foreign laws and foreign forums (as discussed further below). Furthermore, the Government seeks to introduce, particularly in the mining sector, a prohibition on stabilization clauses that entails the 'freezing of laws.' In addition it is proposed that any future stabilization clauses must not be for the life of the mine but have a time limit and be subject to periodic review based on the 'economic equilibrium principle'.

Based on information that is available, most if not all Production Sharing Agreements (PSAs) in the oil and gas sector and Mine Development Agreements (MDAs) in the mining sector that the Government has already entered into over the past two decades have clauses that provide stabilization to the project based on the law that existed at the time of signing, in addition to dispute resolution mechanism outside the country. The proposed Bills seem to allow the Government to renegotiate provisions of these PSAs and MDAs based on them being unconscionable, making it highly unpredictable for a long term investor in Tanzania.

Whilst these Bills introduce a specific amendment to the Mining Act disallowing any agreement to have freezing of the law or life of the mine stabilization clauses, there is no such amendment proposed in the Petroleum Act, although the players in the oil and gas industry may still face a renegotiation of their PSAs based on unconscionability, as shall be determined solely by the National Assembly.

Such powers to renegotiate and unilaterally expunge any articles or clauses in already signed PSAs and MDAs will likely lead to a challenge on the constitutionality of enacting such new legislation with retrospective effect. Any such unilateral expunging of articles or clauses in the already signed PSAs and MDAs may also lead to disputes in forums such as the ICC Paris, LCIA London and ICSID, all forums that appear in such agreements that the United Republic is a signatory to. There is no shortage of case law on sovereign nations being sued in arbitral tribunals based on the negative economic impacts suffered by project companies based on change of law that either had retrospective effect or, going forward, led to a decrease in the economic position of the project company.

Inalienability of natural wealth and resources

The Natural Wealth and Resources (Permanent Sovereignty) Bill 2017 provides that ownership and control over natural resources vests in the Government as a trustee of the people of Tanzania. This is also reflected in the Written Laws (Miscellaneous Amendments) Bill 2017, which amends the Mining Act, and provides that the minerals are the property of the United Republic whose title vests in the President in trust for the People of Tanzania.

It is further provided that the Government shall have lien over any material, substance, product or associated products extracted from the mining operations or mineral processing. This implies that the ownership of natural resources in situ as well as after extraction vests in the state.

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This seems to be different from the previous position (Mining Act 2010 and MDAs) which assumed that the title to minerals once extracted vested in the investors. For example, section 46(c) of the Mining Act 2010 provides that the holder of a special mining licence has the right to dispose of minerals extracted only subject to an obligation to pay royalties.

The new position is reflected in the Written Laws (Miscellaneous Amendments) Bill 2017 which amends the Mining Act 2010 and amongst other introduces the following:

- Mineral rights holders construct a secure storage facility for storing of extracted raw minerals;
- Access to the raw minerals storage shall be procured from joint authorisation by an appointed official of the mining company and the Mines Resident Officer and shall be entered in special logbook showing date and time of entry and the purpose for the entry;
- Mines Resident Officer duty will be monitoring day-to-day activities, authorising entry to the mineral storage facility and oversight of mineral removals and transportation to a newly established Government Minerals Warehouse;
- Any extracted raw minerals shall be stored at the mine site for not more than five days before they are moved to the Government Minerals Warehouse to await disposal for home refining, authorised mineral dealers or, where permitted, for export;
- Abolishes the Mining Advisory Board and replaces it with a more powerful Mining Commission that shall be a body corporate, capable of suing and being sued and who shall be the advisor to the Government on mining matters. This Mining Commission shall also examine annual reports of mining companies, have powers to suspend and revoke licences and permits, audit quality and quantity of minerals produced and exported and audit capital investment and operating expenditure, provide such information to the TRA and produce indicative prices of minerals for purpose of royalty assessment;
- Any mineral right holder must now mandatorily undertake to participate in the growth of the Tanzanian economy, although the Bill doesn't go into further detail on how that participation is to be undertaken;
- What will be seen as a welcome provision by citizens, the Bill also reiterates local content, an integrity pledge and anti-pollution provisions.

Prohibition of exploitation except for the benefit of the People

This makes reference to article 9(c) & (i) of the Tanzanian Constitution which obliges state authorities to ensure natural wealth are harnessed, preserved and applied for common good and that proceeds from natural resources are applied towards the eradication of poverty, ignorance and disease. In essence, section of 6(1) of the Natural Wealth and Resources (Permanent Sovereignty) Bill 2017 obliges the designated Government entities and officials to hold at heart the interests of the People and the United Republic when signing agreements or concessions for natural resources exploitation. This provision does not make reference to any illegality on the terms of the Agreements rather requires the Government representatives to act with due diligence, professionalism and vigilance. This ignores the fact the transactions between the Government and the investors are based on willing-buyer-willing-seller arrangement and no party is compelled entering into any such agreements.

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More so, the Bill proposes that the National Assembly approves such concessions or agreements, and is able to direct the Government to renegotiate and if such renegotiations fail, to expunge any provisions that it believes are not in the interest of the United Republic. This will likely make the business environment highly unpredictable. It also implies that the Government representatives do not have the final say in the arrangements instead the National Assembly becomes the ultimate decision maker, making it even more difficult for projects to effectively come online quickly. It may also lead to decision makers taking very conservative business decisions for such mega projects to come online.

Participation of the People and Government

This provides for Government equity participation as well as citizens participation (local content). In any mining operations under a mining licence or a special mining licence, it is now proposed that the Government shall have not less than 16% non-dilutable free carried interest shares in the capital of a mining company. In addition to the free carried interest shares, the Government shall be entitled to acquire, in total, up to fifty percent of the shares of the mining company commensurate with the total tax expenditures incurred by the Government in favour of the mining company. How this is to be calculated has not been further enumerated bringing in more uncertainty for project companies.

Requirement of beneficiation

The Bill proposes a mandatory beneficiation within the country. In particular for mining, no licence or permit shall be issued for exportation of raw minerals and mineral concentrates.

Retention of earnings

What local banks will welcome, it is now proposed that all earnings from disposal or dealings must be retained in local banks. At the moment, a number of extractive companies have provisions under the respective MDAs and PSAs to have foreign bank accounts for deposit of their income acquired from export sales. Such provisions appeared in the model MDAs and PSAs, as is the case in a number of other countries, but the Bill proposes to change this. It is proposed that remittances only be permitted in respect of repatriation of profits and not otherwise.

Prohibition of proceedings in foreign courts

Much to the detriment of multinational companies, who prefer a neutral forum for adjudication, it is now proposed that disputes be adjudicated by judicial bodies or other organs established in Tanzania and in accordance with the laws of Tanzania. Whilst the MDAs and PSAs have mostly always provided for the laws of Tanzania (even in foreign arbitration), the venue now being proposed as Tanzanian Courts or Tribunals will likely have a negative impact on investing in Tanzania.

Review by the National Assembly

As stated earlier, the Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Bill 2017 empowers the National Assembly to review all agreements and arrangements, whether before or after enactment of the Bills, pertaining to natural resources and where necessary, direct the Government to re-negotiate any unconscionable terms. In this regard, the Petroleum Act is proposed to be amended and now requires that new PSAs shall only enter into force upon approval by the National Assembly. The same applies to the MDAs.

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This blanket provision, if allowed to sail through, will be a big blow to investment in the extractive industry in Tanzania. It will create greater uncertainty and reduce investor's interest in investing in Tanzania. The much awaited USD 30B+ LNG investment is certainly going to get stalled if this provision is allowed to stand as what is and what is not unconscionable is a matter of interpretation and highly subjective.

An unconscionable term is defined as any term that is contrary to good conscience and enforceability of which jeopardises the interests of the People and the United Republic. The Bill enumerates examples of unconscionable terms to include terms (very widely drafted) that: aim to restrict the State to exercise full permanent sovereignty over its wealth, natural resources; restricting the right of the State to exercise authority over foreign investment within the country; are inequitable and onerous to the State; by nature empowering transnational corporation to intervene in the internal affairs of Tanzania; undermining measures to protect the environment or the use of environment friendly technology and aim at doing any act which is injurious to the welfare of the people. The drafting of this is too wide and in our opinion will create a very unpredictable investment climate. It is recommended that whilst the Government is correctly moving with the spirit of securing Tanzanian's interests, it should not isolate itself and needs to look at the overall market and investment trend in other countries not to be make the environment uncompetitive.

Procedure for review of arrangements or Agreements

- Arrangements or agreements on natural wealth shall be reported to the National Assembly within six sitting days of the National Assembly next following the making of such arrangement or agreements be reported to the National Assembly. The practicality of this becomes an issue as the Government would proceed enter into the agreement which would be reviewed by the National Assembly making the agreement unpredictable from the outset.
- The proposed Bill states that where the National Assembly considers that such arrangement contains unconscionable terms, it shall direct the Government to initiate re-negotiation of the arrangements to rectify the unconscionable terms.
- As stated earlier, and quite concerning, the Bill proposes to apply retrospectively to current MDAs and PSAs empowering the National Assembly to order a re-negotiation of unconscionable terms. It gives no room to the investor to refuse such an unconscionable term from being expunged (see further below).

Re-negotiation of arrangement or agreement

- The Government must serve the investors with a notice of intention to re-negotiate the unconscionable terms.
- The notice should state the nature of the unconscionable terms and the intention to expunge them if the re-negotiation is not concluded within a specified period.
- The negotiation period is proposed at 90 days unless extended by mutual consent.
- After completion of re-negotiation, the Government shall report on the outcome to the National Assembly.

Rectification and expunge of unconscionable terms

- Where no consensus on the re-negotiation of the deemed unconscionable terms, such terms will deemed to have been expunged by the operation of the proposed Bill.

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In Summary

- The Bills are meant for both existing and future arrangements/agreements.
- As regards to existing MDAs and PSAs made prior to the Bills, they can be unilaterally changed by operation of law if renegotiations are unsuccessful.
- Such unilateral changes in MDAs and PSAs, which have their own dispute resolution mechanism, will give rise to international arbitration and likely a challenge on the constitutionality of enacting legislation with retrospective effect.
- What triggers re-negotiations is not illegality of the terms or that the Government's representatives did not have the requisite capacity, or procedures and due process for grant of rights were not followed, but only where the National Assembly, in its opinion, considers that the PSA or MDAs contain unconscionable terms.
- Biggest challenge is that the definition of unconscionable terms is too wide that it can preempt even the most basic elements of the PSAs or MDAs.
- Although the Bills provide that they remain intact, the previous MDAs and PSAs are likely to be affected by these proposed Bills.
- Whilst the Bills are meant to empower Tanzanians, if not worded properly, they will result in a reduction of investment in the already challenged extractive industries in Tanzania.

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