# Supporting Inclusive Resource Development (SIRD)
# East Africa
# TRAINING PROGRAM
# 2019

THE CANADIAN BAR ASSOCIATION

Global Affairs Canada | Affaires mondiales Canada

EAST AFRICA LAW SOCIETY

LAW SOCIETY OF KENYA

Tanganyika Law Society

UGANDA LAW SOCIETY

# Supporting Inclusive Resource Development in East Africa Training

## Governing Legal Framework in Mining Oil & Gas in Tanzania

Aisha Ally Sinda

Dar es Salaam: 8- 9 March 2019

# The Mining Legal Framework

- The Mining Act No.14 of 2010
- The Mining Act 2010 regulations
- The Written Laws (Miscellaneous Amendments) Act No. 7 of 2017
- the Natural Wealth and Resources (Permanent Sovereignty) Act (the Permanent Sovereignty Act)
- the Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act 2017 (the Unconscionable Terms Act).

# Salient features of the new mining laws

- extensive amendments of the legal regime governing the mineral sector
- sovereign control of minerals extended to production – Gov. lien
- possible review of development agreements under the Contracts Renegotiations Act despite the fact that para 8 – of UN resolution cited under the laws preserves existing agreements, multilateral and bilateral treaties
- commission is formed as new oversight agency
- abolition of foreign arbitral process
- strict local content provisions, and no external bank accounts
- obligatory banking with local banks, insuring with local insurance providers and local beneficiation

# amendments to the Mining Act, 2010 - part iii-administration

- MoM only policy oversight of mineral sector
- The new commission overall in charge of sector
- commissioner of minerals lead authorized officer
- other officers –inspector of mines and MoM officials
- zonal mines offices
- geological survey & mapping mining
- advisory board –retains advisory mandate
- local content committees to ensure compliance
- Accountability and resource management
- minister retails some regulatory powers

# mining act, 2010 part V1-royalties & fees

- royalty no longer based on gross value but on market value upon valuation as prescribed (point of export or delivery in Tz)
- royalty rates increased substantially:-new section

| old rates | | new rates |
|---|---|---|
| | | one third of royalty to be paid in kind by depositing refined minerals into the national gold and gemstone reserve |
| metallic minerals (silver, gold, copper, platinum) | 4% | 6% |
| gemstone Diamonds | 5% | 6% |
| mineral export levy | - | 1% of value of export |
| building materials | 3% | 3% |
| | | |

# mining act, 2010 - part ix-disputes resolution

- **commissioner may decide disputes** between licensees and/or 3rd parties but not one involving Govt. and may:
  - ❖ give orders and file for execution of his orders at an RMS Court
  - ❖ appeal from commissioner's orders is to the High Court
  - ❖ commissioner may make Appeal Rules but these are pending
  - ❖ in practice commissioner not too keen to adjudicate
- Govt. prohibited from submitting to foreign jurisdictions under the Sovereignty Act
- disputes resolution subject to Tanzanian law and arbitral proceedings must be held in Tanzania
- need to align other statues and multilateral/bilateral treaties of which Tanzania is a party that provide for international arbitration

# mining act, 2010 - part x-disputes resolution – (cont.)

- TIC Act, 1997 applies only in re-benefits, including access to int. arbitration but now overtaken by the Sovereignty Act with respect to natural wealth,
- Tanzania is signatory to the New York convention on recognition and enforcement of foreign arbitral awards, UNCITRAL
- convention on the settlement of investment disputes between states and nationals of other sates – ICSID
- model MDA contains provisions allowing access to UNCITRAL and there are also BIT applicable despite the Contracts Re-Negotiations Act and the Sovereign Act, these are preserved as being existing investment agreements between Govt. to Govt. and between Govt. and investor

# mining act, 2010 part xi-register of mineral rights

- commissioner to keep register of all mineral rights and to enter therein any dealings on a MR such as mortgage, assignment or  transfers
- register open to the public
- certificate of commissioner re - entries in the register conclusive evidence of the facts
- should provide ready and timely records when searched but searches take unduly long

# mining act, 2010 - part xii-miscellaneous provisions

- mandatory listing of 30% of equity on the DSE , applies to all holders of mineral rights (before was only SML and was 25%)
- transfer of a  mineral right or of shares of a company holding a mineral right subject to consent of licensing authority, competition (FCC) approval and clearance by TRA prior to consumation
- new provision introduces a qualification that in case of transfer involving ML or SML there must be evidence of substantial development – how to value development?
- the provision that consent not to be unreasonably withheld repealed reverting to uncertainty
- restriction on transferability will affect development of mines – usually junior companies undertake exploration and then sells to developers who have the funds or the capacity to raise funds from the public

# mining act, 2010 - part xii-miscellaneous provisions

- With 16% mandatory free carry total is 46% leaving only 54% of investors' ownership. If Govt. opts to take equity for those that enjoyed tax benefits, the investors balance of equity would be rather small. And it is unclear at what point would the Govt. decide to exercise the right to take equity in a company that enjoyed tax benefits.

# mining act, 2010 - regulations

- Minister has power to make Regulations:
  - Mining (Mineral Rights) Regulations, 2018
  - Mining (Environmental Protection for Small Scale Mining) Regulations, 2010
  - Mining (Minerals and Mineral Concentrates Trading) Regulations, 2018
  - mining (Mineral Beneficiation) Regulations, 2018
  - Mining (Geological Survey) Regulations, 2018
  - Mining (Audit and Inspection of Records). Regulations, 2018
  - Mining (Radio Active Minerals) Regulations, 2018
  - Mining (Safety Occupational Health and Environment Protection) Regulations, 2010
  - Mining (Local Content) Regulations, 2018
- pending: appeals procedure, listing regulations and warehousing of mineral produce, etc.

# mining act, 2010 - security of tenure

- restrictions on mineral rights transfer (qualified consent and repeal of the standard condition- "consent not to be unreasonably withheld") impacts security of tenure
- mineral right may be suspended or cancelled subject to strict notice process but it is not clear what happens if there is a dispute regarding the grounds for suspension or cancellation. Section 65 of the Mining Act provides for an appeal process but no procedure for stay of execution pending appeal
- guarantee against expropriation without due process that guarantees fair and prompt compensation under the constitution of the URT and TIC and for those with MDAS (debatable whether it is tenable)
- uncertainty in tenure creates apprehension among investors and while they may as well invest, financing of projects becomes very expensive, and that is bad for investment in the mineral sector

# mining act, 2010 – local content

- more stringent local content provisions introduced – (new section 102 - similar to provisions under the Petroleum Act, 2015)
- emphasis on annual procurement plan and filing the same with authorities, reporting requirement by vendors of goods and services and oversight strengthened with local content committee and procedures for procurement amplified
- emphasis on local procurement of goods and services
- if goods must be imported vendor must enter into a jv with a fully owned local company-or at least locals must hold 25% of the equity of the foreign owned vendor company
- contradiction between principal law and regulations – local or indigenous company?
- principal law refers to local company and defined, regulations refer to indigenous company, undefined

# the natural wealth and resources (permanent sovereignty) act 2017

- The preamble to the Permanent Sovereign Act invoke the united Nations General Assembly's Resolution 1803 (XVIII) of 14 December 1962. Although the Resolution declared that all nations have a right to "permanent sovereignty over their natural resources", which must be exercised in the interest of their national development and of the well-being of the people", it has no binding force of its own. Authority is divided as to whether or not it reflects customary international law.
- addressing the State control issue: law intended to reaffirm State control over Tanzania's natural wealth
- reaffirmation that exploitation of natural wealth only for the benefit of Tanzanians
- provisions giving the Govt. option to take up to 50% equity in companies that have benefitted from tax exemptions
- if agreement or arrangement over natural wealth does not secure interests of Tanzanians may be void or voidable
- agreement or arrangement must be approved by parliament and has mandate to review existing agreements
- Govt. not to submit to foreign judicial bodies, arbitration must be subject to Tanzanian law and tribunal can only sit in Tanzania;
- ownership of minerals extends to production in some instances

# the natural wealth and resources (permanent sovereignty) act 2017 (cont.)

- In addition, royalties are increased from four to six percent of the gross value of minerals produced for metallic minerals, and from five to six percent for gemstones and diamonds.
- regulated CSR to ensure delivery of quality and valuable return to the community
- guaranteed returns from natural wealth for the Tanzanian economy and ability for Tanzanians and the State to acquire interest in a natural wealth venture
- no export of raw resources and mandatory local beneficiation – in-country processing
- retention of earnings in local banks, mandatory placing of insurance with local insurers
- in-country disputes resolution/adjudication, using Tanzanian laws-extends to disputes with third parties too

# the natural wealth and resources (review and renegotiation of unconscionable terms) act 2017

- The preamble to the Unconscionable Terms Act also invoke the united Nations General Assembly's Resolution 1803 (XVIII) of 14 December 1962.
- law provides for review of existing agreements by parliament to expunge unconscionable terms
- lists 11 terms deemed unconscionable – sect. 6(2)
- Provides for review procedure:
  - ❖all previous agreement to be reported to parliament for review
  - ❖If parliament finds unconscionable terms, will direct Govt. to commence renegotiations and Govt. must comply within 30 days by serving notice to the concerned party of intention to commence renegotiations stating nature of unconscionable term
  - ❖if negotiations fail or no agreement is reached within 90 days, the unconscionable term or terms will be expunged
  - ❖MDAs holders protected (preserved) as existing investment agreement but debatable and may be subject to arbitration

# the natural wealth and resources (review and renegotiation of unconscionable terms) act 2017 (cont.)

- on completion of renegotiations Govt.  shall prepare a report on the outcome and present before parliament
- if after Govt's notice  the other party fails to agree the unconscionable terms shall be deemed expunged
- paragraph 8 of the first schedule of the UN Resolution 1803(XV11) of 14th Dec. 1962 states that "foreign investment agreements freely entered into by or between sovereign states shall be observed in good faith"
- new sect. 11 of the Written Laws Amendments Act provides that all agreements concluded prior to the coming into force of the law, shall, subject to the provisions of the Contracts Renegotiation Act, 2017, remain in force
- While the UN Resolution upon which the new laws and amendments are premised appear to preserve exisisitng agreements, section 11 of the Written Laws Amendments subjects them to the Contracts Review Act, 2017 and therefore not preserving them and in fact with automatic expunging of provisions deemed unconscionable, there is no preservation.

# mining act, 2010 - new laws progressive or retrogressive?

- the 1998 law came in at a time no investor would touch Tanzania and was amended in 2010 and given the success it was due for further review
- there is need for continued change and reform but need to remain competitive to sustain
- many African countries go through the cyclical reviews, liberal, command and back to liberal but during low times there are losses and losers – exploitation
- Zimbabwe in May tabled a bill restricting mandatory indigenous participation only in platinum and diamonds projects because of minimal investment in minerals during Mugabe era
- must strike a balance for enabling environment
- exploitation of natural resources boosts national economies – but oversight is critical

# mining act, 2010 - new laws progressive or retrogressive? - extent of compliance

- compliance is a challenge as in some instances oversight agency and regulations need to be in place (mandatory listing, warehousing, local beneficiation)
- zero compliance with mandatory listing – issues relating to MDAs and regulatory clarifications (also delay in the constitution of the Commission)
- security for won minerals and regulations for government warehouses not yet in place
- local content regulations require restructuring ownership of mineral rights holders as well as providers of goods and services and compliance time is limited with limited understanding of the regulations
- aggressive administrative actions and pending outcome of Acacia agreement with Govt. create further compliance challenge

# mining act, 2010 - new laws progressive or retrogressive – will Tanzanians benefit from reforms?

- less investment, less revenues, less jobs
- debatable whether listing benefits Tanzanians:
  - labeling shares local means only locals can buy-narrowing the market
  - SA created an alternative BEE market but not successful (lumping poor people together??)
  - Vodacom listing-locals unable to take all the shares
  - Celtel in some African countries locals could not sell while foreigners sold their shares twice
  - What works best for the benefit of Tanzanians? revenues, shares, CSR, local content, special fund like the UTT, holding shares in external mining companies??
- need national discussion to explore best reform options that will benefit Tanzanians

# mining act, 2010 - new laws progressive or retrogressive – need for inclusive dialogue

- the Mineral Policy - 2009 formulated following the mineral sector evaluation conducted in 2007 after 10 years of implementation of the Mineral Policy of 1997. The Mineral Policy of 2009 aimed at:-
  - strengthening integration of the mineral sector with other sectors of the economy-critical
  - improving the environment for investment
  - Maximization of benefits from minerals
  - improving the legal and regulatory regime for the sector
  - strengthening the capacity of the oversight agencies of Govt. for the mineral sector
  - supporting and developing small-scale mining
  - promoting and facilitating the addition of value to minerals
  - strengthening environmental management
  - NB: obviously not all was achieved but cannot be fixed by adhoc and emergency actions or reforms

# Comparative Analysis

- At this point, it is worth observing that, like Tanzania, there are several countries which have previously introduced measures aimed at benefiting more from their mineral or energy resources.
- For example, in the wake of ever-rising energy prices in early and mid 2000s, Bolivia, Ecuador and Venezuela claimed a right to a greater share in the profits of their natural resources.
- The claim paved way for the introduction of new tax measures requiring investors to pay higher taxes. In some instances, the investors' private property was actually nationalised. Thus, apart from enacting the Hydrocarbon Law (3058) in May 2005 requiring investors to alter their contracts and pay greater revenue taxes, the Bolivian govt issued a Supreme Decree in May 2006 nationalising the hydrocarbon sector. The nationalisation raised government's share of the sales from 50% to 82% from the biggest fields.

# Comparative Analysis

- Similarly, the government of the Republic of Ecuador reformed its Hydrocarbon Law in April 2006 introducing a requirement that foreign oil companies must pay to the state 50% of their "extraordinary income". With the electoral win of President Rafael Correa, the percentage of the extraordinary income payable to the state was increased to 99% by a decree.
- On its part, the Venezuelan government announced in early 2006 the mandatory conversion of the Orinico Belt association agreements and risk profit-sharing agreements into jointly owned enterprises with Petroleos de Venezuela, S.A. (PDVSA), Venezuela's state-owned company.
- Some developed countries with investors in their oil & gas sector also sought to benefit more from the rising energy prices of the early and mid 2000s. In December 2005, the British government retrospectively increased the rate of tax for oil and gas producing companies in the North Sea to 50%. And in Canada, Alberta's Finance Minister ordered a complete review of Alberta's royalty and tax regimes with the goal of ensuring that Albertans received a fair share from the energy development through royalties, taxes and fees. The order was issued in 2007.

# Comparative Analysis

- In Africa, Zambia in 2008 unilaterally cancelled the mining development agreements and according to the then Minister of Mines and Mineral Development Dr Kalombo Mwansa, he said the government unilaterally cancelled the MDA's because none of the mines were willing to renegotiate and they never responded to the government correspondence.
- Chamber of Mines of Zambia said all mining companies had accepted government's request to renegotiate the MDA's and they were surprised when the Minister of Finance and National Planning, Ng'andu Magande, during his Budget address in Parliament announced new tax measures for the mining companies as they were still waiting for the committee to invite them to the negotiating table.
- Major mining companies argued that the new tax measures could not apply to mining companies that had signed MDA's with the govt because the MDA's were still binding on the Republic of Zambia.

# Comparative Analysis

- The global financial crisis affected Zambia in 2008 and did not spare mining companies operating in Zambia. The fall of copper prices resulted in serious operational difficulties for most mining companies operating in Zambia.
- Concerned about the continued loss of jobs. In 2009, The govt of Zambia decided to amend the 2008 fiscal regime, by giving mining companies the tax regime they wanted through their counter proposals.

# Oil & Gas Laws

## Legal Framework for Oil & Gas Operations in Tanzania

### Legislation

- Petroleum Act, sector legislation, other relevant Tanzanian legislation
- Requirements applicable to IOC wherever they operate (e.g. FCPA)

### Framework Agreement

- Production Sharing Agreement (PSA) & Gas Addendum

### Partner Agreement

- Joint Operating Agreement (JOA)

# Petroleum Sector in Tanzania

**Sector legislation**

- Petroleum Act 2015
  - Replaces Petroleum (Exploration and Production) Act, 1980
  - Regulations
- Tanzania Extractive Industries (Transparency and Accountability) Act
- Oil and Gas Revenues Management Act

**Petroleum Act 2015 (PA15)**

- Covers the entire petroleum value chain in TZ
  - Up-, mid- and downstream activities
- Sets duty and powers of the Ministry and the regulators (PURA & EWURA)
- Provides for the licence regimes
- Regulates the rights and obligations of the licence holder and the Contractor
- Regulates TPDC roles and participation
- Regulates domestic supply
- Sets local content ambitions (requirements)

# LNG – Capital intensive Mega Project and risk management

- Huge upfront investment and long pay-back time increase th
  - Subsurface risk
  - Construction risk
  - Operational risk
  - Market risk
  - Currency risk
  - **Regulatory risk**
  - Finance and credit risk
  - Etc.


- IOC and lenders (banks, credit agencies, etc.) take most of the upfront risk and need to get comfortable with risk level before Final Investment Decision.
- Legal framework and robustness of agreements is a key consideration

# Stability of legal framework is paramount

- The LNG Project is a ccomplex and large scale project requiring significant capital investment and 3rd party funding. This requires trust that the agreed terms and the framework remain stable over lifetime of project
- Stability is paramount to enable required trust and to mitigate regulatory risk
  - Sanctity of contracts
  - Upfront agreement on a stabilization mechanism for adverse regulatory changes
  - Access to international dispute resolution mechanism
- Recent Natural Resources Legislation raises sincere concerns for stability of the legal framework
  - Natural Wealth and Resources (Permanent Sovereignty) Act 2017 (the **Permanent Sovereignty Act**)
  - Natural Wealth and Resources (Review and Re-Negotiation of Unconscionable Terms) Act 2017 (the **Unconscionable Terms Act**)
  - Written Laws (**Miscellaneous Amendments**) Act 2017
- Key components which investors and lenders require for a project of this size and life span are currently not in place

# 2017 Natural Wealth and Resource Laws

- Recent Natural Resources Legislation raises sincere concerns for stability of the legal framework
  - Natural Wealth and Resources (Permanent Sovereignty) Act 2017 (the **Permanent Sovereignty Act**)
  - Natural Wealth and Resources (Review and Re-Negotiation of Unconscionable Terms) Act 2017 (the **Unconscionable Terms Act**)
  - Written Laws (**Miscellaneous Amendments**) Act 2017
- Key components which investors and lenders require for a project of this size and life span are currently not in place

# Key Features of the Legislation

- **What are natural wealth and resources and who do they affect?**

  *"Natural wealth and resources means all materials or substances occurring in nature such as soil, gaseous and water resources, aquatic resources, air space, rivers, lakes and maritime space etc. which can be extracted, exploited or acquired and used for economic gain whether processed or not."*

- **The Permanent Sovereignty Act**
  - Prohibition of exploitation except for the benefit of the People and the United Republic (Section 6)
    - *It is unlawful to enter into a natural resources contract/arrangement except where the People's interests and the interests of the United Republic are fully secured and approved by National Assembly of Tanzania (National Assembly)*
  - Guarantee of returns from natural wealth and resources (Section 7)
    - This section provides that: ''there shall be guaranteed returns into the Tanzanian economy"
  - Participation of the People and Government (Section 8)
    - This section has two principles: (a) Government must have equity and (b) natural persons may acquire 'stakes'

# Key Features of the Legislation

- **The Permanent Sovereignty Act…contd**
  - Retention of earnings in local banks (Section 10)
    - All revenues are to be held onshore with onshore bank accounts. Only distributable profits (dividends) can be paid offshore where distributable profits are repatriated
  - **Domestic adjudication (Section 11)**
    - ***Only Tanzanian courts and tribunals have jurisdiction over any disputes arising from extraction, exploitation or acquisition and use of natural resources. There is no waiver of sovereign immunity.***
  - **Review by National Assembly (Section 12)**
    - ***All contracts may be reviewed by National Assembly***

# Key Features of the Legislation

- **The Unconscionable Terms Act**

  *"Unconscionable term means any term in the arrangement or agreement on natural wealth and resources which is contrary to good conscience and the enforceability of which jeopardizes or is likely to jeopardize the interests of the People of the United Republic."*

- The wide definition above is supplemented with the following at Section 6(2):
  - *'Terms of arrangement or agreement shall be deemed to be unconscionable and treated as such if they contain any provision or requirement that:*
    - *a) Aim at restricting the right of the State to exercise full permanent sovereignty over its wealth, natural resources and economic activity;*
    - *b) Are restricting the right of the State to exercise authority over foreign investment within the country and in accordance with the laws of Tanzania;*
    - *c) Are inequitable and onerous to the state;*
    - ***d) <u>Restrict periodic review of arrangement or agreements which purport to last for lifetime;</u>***

# Key Features of the Legislation

- **The Unconscionable Terms Act…contd**

  ***e)*** ***<u>Securing preferential treatment designed to create a separate legal regime to be applied discriminatorily for the benefit of a particular investor;</u>***

  *f)* *Are restricting the right of the state to regulate activities of transnational corporations within the country and to take measures to ensure that such activities comply with the laws of the land;*

  *g)* *Are depriving the people of Tanzania of the economic benefits derived from subjecting natural wealth and resources to beneficiation in the country;*

  *h)* *Are by nature empowering transnational corporations to intervene in the internal affairs of Tanzania;*

  ***i)*** ***<u>Are subjecting the State to the jurisdiction of foreign laws and forum;</u>***

  *j)* *Expressly or implicitly are undermining the effectiveness of State measures to protect the environment or the use of environment friendly technology;*

  *k)* *Aim at doing any other act the effect of which undermines or is injurious to welfare of the People or economic prosperity of the Nation."*

# Impact of New Acts on Petroleum Operations

- All future contracts with foreign investors must have disputes settled by judicial bodies or other organs established in Tanzania and in accordance with the laws of Tanzania
  - Ban on foreign arbitration
  - Any such term in existing contracts could potentially be considered as "unconscionable" and be subject to re-negotiation with the Government
- Wide ranging definition of 'unconscionable' seemingly gives the state extensive powers to retroactively alter agreements already in place.
- The State has a the power to regulate and the right to adopt and amend its own laws
- Statoil is governed by the terms under the PSA and we will proceed as such and trust that the Government will honor those terms so as not to seriously impact the viability and stability of the LNG project.
- Viability of continued investment in Tanzania, in the absence of some changes to certain provisions of these laws, will seriously be hampered
- An inability to raise funding