

27 September 2022



New Free Carried Interest Regulations Issued

- 2020 State Participation in Mining Regulations revoked
- ML and SML holders to initiate negotiations within 90 days
- State participation in mining prescribed
- Rights of the GoT as a holder of free carried interest shares stipulated
- Principles of mining joint venture arrangements provided
- Prescribed formats of key documents in place
- Articulates the manner of managing mining JV entities
- State participation by way of revisionary mineral rights assured

In a bid to ensure Tanzanians also enjoy a share of their minerals, section 10 of the Mining Act, R.E. 2019 (the Act) imposes a mandatory requirement to mining companies in Tanzania to afford/grant the Government of Tanzania (GoT) a minimum of 16% non-dilutable free carried interest shares in the capital of a mining company. The Act stipulates that the GoT's non-dilutable free carried interest (FCI) shares can be increased up to 50%. Based on section 10 of the Mining Act, on 30 October 2020, the Minister for Minerals published the Mining (State Participation) Regulations, 2020 (the 2020 Regulations). The 2020 Regulations were published to give more details on the acquisition and control of the GoT's non-dilutable free carried interest shares in a mining company, amongst others. However, the 2020 Regulations were not detailed and created a mayhem regarding, among others, types of minerals to be involved in FCI; and when and how to initiate state participation discussions. Following the above challenges, there was a need to revamp the 2020 Regulations in order to address these areas.

As a result, on 23 September 2022, the Minister for Minerals issued the Mining (State Participation) Regulations, 2022 (the 2022 Regulations), revoking the 2020 Regulations. The 2022 Regulations empower the GoT to participate in mining activities through holding direct equity interests in any mining venture, including mineral beneficiation. Further, the Regulations require Mining Licence (ML) and Special Mining Licence (SML) holders to initiate negotiations for the joint venture arrangement to enable the GoT acquire shareholding in the venture within 90 days from the date of publication of the 2022 Regulations, that is, on or before 22 December 2022.

To enhance state participation in mining, the 2022 Regulations provide for the manner on how the GoT can acquire equity interests. In that regard, the GoT can acquire equity interest by statutory allocation of shares, contribution through revisionary mineral rights which is a new concept under the 2022 Regulations, quantification of tax expenditure enjoyed by the mining entity and mutually negotiated and agreed shares between the GoT and the mining company.

Further, in negotiating the percentage of free carried interest shares to be issued to the GoT over and above the 16%, factors including the extent of GoT development of the public infrastructure servicing the mining venture, or any specific infrastructure put in place by the GoT which is intended to make the particular venture feasible will be taken into

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account. It would likely mean that the more infrastructure in place by the GoT the higher the percentage that could be negotiated over and above the 16%.

It is worth noting that, after the GoT has acquired FCI shares, the 2022 Regulations entitles the GoT, among others, to the right to appoint two suitable persons with pertinent qualifications as independent members to the board of directors of the company; be entitled to participate in assets distribution on winding up; be entitled to receive distributions made by the company, including loan notes in respect of qualifying shareholders loans; and to approve at least two suitable persons to the top executive management of the company as maybe agreed in the shareholders agreement and subject to the structure of the company. On top of that, the 2022 Regulations provide that no financial contribution shall be required from the GoT on account of its shares even in the case of an increase in share capital and FCI shares shall not be diluted even when shareholders increase or on account of the borrower.

The FCI are regarded by the 2022 Regulations as preferential shares, hence entitling the GoT to preferred dividend immediately after a distributable profit is recognized by the company. Also, the 2022 Regulations articulate principles governing mining JV arrangements. The said principles require, among others, incorporation of a JV company with GoT shareholder, application of the equitable economic benefits sharing principle shall be for the life of the mine, having a jointly agreed financial model to guide the management and operations of the JV company, agreeing on fiscal assumptions underlying the economic benefits sharing principle, JV company to hold all proceeds from sale of mineral products in local and foreign currency bank accounts in Tanzania, preference of Tanzanians for appointment to management positions, issuing ML or SML to the JV company and agreeing on modalities of in country beneficiation of minerals. The 2022 Regulations do not specifically address the issue of free carried interest shares for the GoT in integrated companies that use their MLs or SMLs for purposes of local production of goods like cement, gypsum and other materials and it is to be seen how the 2022 Regulations will be interpreted.

For the purpose of determining the right of the GoT to receive loan notes, the 2022 Regulations, unlike the 2020 Regulations, have provided guidelines whereby a shareholder loan with no interest applied to it need not issue loan notes to the GoT, but should interest be applicable on loans by shareholders then there is an obligation to issue loan notes to the GoT in proportion to the FCI of the GoT. The Regulations, however have a sub regulation which provides that should the shareholder loan bear a reasonable interest rate that is advantageous to the company, then there is no obligation to issue loan notes to the GoT. It is to be seen how these two sub regulations will be interpreted. And finally, if a shareholder loan has been raised from an external third party for on lending purposes, then loan notes are required to be issued to the GoT.

Regarding the key documents, the 2022 Regulations prescribe the standard formats for Framework Agreement, Shareholders Agreement, JV Company Memarts and Form of Extract of Joint Financial Model. Moreover, the 2022 Regulations require the JV arrangement to be governed by the Framework Agreement in the form prescribed in the 2022 Regulations, to be negotiated and executed between the mineral right holder and the GoT. Furthermore, the Shareholders Agreement provides for the management of the JV entity as well as the day to day running of the JV which shall be governed by the Articles of Association as provided for in the 2022 Regulations.

For the purposes of acquisition of shares under the 2022 Regulations, the Commission in consultation with the GoT and Tanzania Revenue Authority, shall from time to time determine the types of minerals or level of investment made by a holder of SML or ML on which the GoT shall be entitled to acquire the 16% non-dilutable FCI shares or more. It is too soon to see how this regulation will work hand in hand with the 90 days to commence negotiations for FCI, as at the time of this FB Attorneys Legal Update, the type of minerals or level of investment thresholds were yet to be released.

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Further to the foregoing, the 2022 Regulations provide the manner in which the GoT can participate in mining by way of revisionary mineral rights. This happens when there are mineral rights which cease to exist by operation of law and hence revert to the GoT. Upon such rights reverting to the GoT, a Revisionary Certificate will be issued in favour of the GoT, for a period of 10 years, which will have rights similar to a prospecting licence. Additionally, the revisionary mineral rights confer the right to the GoT to enter into JV arrangements for mining activities, and such rights are convertible to ML or SML.

The 2022 Regulations are certainly a step forward in providing clarity to mining stakeholders but still there are a few grey areas that will need interpretation and/or amendment to ensure that there is no ambiguity.

To read the Mining (State Participation) Regulations, 2022 [click here](#).

To read the repealed Mining (State Participation) Regulations, 2020 [click here](#).

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