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Overview of Mining Oil & Gas Contracts in Tanzania

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Mining Development Agreements (MDAs)

MDAs Legal Contexts

- A critical context for any MDAs is the fuller legal setting of which an MDA will be a part. There are three sources of law: domestic law, the MDAs and potentially an international investment treaty. The relationship btn these three is very important.

Domestic laws:

- Investment in mining or oil & gas is covered by a series of domestic laws such as constitution, environmental, health & safety, labour laws, human rights, infrastructure development etc.
- In many countries, the domestic law is highly developed and covers all aspects of a mining project, from initial stage to exploration to its operation and closure.
- In other countries, the domestic law may be much less developed, leaving gaps that falls below international standards. Many countries which use MDAs fall into this category, often relying on the contract to fill in these gaps. Unfortunately, this strategy has not worked well.

MDA's Legal Context Continued….

MDA's

- This refers to the contracts between the investor and the host government. When the investor is a foreign investor, as is often the case for developing countries, the MDA's will take on an international dimension that raises additional issues.
- MDA's fit within the law of the host state where the investment is located, and are subject to domestic law. Although situated within domestic law, a contract with a foreign investor is understood to be an international contract between the government and the foreign investor. This internationalization is seen as taking the contract out of the common private law and adding a public law element to it.
- This means the MDA's will be governed by the law of another state or international law as the basis of interpreting the contract. Also most MDA's have international dispute settlement provisions that alter the usual recourse to resolving contract disputes in the domestic courts.

MDA's Legal Context Continued…

International Investment Treaties

- Where a foreign investor is involved in a mining project, international investment treaties can become the third source of relevant law. The first such treaty was signed in 1959 by Germany and Pakistan. There are about 3,000 international treaties in force today with more still being signed and ratified every year. These agreements come in the form of bilateral or regional investment treaties and as chapters in economic partnership agreements.
- Tanzania has BITs with 11 countries- Canada, China, Denmark, Finland, Germany, Italy, Mauritius, The Netherlands, Sweden, Switzerland and UK. Tanzania like many other African countries, concluded these agreements aiming to attract foreign investors.
- While they are formal treaties between states, they establish rights for foreign investors. A key feature is the availability of a direct right for investors to initiate an international arbitration against the host state to enforce their rights.

MDA's Legal Context Continued…

- As by 2015, approximately 650 arbitrations have been commenced by investors since the first one in 1987.
- The majority of these have been initiated in the last 10 years.
- Mining, oil and gas cases constitute about 25 per cent of these arbitrations today. Split almost 50-50between the mining sector and oil and gas sector.
- As a result, investment treaties are becoming an ever more important element as a source of law relating to mining investments.

The relationship btn the three sources of law

- The relationship btn these three sources of law is important to understand. First where there is a conflict between the domestic law and international law obligations, international law will prevail, in particular when international dispute settlement processes are used by an investor.

MDA's Legal Context Continued…

- Also when dispute settlement forum is shifted from domestic courts to the international level, the international mining contracts and treaties will generally be used to fill in gaps in domestic law.
- It is here that the importance of the relationship between these different sources of law truly begins to crystallize: these contract and treaties can fill in the gaps in domestic law in favour of either the investor or the host state, or in a properly balance way.
- In a well functioning set of legal rship, the state will have a broad base of domestic law, through which the great majority of the factors relating to investment will be regulated. Contracts will come on top of that, and identify a narrower number of issues very specific to the investment. E.g management issues. The contract will not alter domestic law.
- Investment treaties which come at the top will deal with egregious violations of the treaty provisions such as expropriation without any compensation.

MDA's Legal Context Continued…

- In a poorly functioning rship the domestic law is more likely to be the smallest part. In many cases sufficient domestic law and enforcement does not exist e.g for environmental, economic development etc. This is common in many areas where large foreign investment in developing countries in mining are going on.
- Hence one may find a largely weak or very narrow domestic law base upon which the MDA's then come into play. Here, one can easily see a result where a contract has a broader legal reach than the underlying law does.
- It is therefore essential that the contract be fully balanced and reflective of the necessary sustainable development linkages of the project for both the state and the local community.
- If the contract is not balanced and favour interests of the investor, or is silent on key issues, the balance in the legal rship can easily tilted in its favour.
- Treaties bse they focus solely on the rights of investors, there are very few mechanisms within them to read in obligations of the investor or rights of the host state to regulate in order to fill in gaps in the domestic law. This can leave a clear balance of contract and treaty law being applied in favour of the investor.

The MDA's Legal Regime Before the Amendments

- The Mining Act 2010 governs the mining industry in Tanzania. The Mining Act is supported by regulations such as Mining (Mineral Rights) Regulations 2010 which provides a standard model development agreement.
- Section 10 (1)of the Mining Act 2010 prior to the amendments by the Written Laws (Miscellaneous Amendments) Act 2017allowed the Minister of Energy and Minerals to enter into a MDA with a holder of, or an applicant for, a mineral right.
- Section 10(4) of the Mining Act 2010 provided important issues to be considered by potential investors in relation to large scale mining projects in a development agreement. These included:

❖ Fiscal stability during the whole period of the project according to the laws agreed rates of royalties, taxes and levies;

❖ How the Minister or Commissioner can exercise any discretion conferred on them according to the law and its guidelines;

The MDA's Legal Regime Before the Amendments Continued…

- Specification of the limits of the investor's responsibility to protect/rehabilitate the environment;
- Settlement of disputes arising out of mining development agreements;
- Guarantee of procurement of goods and services available in Tanzania by the investor;
- Commitments to employment and training and succession plans for Tanzanian citizens; and
- Government free carried interests and state participation.

- The Mining (Mineral Rights) Regulations, 2010 provide for a standard MDAs. Apart from those matters dealt with in the Mining Act, 2010, prior to the 2017 amendments other considerations under the MDAs include that the company:

- retain foreign proceeds of sales of minerals, enter into loan agreements outside Tanzania for the purpose of financing mining operations, open a bank account in any foreign currency and repatriate funds;
- grant any charge, loan assignment, pledge, debenture or mortgage; and
- export any minerals or associated products derived or extracted from the contract area and to sell such minerals and associated products to foreign purchasers.

New Legislations Affecting MDA's…

The Tanzania Extractive Industries (Transparency and Accountability) Act 2015

- The Tanzania Extractive (transparency and Accountability) Act 2015(TEI) amended Section 11 of the Mining Act on the validity of development Agreement.
- Section 11 of the Mining Act, 2010 provided that the development agreement to be entered into under the Act shall be valid for the period of duration of the special mining license.
- TEI provided that MDAs entered to under the Mining Act, shall be valid for a maximum period of ten years and maybe renewed on mutual agreement by parties.

Most MDAs that the GoT has already entered to with foreign investors have clauses that provides MDAs shall be valid for the period of duration of the special mining license.

New Legislations Affecting MDA's…

The Written Laws (Miscellaneous Amendments) Act 2017

- Repealed previous provisions regulating MDAs;
- Replaced with basic requirement of 16% non-dilutable, government free carried interest shares in the capital of a mining company depending on the type of minerals and the level of investment.
- And, in addition, the government shall be entitled to acquire , in total up to 50% of the shares of the mining company commensurate with total tax expenditures incurred by government in favour of the mining company.
- MDAs no longer specifically provided for in the Act, but legislation still seems to contemplate "agreements or arrangements" relating to extraction, exploitation or acquisition and use of natural wealth and resources.
- Recognises that existing MDAs remain in force (subject to what follows).

The Written Laws (Miscellaneous Amendments) Act 2017

Stabilisation

- In any negotiations for stabilisation regime, freezing of laws or contracting out of national sovereignty prohibited.
- Any arrangement to be specific, time-bound and to provide for renegotiation from time-to-time.
- Any tax stabilisation arrangement to quantify benefits and compensation to government for foregone revenue; government has option to convert compensation into equity.
- 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. Unlike "freezing" clauses which exempt investors from complying with new laws, "economic equilibrium" clauses instead require the state to compensate investors for the cost of complying with new laws (e.g. through adjusted tariffs , extension or renewal of rights, tax reductions etc.
- Most MDAs that the Government has already entered to with foreign investors have clauses that provides for stabilization clauses and give assurances of stability of the fiscal regime applying to the investors at the time the Agreement was made. However, the agreement must be registered by the Minister for Finance in the Register of Tax Agreements as per Section 143(2) of the Income Tax Act, 2004.

The Natural Wealth and Resources (Permanent Sovereignty)Act 2017

Dispute Resolution

- The prohibition of proceedings in foreign courts and tribunals. Judicial bodies or other bodies established in Tanzania and application of laws of Tanzania shall be acknowledged and incorporated in any arrangement.
- Most if not all MDAs that the Government has already entered to with foreign investors have clauses that provides for dispute settlement resolution mechanism outside the country.
- Foreign investors, prefer a neutral forum for adjudication. Most MDAs provides for the laws of Tanzania (even in foreign arbitration), the venue now being proposed as Tanzanian Courts or Tribunal.

The Natural Wealth and Resources (Permanent Sovereignty)Act 2017

Retention of earnings

- All earnings from disposal or dealings must be retained in local banks. This favours local banks.
- At the moment, foreign investors in the mining sector have provisions in the MDAs to have foreign bank accounts for deposit of their income acquired from export sales. This provision is also in the model MDA.

Review by the National Assembly

- All arrangements or agreements entailing extraction, exploitation or acquisition and use of natural wealth and resources may be reviewed by the National Assembly.

The Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act 2017

- The new laws allow the government to renegotiate provisions of existing MDAs based on them being unconscionable.
- "Unconscionable term" means any term… which is contrary to good conscience and the enforceability of which jeopardises the interests of Tanzanian citizens
- The Act make comprehensive statutory provisions that require all arrangements or agreements on natural wealth and resources to be tabled for review by the National Assembly for purposes of ensuring that any unconscionable terms are rectified or expunged
- Where NA considers any agreement made before the Act came into effect, or any terms therein, to be unconscionable, it may through a resolution advise the government to renegotiate that agreement
- Government must, within 30 days, notify the mineral right holder of the intention to renegotiate.

The Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act 2017

- An extensive list of terms are deemed to be unconscionable, including those that:
  - ❖ restrict government authority over foreign investment
  - ❖ are inequitable to and onerous on the State
  - ❖ secure preferential treatment of or create a separate legal regime to be applied to the investor
  - ❖ deprive Tanzanian citizens of economic benefits arising from beneficiation in Tanzania
  - ❖ subject the state to the laws of foreign jurisdictions
- Unless extended by agreement, the period for renegotiation is 90 days
- Where no agreement is reached, the relevant terms will "…cease to have effect and shall, by operation of the Act, be treated as having been expunged…"
- In assessment of the stability of the sector in Tanzania, we are not aware of the government having exercised the powers conferred on it through this legislation in any instances up until now.

Production Sharing Agreement
The PSA and the Gas Addendum

Key Facts

- **Type:** Framework/ Investment Agreement
- **Parties:** Government of Tanzania, TPDC, and Contractor
- **Scope:** Entire value chain, both for oil and gas
- **Duration:** As long as there is underlying licences in effect
- **Risk:** Contractor has exploration risk and funds any development, but has right to cost recovery and a share of the petroleum produced

Regulations

- The Parties' rights and obligations
- Exploration phase work commitments
- Governance structure; Advisor Committee
- Annual work program and budgets; Audits
- Cost recovery and production sharing
- Fiscal regime
- TPDC's rights to participate as Contractor
- Domestic supply obligation; LNG marketing
- Requirements for building local capacity and use of Tanzanian resources (local content)
- Change of law / Stabilisation
- Applicable law and Dispute resolution

Partner Agreement
Joint Operating Agreement

Key Facts

- **Type:** Joint Venture agreement
- **Parties:** Oil and Gas Companies; the Contractor parties under the PSA
- **Roles:** Operator responsible for all activities; partners control/follow-up
- **Scope:** All joint activities (up- and midstream), but not sale of petroleum products (downstream)
- **Duration:** Same as the PSA
- **Risk:** Risk sharing: Funding of activities in accordance participating interest; produced petroleum split the same way

Regulations

- Governance structure; Operating Committee
- Operators' rights and obligations
- Partners' rights and obligations
- Annual work program and budgets; Audits
- Operations by less than all parties (Sole risk)
- Default
- Disposition of production
- Relationship of the parties
- Transfer of interest; Withdrawal
- Venture information
- Applicable law
- Dispute resolution

Host Government Agreement (HGA) Process

- LNG is an international commodity and LNG projects are in global competition
- A stable and competitive legal and fiscal framework is a key differentiator and investment criteria
- It is common to set up tailor-made frameworks for project's of this size
- IOC are in negotiations with GoT with the aim to create a tailor-made framework based on the existing PSA to address the project's particularities and complexity and close the gaps in existing framework
- The HGA process allows the required transparency and involvement of the various government entities
- HGA process is the key

Host Government Agreement (HGA) Process

- Addressing the oil and gas conference in September 2018: The Minister of Minerals urged investors in waiting to be patient.
- Talks started in September 2016 and negotiations expected to last for a year.
- The final investment decision delayed by the GoT as it is ironing out issues relating to the legal framework which is considered necessary for the LNG.
- According to the investors if the HGA is signed, Tanzania may start exporting natural gas in the form of liquefied natural gas in the coming five to eight years.

Discussion

1. What are the implications of the new laws on existing obligation under the MDAs and Oil & Gas Contracts and BITs.
2. Is it wrong for the govt to regulate economic activities for public interest
3. Tanzania Experience with BITs
4. In accordance with the principle of national sovereignty, does foreign investor have the option to pursue investor-state disputes through internationalised methods of dispute settlement
5. The efficacy of our local courts in investment dispute.