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CLIENT ALERT

Tanzania's Legal Reform of the Natural Resources Sector Threatens Extractive Industries

AUGUST 1, 2017

On 3-4 July 2017, the Parliament of Tanzania passed three new laws amending the natural resources sector, 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.

Overview of the New Legislation

In summary, the new legislation puts at risk those operating under current contracts in Tanzania. To this point, the Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Bill 2017 empowers the Tanzanian National Assembly to direct the Government to re-negotiate contracts relating to the development of natural resources (including minerals and oil and gas) that contain "unconscionable terms", including those entered into before the amendments come into force. The term "unconscionable" is not strictly defined in the law, but is a provision or requirement that is intended to either: (i) restrict the right of the State to exercise full or permanent sovereignty over its wealth, natural resources, or economic activity; (ii) restrict the right of the State to exercise authority over foreign investment within the country and in accordance with the laws of Tanzania; (iii) is inequitable and onerous to the State; (iv) restrict periodic review of the arrangement or agreement; (v) secure preferential treatment designed to create a separate legal regime to be applied for the benefit of a particular investor; or (vi) deprive the people of Tanzania of economic benefits derived from subjecting natural wealth and resources to beneficiation in the country. The law further provides that any "unconscionable terms" will be automatically deleted if the other party fails to agree to re-negotiate or no agreement is reached.

Moreover the new legislation introduces: (i) a requirement that the Tanzanian Government shall have a non-dilutable free carried interest of no less than 16% in the capital of mining companies which have mining operations under a mining licence or special mining licence in Tanzania; (ii) the right for the Tanzanian Government to acquire up to 50% of any mining asset commensurate with the value of tax benefits provided to the owner of that asset; (iii) as well as

an increase in revenue royalties from 4% to 6% on gold, copper, silver and platinum exports, and from 4% to 5% on uranium exports.
The law also prohibits adjudication of disputes relating to natural resources by “any foreign court or tribunal”, and provides that all disputes arising from extraction, exploitation or acquisition and use of natural wealth and resources shall be adjudicated by “judicial bodies or other organs established in the United Republic and accordance with laws of Tanzania” (Art. 11 of the Natural Wealth and Resources (Permanent Sovereignty) Bill).

Finally, the new legislation amends various existing pieces of legislation, including the Mining Act and the Petroleum Act. Among other things, the law asserts that the Tanzanian people own all minerals, petrol and natural gas. The law further 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, as well as audit capital investment and operating expenditure.

Legal Implications and Bilateral Investment Treaties

These new laws bring some of the most radical amendments to a legal framework governing investment in the resources industry. It is likely that these amendments will significantly impact the mining and energy industries in Tanzania, and might cause the withdrawal of many existing investors in the resources industry in Tanzania.

In particular, the amendments raise specific questions in relation to the Bilateral Investment Treaties and/or individual investor-State agreements that Tanzania is party to, such as the question as to whether the amendments amount to an expropriation of assets of foreign investor.

Tanzania is party to Bilateral Investment Treaties with 19 countries, including the UK, Canada, Switzerland, the Netherlands, China, Sweden, and Mauritius. Each one of these treaties contains a provision to the effect that the investments of nationals of the Contracting Parties shall not be nationalised, expropriated or subjected to measures having an effect equivalent to nationalisation or expropriation unless there is adequate and effective compensation.

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