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# **ANALYSIS ON THE IMPLEMENTATION OF THE AFRICA MINING VISION (AMV) IN TANZANIA, 2017-2019**

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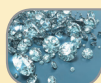
# ACRONYMS

AMDC	Africa Minerals Development Centre
AMV	Africa Mining Vision
AU	African Union
BIT	Bilateral Investment Treaty
CSOs	Civil Society Organizations
CSR	Corporate Social Responsibility
DTA	Double Taxation Agreement
EITI	Extractive Industries Transparency Initiative
FDI	Foreign Direct Investment
GDP	Gross Domestic Product
G.N	Government Notice
ICMM	International Council for Minerals and Metals
IFFs	Illicit Financial Flows
LGAs	Local Government Authorities
MoF	Ministry of Finance
NGOs	Non-Governmental Organizations
PF	Policy Forum
SWF	Sovereign Wealth Fund
TEITI	Tanzania Extractive Industries Transparency Initiative
TJNA	Tax Justice Network - Africa
TRA	Tanzania Revenue Authority
VAT	Value Added Tax



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Policy Forum also appreciates the support provided by technical partners, supporters, and report validators, government institutions, parliamentary standing committees (Energy & Minerals and Constitution & Legal Affairs) and Civil Society Organizations at large.

It is our sincere expectation that this publication will contribute to broadening the understanding of the mining fiscal regime in Tanzania as well as enhancing stakeholders' participation in shaping and influencing policy debates in the sector.



# ABOUT POLICY FORUM

The Policy Forum (PF) is a network of 74 civil society organizations brought together in their interest in poverty reduction, equity and democratization and pursuit to enhance and augment the voice of ordinary citizens in national policy processes. The primary objective is to make policies work better for the people of Tanzania, especially the poor. The network was established in 2003 and formalised in 2006 as a company limited by a guarantee, in 2019, PF changed its legal status and became a National Non-Governmental Organization (NGO). The network focuses on governance and public money accountability at both central and local levels as the underpinning pillar on which all Policy Forum activities are based.

In 2017, PF approved a four-year (2017-2020) strategic plan that seeks to contribute to enhanced governance and accountable use of public resources by improving civil society capabilities and opportunities to influence and monitor policies. The strategic plan focuses three outcome areas:

**Outcome 1:** Strengthened PF members' capacity to influence and monitor the implementation of policies relating to public resources

**Outcome 2:** Policymakers supportive of PF agenda related to transparent, equitable use of public money and increased DRM is reflected in the policy process

**Outcome 3:** Institutional effectiveness and efficiency of Policy Forum network is sustainably enhanced.



# EXECUTIVE SUMMARY

This analysis assesses the extent to which Tanzania's mining fiscal regime is aligned with the Africa Mining Vision (AMV). The AMV, which was adopted by the Heads of State and Government of the African Union (AU) in February 2009, serves as a regional policy tool to guide the development of mineral resources in Africa. The AMV's overarching goal is to create a regional framework that supports a "transparent, equitable and optimal exploitation of Africa's mineral resources to underpin broad based sustainable growth and socio-economic development".

The Action Plan for implementation of the AMV was approved in December 2011. The Action Plan comprises of 9 programme clusters of activities. These are: mineral rents and management; geological and mining information systems; building human and institutional capacities; artisanal and small scale mining; mineral sector governance; research and development; environmental and social issues; and linkages and diversification. The Action Plan provides guidelines for prudent, transparent and efficient development and management of Africa's resources.

This analysis focuses on Cluster 1 of activities under the AMV Action Plan which deals with mining revenues and mineral rents management. The first issue addressed by Cluster 1 is how to design fiscal terms which are fair and equitable to both the investor and the resource owner (the Government on behalf and in trust of people). The second issue is how to design and implement policies and strategies that ensure the most efficient and productive use of revenues accruing from the mining sector.

The AMV Action Plan under cluster 1 acknowledges that the greatest challenge facing governments when designing fiscal frameworks is striking a balance between obtaining an optimal share of the revenues and attraction of investment. While governments wish to maximize the value of mining investment to fund socio-economic infrastructure and other national development priorities, mining companies seek for appropriate compensation for the high risks associated with mining projects. In practice, mining companies have more expertise, information and experience in the mining sector than most governments in Africa do. Consequently, fiscal provisions in mining concessions are not optimized. It has been reported that the extractive sector is a



primary source of illicit financial flows (IFFs) in Africa, accounting for more than half of Africa's IFFs. This illustrates the potential losses of financial flows from unequal contracts in the extractive sector in Africa. Based on this state of affairs, the AMV Action Plan concludes that mining fiscal regimes in most African countries are characterized by overly generous tax holidays and poorly designed royalties and additional profit taxes. Further to that, mining companies devise several techniques to avoid and evade payment of taxes, royalties and levies. Consequently, there is a widespread sense that Africa does not obtain commensurate compensation from the exploitation of its mineral resources.

The AMV Action Plan also acknowledges that there are several challenges facing African countries in managing revenues accruing from mining sector. These include volatility of commodity prices, non-renewability of resources and equitable sharing of such revenues. In this regard, Cluster 1 goal is to create a sustainable and well governed mining sector that effectively garners and deploys resource rents.

Against this background, in 2017, the **Tax Justice Network-Africa (TJNA)** in collaboration with **Policy Forum (PF)** launched a study in Dodoma, Tanzania entitled "**Where is the Money? Taxation and the State of Africa Mining Vision Implementation: A case of Tanzania and East Africa.**" One of the major findings of that study was that there have been notable improvements in Tanzania's extractive sector tax administration and revenue management at the national level. However, there continued to be challenges in terms of engaging local communities in employment decisions and investing part of revenues back into communities hosting large extractive projects. Based on its findings, the study provided recommendations to enhance the pace towards meeting the AMV aspirations at the national level in Tanzania.

This analysis reviews the existing literature on the AMV, on the Tanzania's mining sector, Tanzania's mining sector revenue policy and legislation as well as mining sector revenue regime in general from 2017 to 2019. The main objectives being: providing an examination of how the Tanzanian legal frameworks (from 2017-2019) are aligned to the AMV; assessing the extent to which the AMV study (by TJNA and PF) recommendations' have been reflected by changes in the current statutes, policy, administrative circulars, regulations and political declarations; establishing what happened in two other East African countries (Kenya and Uganda) in terms of AMV implementation and





whether there are any remarkable achievements that Tanzania could replicate; identifying any advocacy gap and providing recommendations that can help in the implementation of the AMV in Tanzania.

This analysis concludes that Tanzania has undertaken measures towards realisation of the AMV and most of notable developments have taken place since 2017. Tanzania has undertaken some major reorganisation of her fiscal regime applicable to the mining sector over the past three years. There are, however, areas which need further improvement and thus the study suggests remedial measures.





# CHAPTER ONE

## INTRODUCTION AND RATIONALE FOR THE ANALYSIS

### 1.1 Introduction

The Africa Mining Vision (AMV) was adopted by the Heads of State and Government of the African Union (AU) in February 2009. The AMV was adopted in response to growing concerns that the liberal reforms adopted by African countries since the late 1980s in the extractive sector were not making Africa get the most from the extraction of its mineral resources. Thus, the AMV serves as a regional policy tool to guide the development of mineral resources in Africa. Its overarching goal is to create a regional framework that supports a “transparent, equitable and optimal exploitation of Africa’s mineral resources to underpin broad based sustainable growth and socio-economic development”.<sup>1</sup>

The Action Plan for implementation of AMV was approved in December 2011. The Action Plan comprises of 9 programme clusters of activities. These are: mineral rents and management; geological and mining information systems; building human and institutional capacities; artisanal and small scale mining; mineral sector governance; research and development; environmental and social issues; and linkages and diversification. The Action Plan is a tool that provides guidelines for prudent, transparent and efficient development and management of Africa’s resources.

This analysis focuses on Cluster 1 of the activities under the AMV Action Plan which deals with mining revenues and mineral rents management. The first issue addressed by Cluster 1 is how to design fiscal terms which are fair and equitable to both the investor and the resource owner (the Government). The second issue is how to design and implement policies and strategies that ensure the most efficient and productive use of revenues accruing from the mining sector.

Cluster 1 of the AMV Action Plan acknowledges that the greatest challenge facing governments when designing fiscal frameworks is striking a balance between obtaining an optimal share of revenues

<sup>1</sup> Africa Mining Vision (2009) p.v.



and attraction of investment. While governments wish to maximise the value of mining investment to fund socio-economic infrastructure as well as other national development priorities, mining companies seek for appropriate compensation for the high risks associated with mining projects. In practice, mining companies have more expertise, information and experience in the mining sector than the governments in Africa do. Consequently fiscal provisions in mining concessions are not optimized. It has been reported that the extractive sector is a primary source of illicit financial flows (IFFs) in Africa, accounting for more than half of the IFFs from the African continent.<sup>2</sup> This illustrates the potential losses of financial flows from unequal contracts in the extractive sector in Africa.<sup>3</sup>

Based on this state of affairs, the AMV Action Plan concludes that most African countries have failed to strike this balance. This is because mining fiscal regimes in most African countries are characterized by overly generous tax holidays and poorly designed royalties and additional profit taxes. Mining companies also devise several techniques to avoid and evade payment of taxes. Consequently, there is a widespread sense that Africa does not obtain commensurate compensation from the exploitation of its mineral resources.<sup>4</sup>

The Action Plan also acknowledges that there are several challenges facing African countries in managing revenues accruing from mining sector. These challenges include volatility of commodity prices, non-renewability of mineral resources and equitable sharing of mineral revenues. In this regard, Cluster 1 goal is to create a sustainable and well governed mining sector that effectively garners and deploys resource rents.<sup>5</sup>

The AMV Action Plan is used as a benchmark in assessing the extent to which countries have mapped the AMV strategies in their mining sector policies and laws. As regards to Cluster 1 of activities which covers mining sector fiscal regime and revenue management, the table below indicates expected accomplishment, activities and monitoring indicators.

<sup>2</sup> AU/ECA Conference of Ministers of Finance, Planning and Economic Development Report of the High Level Panel on Illicit Financial Flows from Africa (2015) 82, 97.

<sup>3</sup> *Ibid* 31.

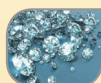
<sup>4</sup> AMV Action Plan (2011) p. 11.

<sup>5</sup> *Ibid*



**Table 1: Mining sector fiscal regime and revenue management strategies under the AMV at national level**

EXPECTED ACCOMPLISHMENT	ACTIVITIES	MONITORING INDICATORS
Enhanced share of mineral revenue accruing to African mining countries	<ul style="list-style-type: none"> <li>• Improve national capacity to physically audit mineral production and exports</li> <li>• Review mineral regimes in terms of optimising revenues</li> <li>• Build capacity and enhance skills of officials in negotiating fiscal issues and effectively monitoring compliance with taxation laws</li> <li>• Negotiate or renegotiate contracts to optimize revenues and to ensure fiscal space and responsiveness to windfalls</li> <li>• Develop systems to evaluate components of tax regimes for leakages, losses and tax avoidance and evasion (e.g. transfer pricing)</li> <li>• Review terms of double taxation agreements and BITs with host countries of mining companies including the principle that minerals should be taxed at the point of extraction</li> <li>• Build capacity and systems to auction mineral rights where applicable</li> </ul>	<ul style="list-style-type: none"> <li>• Physical audit system in place and implemented with trained inspectors</li> <li>• Reviews of mineral regimes undertaken</li> <li>• Level of improvement in fiscal revenue collected by African mining countries</li> <li>• Increase in numbers of policy makers and other stakeholders participating in capacity building initiatives</li> <li>• Degree of improvement in the design of fiscal terms</li> <li>• Extent to which tax leakages are reduced by evaluation systems as determined by independent audits of tax compliance</li> <li>• Number of double taxation agreements signed and implemented by member States</li> <li>• Extent to which mineral concession systems are competitive and transparent</li> </ul>



Improved management and use of mineral revenue	<ul style="list-style-type: none"> <li>• Explore strategies for investing windfall earnings and mineral rents into sovereign wealth funds including stabilization funds and infrastructure funds</li> <li>• Develop rent distribution systems for allocating part of mineral revenues to communities near mining areas and local authorities.</li> <li>• Develop mechanisms to facilitate local communities' access to jobs, education, transport infrastructure, health services, water and sanitation.</li> <li>• Develop the capacity of local communities to negotiate partnership agreements.</li> <li>• Develop systems for strengthening capacities for national and sub-national bodies for revenue management.</li> </ul>	<ul style="list-style-type: none"> <li>• Number of SWFs established by African mining countries.</li> <li>• Degree to which local authorities and communities benefit from mining projects.</li> <li>• Degree to which local authorities and communities improve their management of mineral revenues</li> <li>• Best practice guidelines compiled</li> </ul>
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**Source: AMV Action Plan, 2011.**

As it can be seen in the table above, Cluster 1 of AMV Action plan aims at creating a sustainable and well governed mining sector that effectively garners and deploys resource rents. To achieve this goal, the AMV Action plan identifies two expected accomplishments that must be undertaken at the national level within certain timeframes namely "Enhanced" share of mineral revenue accruing to African countries; and "Improved" management and use of mineral revenue as indicated in the Table above.

Against this background, in 2017, the **Tax Justice Network-Africa (TJNA)** in collaboration with **Policy Forum** launched a study in Dodoma, Tanzania entitled: **Where is the Money? Taxation and**



## **the State of Africa Mining Vision Implementation: A case of Tanzania and East Africa.**<sup>6</sup>

The study reported that although Tanzania had made commendable progress in mineral tax administration and revenue management, there were still challenges in terms of how mineral extraction connected with, and responded to subnational community development concerns, as well as the non-existence of mineral sovereign wealth fund. Based on these and other findings, the study provided recommendations to enhance the pace towards meeting the AMV aspirations at the national level. The recommendations are:

- a) Maintaining the current efforts towards developing a country mining vision formulated along the AMV;
- b) Strengthening mineral audit capacity;
- c) Utilise the AMDC, including the capacity to negotiate mineral concessions as well as the best regime with respect to BITs and double taxation.
- d) Establishment of sovereign wealth fund; and
- e) Devising strategies for investing part of the mining revenues to local communities.

This Analysis examines how the Tanzania's fiscal and revenue management regime is AMV-compliant. In doing so, the analysis adopts the AMV Action Plan activities and the TJNA and PF study recommendations as benchmarks to evaluate how Tanzania's mining fiscal regime is aligned to AMV aspirations. The analysis specifically examines the legislative measures undertaken by Tanzania for the period from 2017-19.

### **1.2 Objectives of the Analysis**

Based on the background information above, this analysis examines the AMV Action Plan and TJNA and PF Study Recommendations with a view to achieve the following objectives:

- a) To provide an analysis showing how the Tanzanian legal frameworks (from 2017-2019) are aligned to the AMV.
- b) To make an assessment as to what extent the AMV study (by TJNA and PF) recommendations' have been reflected in changes in the current statutes, policy, administrative circulars, regulations and political declarations
- c) To establish what has happened in two other East African countries (Kenya and Uganda) in terms of AMV implementation and whether there are any remarkable achievements that Tanzania could replicate.

<sup>6</sup> Available at <https://bit.ly/2lyuXQj>



- d) To identify an advocacy gap and provide recommendations that can help in the implementation of the AMV in Tanzania.

### 1.3 Methodology for the Analysis

The methodology for the measurement of performance by Tanzania in the implementation of the AMV since the publication of the Policy Forum and Tax Justice Network Africa (TJNA) study takes account of requirements set out in the ToRs. The analysis examines specifically Cluster 1 of the AMV Action plan which deals with mining fiscal regimes and revenue management.

This analysis is generally a desk review of existing literature on the AMV, on the Tanzania's mining sector, Tanzania's mining sector revenue policy and legislation as well as mining sector revenue regime in general. The reviewed legal instruments include: The Mining (Local Content) (Amendments) Regulations 2019; the Mining (Integrity Pledge) Regulations, 2018; the Mining (Local Content) Regulations 2018, the Mining Act 2010; the Written Laws (Miscellaneous Amendments) Act 2017 (Act No. 7 of 2017), the Finance Act 2017, Act No. 4 of 2017; the Mining (Audit and Inspection of Records) Regulations, 2018; the Executive Agency (Tanzania Mineral Audit Agency) (Disestablishment) Order, 2018; the Local Government Finances Act Cap 290; the Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act 2017; the Natural Wealth and Resources (Permanent Sovereignty) Act 2017; the Mining (Mineral Beneficiation) Regulations 2018 (G.N No. 5 of 2018), the Mining (Mineral Rights) Regulations, and the Mining (Mineral Value Addition) Guidelines 2019 (G.N No. 60 of 2019).

The study also relied on several secondary sources which included reports, journal articles, and other publications related to mineral resources development with particular emphasis on fiscal regimes and revenue management in Tanzania. The study also reviewed official publications and statistics from government institutions involved in the mining industry in Tanzania, including the Ministry of Minerals, the Mining Commission and Tanzania Revenue Authority.

The key provisions of the AMV Action Plan and the Study by TJNA and PF entitled: **Where is the Money? Taxation and the State of Africa Mining Vision Implementation: A case of Tanzania and East Africa**, were used as a benchmark, especially as provided for in the recommendations. The aim being to assess the extent to which Tanzanian legislative reforms (from 2017-2019) are aligned with cluster 1 of the Action Plan as well as the Study's recommendations.





# CHAPTER TWO

## DEVELOPMENTS IN TANZANIA'S MINING FISCAL REGIME AND REVENUE MANAGEMENT, 2017-2019

### 2.1 Introduction

Tanzania is endowed with substantial mineral resources, including gold, copper, diamonds, and gemstones (including the unique tanzanite). There is also a variety of industrial minerals (such as phosphates, mica, gypsum, limestone, graphite, quartz and vermiculite) that have a wide range of applications in ceramics, pottery, brick and tile-making, and glass manufacture. Other minerals available include nickel, cobalt, copper, apatite, niobium, iron ore and coal.

The mining sector has a long history in Tanzania. Before independence in 1961, there was substantial mining activities in the then Tanganyika (now Mainland Tanzania) dating back to 1890's especially around Lake Victoria and Chunya as well as diamond mining at Mwadui.<sup>7</sup> Six years after independence in 1967, the government adopted the Arusha Declaration a socialist policy under which mining sector was brought under control of the state and public institutions such as the National Development Corporation (NDC) and State Mining Corporation (STAMICO). The performance of the mining sector during the socialist era was dwindling. For example, in 1988 the sector contributed only to 1% of the GDP compared to 34% contribution during the early 1960s.<sup>8</sup> Tanzania redefined its economic policies in the 1990's under the auspices of the World Bank. The country abandoned its socialist policies and replaced them with a neoliberal, market-oriented economy. The major objective of these reforms was to attract large scale foreign direct investment into different sectors of the economy including the mining sector. In implementing this new approach, the Mining Policy was adopted in 1997 and later the Mining Act 1998 was enacted. There was significant success in implementation of these reforms as the country was able to attract large scale investments in gold mining. As a result, gold production expanded rapidly to the extent of making Tanzania one of the top three producers of gold in Africa.

<sup>7</sup> Poncian, J 2019 "Extractive Resource Politics and Government-Community Engagement in Tanzania: A Case of Natural Gas." University of Newcastle. <https://nova.newcastle.edu.au/vital/access/manager/Repository/uon:35558>

<sup>8</sup> Lange, S, 2006. "Benefit Streams from Mining in Tanzania: Case Studies from Geita and Mererani." CMI - Chr. Michelsen Institute at 6.



Despite all these investments, the contribution of the mining sector to the economy was still low. The reasons attributed to this low contribution include the adoption of an overgenerous fiscal framework characterised by low tax and royalty rates, tax holidays, and provisions for profit repatriation, laxity in expatriate employment and in other local content areas.<sup>9</sup> To ensure that the mining sector makes its appropriate contribution, the government of Tanzania has been undertaking several measures to ensure a win-win situation with the mining companies. These measures include formation of various Committees and Commissions to probe the mining sector's legal and policy framework and advise the government on relevant measures. One of the notable commission being the Bomani Commission in 2008.<sup>10</sup> The Bomani report recommended review of MDAs, requirements for value addition and beneficiation, auditing of mineral production and operating expenses. These recommendations culminated into the formulation of Mineral Policy 2009 and later enactment of the Mining Act 2010.

The mining fiscal regime comprises taxes (such as corporate income tax fuel levy, value added tax, stamp duty, import duty, withholding taxes on dividends, interests, and capital gains tax), fees, duties and royalty (chargeable on the gross back value of minerals produced under license), rental fees, local government levy, and dividends that mining companies are required by law to pay the government. The fiscal regime is of paramount importance to the national economy due to its potential to transform economies by enhancing economic growth and supporting socio-economic development. The fiscal terms for mining regime in Tanzania are contained in both legislation (both primary and secondary) and those that derive from other agreements (such as MDAs or DTA).

Reforms in the mining sector have continued under the fifth-phase government. The new government demonstrated dissatisfaction with how the mining sector was operated in the country. This led to formation of two Presidential Probe Committees in 2017. The first Committee, led by Prof. A. Mruma, head of the GST, was tasked to examine the extent and type of minerals contained in mineral concentrates in containers in various locations in the country. The Committee presented its report

<sup>9</sup> Lissu, T & Curtis, M (2008), 'A Golden Opportunity: How Tanzania is Failing to Benefit from Gold Mining'

<sup>10</sup> The other Commissions include Kipokola Commission (2004), the Mboma Commission (2004), the Bukuku Commission (2005), the Masha Commission (2006), see TEITI Scoping Study for the Preparation of the Eighth Report of the Tanzania Extractive Industries Transparency Initiative for the Period from July 1, 2015 to June 30, 2016 (2017) pp 3-4



on 25 May 2017. The Committee reported that containers impounded at the Dar es Salaam port contained real minerals with a value of TZS 1.4 trillion and had neither been declared for tax purposes nor recorded. They also found that there was an average of 14 kg of gold per tonne of mineral concentrates in the containers, seven times as much as reported by TMAA. The Committee recommended the export ban on metallic mineral concentrates be maintained, effective scanners be installed at the Dare es Salaam port and building of smelters in Tanzania to maximize the full value of minerals produced.<sup>11</sup>

The second committee, led by Prof. Nehemiah Osoro, which probed the economic impact of the mineral concentrates exports presented its report on 12 June 2017. The Committee estimated that between 44,000 and 61,000 containers of gold and copper had been exported between 1998 and March 2017. It estimated losses in government revenue between TZS 68.59 trillion and TZS 108.5 trillion over the period due to under-declaration of both export volume and value of gold and copper concentrates. The Committee made several recommendations including: review of all MDAs and mining laws; new MDAs to be approved by parliament, terms of MDAs to be made public, overly generous tax concessions to be removed; and strengthening security at mines to reduce smuggling.<sup>12</sup>

The Speaker of the National Assembly also formed a parliamentary investigative committee led by Hon. Mussa Hassan Zungu to investigate the mining of tanzanite and diamonds. The Committee presented its reports on 6 September 2017 which showed that, among others, exports of diamonds and tanzanite from Tanzania were under-declared, mining contracts were exploitative, conflicting data from government sources on actual amount of diamonds transported outside the country and poor security on mine sites which makes it easy for smuggling of tanzanite.

The different reports described above, indicated that there were fundamental flaws in the mining sector that denied the government a fair share of revenues. In response to these challenges, the government implemented several legislative measures. These legislative measures aimed at, inter alia, reorganizing the mining fiscal regime. Notably, in July 2017 three pieces of legislation were enacted namely, Natural Wealth and Resources (Permanent Sovereignty) Act 2017, the

<sup>11</sup> <https://www.tzaffairs.org/2017/09/the-mineral-sands-export/>

<sup>12</sup> <https://www.tzaffairs.org/2017/09/the-mineral-sands-export/>



Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act and the Written Laws (Miscellaneous Amendments) Act 2017. The three Acts of Parliament were prompted by the reports of the two Presidential Committees of inquiry into the mining industry discussed above. These Acts of parliament were supplemented by promulgation of several subsidiary legislation made by the Minister responsible for mining. The next section examines how these legislative measures are aligned to AMV aspirations and AMV Action Plan.

## 2.2 Current Efforts at Addressing Some of the Fiscal Regime Issues

One of the major goals of the AMV is to ensure that African countries “Obtain an adequate share of mineral revenue and utilizing it in an equitable manner is crucial.”<sup>13</sup> It is in light of this goal, the reforms in the Tanzania fiscal regime are examined. The next sub-section highlights some legislative reforms effected by the Government of Tanzania in improving its fiscal regime for the period 2017-2019.

### 2.2.1 Review of mineral fiscal regimes

The major goal of Cluster 1 of the AMV Action Plan is to create a sustainable and well-governed mining sector that effectively garners a fair share of resource rents. According to the Action Plan, the identified activity to achieve this goal is reviewing mineral regimes in terms of optimising revenues. Thus, to ensure enhanced share of mineral revenue accruing to the Government of Tanzania, the following legal reforms were effected/instituted.

The Written Laws (Miscellaneous Amendments) Act, 2017 amended several provisions of the Mining Act 2010 and other fiscal laws in order to improve the fiscal regime and enhance government take in mining sector.<sup>14</sup> The major objective of the Written Laws (Miscellaneous Amendments) Act, 2017 was to ‘amend certain written laws in the extractive industry and financial laws with a view to enhancing control and compliance, ensuring maximum collection of revenues and securing national interests’. This objective rhymes with AMV vision requiring review of mineral fiscal regimes in order to optimise revenues and ensuring mineral extraction generate reasonable revenues to government commensurate with the resources extracted. The amendments brought the following reforms on the mineral fiscal regime in Tanzania:

<sup>13</sup> *The Africa Mining Vision (2009)*

<sup>14</sup> *Through the Written Laws (Miscellaneous Amendments) Act 2017 Act No.7 of 2017*



- (a) Setting a minimum level of state participation where government will obtain a 16% non-dilutable free carried interest shares in the capital of any mining company operating under a mining license (ML) or a special mining license (SML) depending on the type of minerals and the level of investment.<sup>15</sup> Before the Amendments in 2017, the level of state participation was subject to negotiations.<sup>16</sup> State participation means the government will be entitled to dividends from the mining companies' profits equal to its 16% shareholding. However, this requirement does not apply to existing MDAs (because of stabilization clauses) until after successful renegotiations of such MDAs.

While free carried interest is considered as one of the major steps for the government to obtain more revenues, there are challenges in ensuring the government obtains dividends from its shares. The first challenge arises from the fact that mining venture is capital intensive and thus it takes a long time for mining companies to start declaring profits. It can take up to ten years from the production date to the time when the company breaks-even and declares profits. The other challenge is that sometimes mining companies manipulate their books of accounts and declare perpetual losses. For example, Resolute Tanzania Limited operated from 1997 to 2012, exported gold and silver worth US\$ 1.5 billion, but paid corporate tax only once, three years before it closed its operations.<sup>17</sup>

- (b) Tax incentives (tax expenditure) will be computed and converted into government's equity in the mining projects. The Government can acquire up to 50% shares in the mining company commensurate to total tax incentives granted to such mining company.<sup>18</sup> This is one of the major step, contemplated by AMV Action Plan, to optimize the fiscal regime and to address the issue of overly generous fiscal terms. It will also ensure the government obtains more revenues from the mining sector. However, the challenge is that the law does not specify what kinds of tax incentives will be converted into government equity. The law also does not indicate how the calculation of tax incentives will be done and recorded so as to establish the exact amount of such tax incentives before converting them into government equity.

<sup>15</sup> Section 10(1) of the Mining Act, Cap. 128 R.E 2018.

<sup>16</sup> Section 10(1) of the Mining Act 2010 before amendments in 2017.

<sup>17</sup> Commissioned in 1998 and was officially closed in February 2014. In its 15 years operations, the mine produced 2.2 million troy ounces of gold and 207,803 troy ounces of silver. See the Tanzania Minerals Audit Agency Annual Report 2014 (2015) available at [http://www.tmaa.go.tz/uploads/ANNUAL\\_REPORT\\_2014.pdf](http://www.tmaa.go.tz/uploads/ANNUAL_REPORT_2014.pdf). (accessed 20 November 2016) Another report quotes the total revenues generated by the mine to be US\$ 3.5 billion.

<sup>18</sup> Section 10(2) of the Mining Act 2010 as amended in 2017



While this requirement is a positive step towards avoiding stealth tax incentives, it pre-empted the meaning of tax incentives. Tax incentives are given as a measure to attract investments. Calculating tax incentives and converting them into government equity means that there are no tax incentives in Tanzania. This might have negative consequences as some investors may go to other jurisdictions where there are tax incentives.

- (c) Royalties<sup>19</sup> for gemstone and diamond, have been increased from (5%) to (6%) and royalties for metallic minerals such as copper, gold, silver, and platinum group minerals, from (4%) to (6%).<sup>20</sup> This move will ensure that the government obtains more revenues from the mining sector. However, these changes do not apply to mining companies with MDAs because of stabilization clauses. The new rates of royalties will be applicable only after successful renegotiations of such MDAs and if mining companies agree to such new rates of royalties.
- (d) Introduction of a 1% inspection fee on the gross value of all minerals prior to clearance for domestic use or export as per sections 18(3)(b), 18A and 90A(3)(4) of the Mining Act 2018.<sup>21</sup> This is also an opportunity for the government not only to obtain more revenue but can also be used as a control mechanism to ensure that all minerals are accounted for before exportation. This, in turn, will enhance collection of other revenues such as royalties which are paid based on the value of minerals.
- (e) The government has abolished input tax credit for purposes of VAT for export of raw minerals.<sup>22</sup> It means that the mining companies exporting raw minerals are not entitled to claim input tax credit in respect of domestic purchases under the Value Added Tax. This provision aims at encouraging local beneficiation. Thus companies are compelled to devise measures to ensure local beneficiation otherwise they will not be entitled to input tax credit for domestic purchases. Again, this requirement does not apply to mining companies with MDAs due to existence of stabilization clauses.

<sup>19</sup> Royalty has been used as fiscal instrument to compensate owner of the mineral resource in return for the extraction of the minerals from the land. This is payable to the Government as the owner of minerals.

<sup>20</sup> Section 87 of the Mining Act 2010 as amended

<sup>21</sup> Introduced by sections 35 & 38 of the Finance Act 2017, Act No. 4 of 2017.

<sup>22</sup> Section 68 of the Value Added Tax Act, 2014 was amended by section 47 of the Misc Amendment Act 2017 No. 7



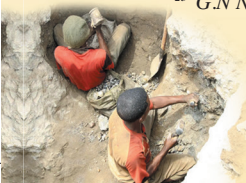
## 2.2.2 Anti-tax avoidance and tax evasion measures (Preventing revenue leakage)

The AMV Action Plan requires African countries to develop systems to prevent tax revenue leakage in the mining sector. These measures usually aim at counteracting tax avoidance and tax evasion. This is because mining companies usually devise different mechanisms to avoid and evade taxes. In this regard, Tanzania has adopted the following measures that aim at preventing leakages of government revenues from the mining sector.

- (a) Requirement to sign integrity pledge under section 28(3) & 106(1) of the Mining Act 2018 and Mining (Integrity Pledge) Regulations, 2018<sup>23</sup> under which mining companies undertake not to engage in any malpractices including tax evasion, abuse of double tax treaties, under or overpricing, transfer pricing and corruption. Non-compliance with the integrity pledge attracts penalties including cancellation of mining license. This is considered as one of the measures to remind mining companies to adhere to ethics of doing business. It also acts as a deterrent measure as companies risk losing their mining licenses if engaged in any of the prescribed malpractices. However, it remains to be seen how this requirement will be implemented. At first sight, this looks more aspirational than a legal requirement.
- (b) The Mining (Minerals and Mineral Concentrates Trading) Regulations, 2018 provides that export permits will only be issued where there are evidences of payment of royalty or provisional royalty, and other fees. This requirement ensures that no minerals are smuggled out of the country without payment of royalties and other applicable levies. The implementation of this provision has the potential to curb smuggling and thus enhance government revenues.
- (c) Valuation and calculation procedures for royalties' to be paid, require the presence of a Mines Resident Officer and an officer from the TRA for verification. Where the Minister realizes that the price given does not correspond to the price at the point of transactions between seller and buyer, the Minister may issue a notice of disagreement to the license holder in accordance to Section 87(3)&(4) of the Mining Act 2018.

The government has power to reject an amount calculated for royalty purposes in accordance to section 87(6) of the Mining Act 2018 if the declared value is considered steeply low on account of deep negative

<sup>23</sup> G.N No. 304 of 2018.



price volatility, unless the minerals are disposed of for beneficiation in Tanzania and where the government has the option of buying the minerals at the low value ascertained. This provision aim at discouraging under declaration of values of minerals for purposes of calculating royalties payable. Therefore, effective implementation of this provision will enhance government revenues.

- (d) Mining Commission vested with powers under section 22 of the Mining Act 2018 to produce indicative prices of minerals, to monitor and audit quality and quantity of minerals produced and sold; to audit capital investment and operating expenditure; sorting and assessing values of minerals produced and producing indicative prices of minerals. The exercise of these powers will prevent under declaration of minerals production and values and overstating of expenses by mining companies. It means the government will be able to charge appropriate royalties. It also curbs the practice of mining companies overstating operational expenses and understating revenues in order to reduce or negate profits for purposes of avoiding profit-based taxes such as corporate income tax. However, the success of this will greatly be determined by the extent to which the state is willing to invest in building the technical, financial and expertise capacity of the Commission.
- (e) Section 9(4) of the Mining Act (amended in 2017) provides that consent of the Mining Commission for transfer of mineral right shall not be granted unless there is proof of a Tax Clearance Certificate issued by the TRA and proof that other charges, fees and payables have been cleared.<sup>24</sup> This means that mining companies have to pay all the requisite taxes (especially capital gains tax and stamp duty) before effecting any transfer of mineral right. It also means that if taxes are not paid, no transfer will be approved by the Mining Commission.
- (f) Promulgation of Transfer Pricing Regulations 2018.<sup>25</sup> The aim is to curb transfer mispricing which is considered as one of the most applied techniques of tax avoidance. The Regulations incorporate the Arm's Length Principle (ALP), impose reporting and documentation requirements and sanctions for non-compliance. These Regulations are not specific to the mining sector but are of

<sup>24</sup> Amended by the Finance Act 2019.

<sup>25</sup> G.N No 166 of 2018. They repeal and replace the Income Tax (Transfer Pricing) Regulations 2014, G.N 27 of 2014 which were introduced in 2014.





general application. The promulgation of these Regulations is one of the major steps in counteracting tax avoidance.

- (g) Regulation 3(1) of the Tanzania Extractive Industries (Transparency and Accountability) (General) Regulations, 2019<sup>26</sup> requires all mining companies to keep records of payments, beneficial ownerships information, costs of production, exploration, prospecting, award or transfer of licenses, capital expenditure at every stage of investment, volumes of production and export data from extractive industries company in respect of each license. Keeping essential records will facilitate audits by the Mining Commission and TRA of expenses and revenues of mining. Thus it helps in ensuring that all taxes, royalties and levies are paid as required by law.
- (h) Section 5A of the Mining Act provides for increased security around mine sites. Under this provision, the President, after the consultation with Local Authorities through the Minister responsible, may declare an area of Tanzania which is subject to mining operations to be controlled area.

The President ordered<sup>27</sup> the construction of a 24-kilometre wall at Mererani which was completed in April 2018. The Mererani wall is now being regulated by the Mining (Mirerani Controlled Area) Regulations G.N 135 of 2019 which provides for, among others, rules on entrance and exit. The aim is to control illegal smuggling of Tanzanite outside the country as well as ensuring that all royalties, taxes, levies and charges due are paid before tanzanite is cleared for domestic uses or exports. Since the construction of the wall, production has increased from 147.7 kg in 2017 to 781.2 in 2018 and revenue collection from TZS 166,094,043 in 2017 to TZS 1,436,427,228 in 2018.<sup>28</sup>

- (i) More than 20 Mineral Marketing Centres have been established across the country in Geita, Namanga, Singida, Chunya, Ruvuma, Shinyanga, Katavi, Dodoma, Kigoma, Tabora, and Tanga to mention a few<sup>29</sup> as per Section 27C (1) of the Mining Act (as amended 2017). As regards to diamonds, the Mining Diamond (Trading) Regulations 2019<sup>30</sup> were promulgated. The

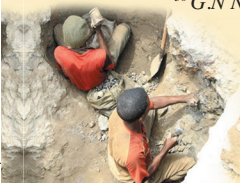
<sup>26</sup> G.N No. 141 of 2019.

<sup>27</sup> By virtue of article 27 (duty to safeguard public property) of URT Constitution and Section 8 of the Permanent Sovereignty Act.

<sup>28</sup> Ministry of Minerals Budget Speech 2019-20

<sup>29</sup> Ministry of Minerals Budget Speech 2019-20 p.8.

<sup>30</sup> G.N No. 138 of 2019.



establishment of these centres enhances controlled trading of minerals which, in turn, ensures accurate data of the quality and quantity of minerals mined and sold. It also ensures easy valuation of minerals for purposes of calculating taxes, royalties and other fees and levies payable. The Centres also ensures reliable markets for small scale miners and discourages illegal smuggling of minerals outside the country. The establishment of these centres has already started paying off in terms of increasing revenues streaming from minerals trading. For instance, it has been reported that the Manyara mineral trading centre generated a total of \$25 million in royalty, inspection and clearance fees from May to July in 2019; and that all mineral trading centres were able to generate a total of \$7.1 million from the sale of minerals at the centres on 10 August 2019.<sup>31</sup>

- (f) Introduction of Alternative Minimum Tax (AMT) to deal with companies declaring perpetual losses. Mining projects are by nature capital intensive meaning that mining companies have to recoup their capital expenditures before declaring profits. It implies that mining companies will only start paying profit-based taxes such as corporate income tax after declaring a profit. In practice, mining companies will arrange their financial affairs in such a way that they do not declare any profit and defer the declaration of profits. To avoid payment of corporate income tax, mining companies will be declaring perpetual losses. For example, Resolute Mining Company paid corporate income tax only once and it was three years before mine closure. This implies that the mining companies will have the protection of the State and use of social services without making its due contribution. To ensure that the mining companies also contribute to the Governmental expenditures, Tanzania charges an alternative minimum tax (AMT).<sup>32</sup> The AMT is payable by all mining companies, at production stage, that do not declare a profit for three consecutive years.<sup>33</sup> The AMT is calculated at 0.5 percent of gross revenues.<sup>34</sup> Because of AMT, mining companies are compelled either to declare a profit and pay corporate income tax or declare losses and be subjected to AMT. There is a risk that mining companies will weigh between AMT and corporate income tax and where AMT is too high, such companies will declare nominal profits just for the sake of avoiding AMT.

<sup>31</sup> Materu, B. 2019. 'Trading centres boost Tanzania's mining sector.' *The Citizen*, 6 October. <https://www.thecitizen.co.tz/news/1840340-5301050-9r8uhi/index.html>

<sup>32</sup> IMF *Spillovers in International Corporate Taxation* (2014) 36.

<sup>33</sup> Sections 3 & 4(1) (a) of the *Income Tax Act 2004*.

<sup>34</sup> Sections 3 & 4(1)(a) read together with item 3(3) of the *First Schedule to the Income Tax Act 2004 as amended by the Finance Act 2018*.



### 2.2.3 Review of terms of double taxation agreements and BITs

The AMV Action Plan encourages African countries to review terms of double taxation agreements (DTAs) and Bilateral Investment Treaties (BITs) with host countries of mining companies. DTAs are signed between two countries with the primary purpose of facilitating international flow of capital, technology and services by eliminating double taxation of income and other taxes in international transactions.<sup>35</sup> The DTAs usually deal with capital gains tax and withholding taxes on interests, dividends and royalty for use of intellectual property rights.<sup>36</sup>

While the aim of DTAs is to facilitate trade and eliminate double taxation, studies have shown that DTAs sometimes contain provisions that are harmful to domestic resource mobilization and can be used to facilitate illicit financial outflows.<sup>37</sup> DTAs also have been used as conduits for tax avoidance by multinational companies across tax jurisdictions.<sup>38</sup> In line with AMV aspirations, it has been recommended that African countries should review their current and prospective DTAs to ensure that they do not provide opportunities for abuse.<sup>39</sup> The aim is to ensure that such DTAs and BITs are beneficial to African countries.

Currently, Tanzania has signed DTAs with nine countries. These are Sweden (1976), Canada (1995), Denmark (1976), Finland (1976), Norway (1976), India (1979), Italy (1973), Zambia (1968) and South Africa (2005). So far there are no publicly known DTAs lined up for re-negotiation.

Tanzania has been in negotiations for new DTAs with nine countries namely Netherlands, Mauritius, United Kingdom, United Arab Emirates, Kuwait, Iran and China. However, since 2017 to 2019 no DTA has been signed.

As regards to bilateral investment treaties (BITs), these may impact on tax measures and administration undertaken by the host country. This is because there are overlaps between BITs and the domestic tax systems. For example, BITs require the free transfer of funds net of applicable taxes, including withholding taxes and capital gains tax. BITs may also restrict tax measures that would subvert key aspects

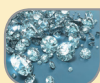
<sup>35</sup> *Tanzania Tax Justice Coalition Double Taxation Agreements Gain or Loss to Tanzania?* (2016) 7.

<sup>36</sup> Trepelkov, A., Tonino, H & Halk, D (ed) *United Nations Handbook on Selected Issues in Administration of Double Tax Treaties for Developing Countries* (2013) 15-18, 271-276 available at [https://www.un.org/esa/ffd/wp-content/uploads/2014/08/UN\\_Handbook\\_DTT\\_Admin.pdf](https://www.un.org/esa/ffd/wp-content/uploads/2014/08/UN_Handbook_DTT_Admin.pdf)

<sup>37</sup> *AU/ECA Conference of Ministers of Finance, Planning and Economic Development Report of the High Level Panel on Illicit Financial Flows from Africa* (2015) 81.

<sup>38</sup> *Tanzania Tax Justice Coalition Double Taxation Agreements Gain or Loss to Tanzania?* (2016) 10.

<sup>39</sup> *AU/ECA Conference of Ministers of Finance, Planning and Economic Development Report of the High Level Panel on Illicit Financial Flows from Africa* (2015) 40.



of BITs, and thereby deviate from the “promises” of BITs as to the investment and trading climate.<sup>40</sup> It is also possible under BITs that confiscatory or arbitrary taxation could, in certain cases, be regarded as indirect expropriation.<sup>41</sup> For these reasons, BITs can be influential in the design of Tanzania regime.

Currently, Tanzania has signed 20 BITs.<sup>42</sup> These are with Kuwait (2013), Canada (2013), China (2013), Oman (2012), Turkey (2011), Jordan (2009), Mauritius (2009), South Africa (2005), Switzerland (2004), Zimbabwe (2003), Italy (2001), Netherlands (2001), Finland (2001), Sweden (1999), Denmark (1999), Korea Republic (1998), Egypt (1997), UK (1994), Switzerland (1965), and German (1965).

Notably, on 30 September 2018, the Government of Tanzania issued a notice to the Government of the Netherlands concerning its intention to terminate the BIT between the two nations. The BIT, signed in 2001, has been in force from 1 April 2004.<sup>43</sup> The BIT was criticized for its terms being not favourable to Tanzania. The terms of this BIT were considered unfair to the country and thus presented avenues for abuse in the future. Tanzania has also exercised its right, as required by AMV Action Plan, to review the terms of BITs to ensure that they are beneficial to the country. It means that prospective mining companies cannot use Netherland as a conduit to avoid taxes and to take undue advantage of the provisions of the BITs. However, the termination of this BIT will not have a significant impact on the mining sector. This is because most of the mining companies in Tanzania hail from the USA, Canada, United Kingdom and Australia.

#### 2.2.4 Negotiation or renegotiation of mining contracts

The AMV Action Plan urges African countries to negotiate or renegotiate mining contracts to optimize revenues and to ensure fiscal space and responsiveness to windfalls. It calls for flexibility of fiscal regimes which can capture a fair share of revenues during the mining booms. Further to that, the Study by TJNA and PF recommended that Tanzania should enhance the capacity of its officials in negotiating mineral concessions, BITs and DTAs to ensure that the country attains the optimal mining regime as envisaged under the AMV. Tanzania has undertaken several

<sup>40</sup> *Committee of Experts on International Cooperation in Tax Matters The Interaction of Tax Trade and Investment Agreements* (2019) p.3.

<sup>41</sup> *Ibid* p.13

<sup>42</sup> See <https://investmentpolicy.unctad.org/international-investment-agreements/countries/222/united-republic-of-tanzania> (25/10/2019).

<sup>43</sup> <https://www.africalegalnetwork.com/tanzania/news/legal-alert-tanzania-terminates-bilateral-investment-treaty-netherlands/> (25/10/2019).



legislative measures to enable the government to renegotiate the MDAs as follows.

- (a) The Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act 2017 empowers the National Assembly to review all agreements and arrangements pertaining to natural resources (including minerals). The Act also empowers the government to renegotiate unconscionable terms. Unconscionable terms include: terms that are inequitable and onerous to the state; terms depriving the people of Tanzania of the economic benefits derived from subjecting natural wealth and resources to beneficiation in the country; terms subjecting the State to the jurisdiction of foreign laws and fora; terms aiming at doing any other act the effect of which undermines or is injurious to welfare of the people or economic prosperity of the nation.

This Act provides an opportunity for the government of Tanzania to intervene in mining operations to ensure such operations are undertaken for the best interest of the people and that the government obtains a fair share of the revenue commensurate with the extracted minerals. It also ensures that Tanzania exercises its permanent sovereignty over natural resources by requiring mineral concessions to be subjected to periodic reviews. All these mechanisms are well in alignment with the AMV Action Plan which requires African countries to negotiate or renegotiate mining contracts with a view to optimize revenues and to ensure fiscal space and responsiveness to windfalls.

The government has been in discussions with African Barrick Gold to renegotiate its MDAs. Finally, on 24 January 2020, the Government and Barrick Gold Corporation reached an agreement to settle their protracted disputes.<sup>44</sup> The terms of the agreement include the sharing of future economic benefits from the mines on a 50/50 basis and the Government will acquire a free carried shareholding of 16% in each of the mines operated by Barrick Gold namely Bulyanhulu, North Mara and Buzwagi.<sup>45</sup> Barrick will also make a \$ 300 million as compensation for all tax debts owed by its predecessor Acacia. This payment will be made by instalments starting with a \$ 100 million down payment and the balance payable within seven years. It is notable, however, that the 50/50 sharing of economic benefits lacks clarity and is not backed by any legislation. There is a risk that it may end up being an empty promise.

<sup>44</sup> <https://www.barrick.com/English/news/news-details/2019/The-Launch-of-Twiga-Minerals-Heralds-Partnership-Between-Tanzanian-Government-and-Barrick-/default.aspx>

<sup>45</sup> Most of these issues were legislated in 2017 through the amendments to the Mining Act and enactment of the two new laws on permanent sovereignty over natural resources.



This agreement is a clear evidence that it is possible for African countries to review the terms of mining concessions to ensure that economic benefits are shared in an equitable manner between the government and mining companies as envisaged under the AMV Action Plan which specifically requires countries to review mining contracts with a view to optimize revenues and to ensure fiscal space and responsiveness to windfalls.

While this law is a positive step for the government towards obtaining a fair share of the revenues accruing from mineral extraction, if not implemented with caution it has a potential to scare away investments in the extractive sector. For example, it has been reported that this law together with Natural Wealth and Resources (Permanent Sovereignty) Act, 2017 have negatively impacted on foreign investment inflows into the extractive sector. These laws have also contributed to delayed final LNG investment decision and negotiations.<sup>46</sup> The UNCTAD has also reported that Tanzania is the least recipient of FDI having attracted an increase of 18% behind Uganda's 67% and Kenya's 27%.<sup>47</sup> Further, the successful implementation largely depends on accountable and transparent governance as well as an independent national assembly, both of which are currently questionable.

- (b) Section 100E (1) of the Mining Act (as amended in 2017) prohibits negotiations of stabilization clauses in mining concessions that entail the freezing of laws or contracting away the sovereignty of Tanzania. The law now requires stabilization clauses to be specific and time bound and also provide for renegotiation from time to time as may be necessary. However, this provision can be used as a loop hole by mining companies during negotiations as it is not clear on how to set the time limits.
- (c) The Natural Wealth and Resources (Permanent Sovereignty) Act, 2017 reasserts Tanzania's sovereignty over its extractive and other natural resources. In doing so, the Act makes resource extraction a national interest issue that has to be done with the interests of the people and the nation at the centre. This is well in alignment with the UNGA 1803 (XVIII) of 14 December 1962 which declared that nations have a right to "permanent sovereignty over their natural wealth and resources" which "must be exercised in the interests of their national development and well-being of the people".

<sup>46</sup> HakiRasilimali, 2019 *Extractive Resources - Industrialisation Linkages: Opportunities, Challenges and Lessons from Tanzania* at 42.

<sup>47</sup> UNCTAD, 2019. *World Investment Report 2019: Special Economic Zones*. New York: UNCTAD at 37.



Section 6 of the Act prohibits any arrangement or agreement for the extraction, exploitation or acquisition and use of natural wealth and resources unless the interests of the people and the nation are fully secured. The law further prohibits beneficiation of raw minerals outside Tanzania and requires new resource extraction contracts to contain provisions for establishment of beneficiation facilities within Tanzania. The law also requires that proceeds from resource extraction, exploitation or acquisition to be retained in local banks and financial institutions to further enhance strong linkages between resource extraction and the broader linkages to the rest of the economy. The implementation of these provisions provides an opportunity for the government to align mining activities with national and people's interests. The biggest challenge with implementation of these provisions is that they create unpredictable investment climate which does not support private investments. Another challenge is that national and people's interests are not clearly defined by the law and there is no guarantee that these interests can be stable. This adds another layer of unpredictability and ambiguity.

### 2.2.5 Auditing mineral production and exports

The AMV Action Plan urges African countries to improve national capacity to physically audit mineral production and exports. Also the Study conducted by TJNA and PF in 2017 recommended that Tanzania should continue ensuring that the mineral audit capacity, which is inbuilt in the Mining Commission (formerly the TMAA), is constantly strengthened so that the auditing capacity matches evolving strategies on illicit financial flows that are constantly being used by players in the mining sector.<sup>48</sup> In this regard, Tanzania has made some amendments to the Mining Act and other Regulations as follows:

- (a) Establishment of the Mining Commission<sup>49</sup> with mandate to monitor and audit quality and quantity of minerals produced and sold; audit capital investment and operating expenditure of the large and medium scale mines; sorting and assessing values of minerals produced in order to set indicative prices of minerals.<sup>50</sup>
- (b) The Mining (Audit and Inspection of Records) Regulations, 2018<sup>51</sup> oblige every mineral right holder to keep and maintain records in respect of all mining activities or operations within the mining areas or at the mineral rights holder's office located in Tanzania.

<sup>48</sup> TJNA) & *Where is the Money? Taxation and the State of Africa Mining Vision Implementation: A case of Tanzania and East Africa* (2017) p. 7

<sup>49</sup> *Replacing the Tanzania Mineral Audit Agency (TMAA)*

<sup>50</sup> *The Executive Agency (Tanzania Mineral Audit Agency) (Disestablishment) Order, 2018 (GN No.8 of 2018).*

<sup>51</sup> *G.N No. 7 of 2018.*



- (c) Sections 100A & 100B of the Mining Act 2010 (as amended) require that all won raw minerals shall be mined, sorted and valued in the presence of Mines Resident Officer, an Officer from TRA and relevant institutions of state organs.
- (d) The Tanzania Extractive Industries (Transparency and Accountability) Act, 2015, demands the disclosure of information on local content, corporate social responsibility and capital expenditures as well as disclosure of contracts and beneficial ownership. The Act establishes the Extractive Industries (Transparency and Accountability) Committee as an independent government body to oversee transparency and accountability in the extractive sector. The Committee's functions include requiring disclosure of cost of production, capital expenditure, production volumes and export data from extractive companies; make reconciliation of payments from extractive companies and government receipts; among others. The Act ensures creation of a more open and accountable mining resource governance regime in Tanzania. The Reconciliation reports produced by the Committee provide valuable information about the mining sector. Such reports have also enhanced awareness to the citizen and civil society, increasing policy debate on transparency and accountability. However, with decreasing political space, suppression of critical voices and declining freedom of press, it remains to be seen how these measures can adequately address illicit financial flows.<sup>52</sup>

### 2.2.6 Improving business environment

The AMV Action Plan under cluster 1 acknowledges that the greatest challenge facing governments when designing fiscal frameworks is striking a balance between obtaining an optimal share of the revenues and attraction of investment. In Tanzania the government has undertaken several measures to improve the business environment.<sup>53</sup> The relevant measures include:

- (a) The Blueprint for regulatory reforms to improve the business environment published in 2018 by the Ministry of Industry, Trade and Investment. The Blueprint aims to improve Tanzania's business environment and attract more investors. One of the key challenges addressed by the Blueprint is existence of high compliance costs in monetary terms and time in starting and operating business. The Blueprint proposes several regulatory

<sup>52</sup> Poncian, J. and Kigodi, H.M. 2018. *Transparency Initiatives and Tanzania's Extractive Industry Governance*. *Development Studies Research*, Vol. 5, No. 1, pp. 106-121.

<sup>53</sup> Haki Rasilimali, 2019 *Extractive Resources - Industrialisation Linkages: Opportunities, Challenges and Lessons from Tanzania at 42*.





reforms across all economic sectors and institutions. For example, it recommends that the Minister for local government authorities enact Regulations to standardize local government authority payments and fees concerning activities in the mineral sector and address the concern on fees.

The Blueprint represents a major step towards improving the business environment in Tanzania. However, the main challenge remains to be implementation. The Blueprint is as good as nothing if the proposed regulatory reforms are not carried out.

- (b) The government has been organizing meetings with stakeholders in the mining sector. The major aims for these meetings is to improve the business environment and regain investor confidence. For example, on 22 January 2019 the Ministry of Minerals organized a meeting with mining stakeholders which was also attended by President Magufuli. Stakeholders raised different challenges facing the mining sector including complaints on VAT and withholding taxes. In his response to these challenges, the President ordered the Ministry of Minerals and other government agencies to look into how taxes, which he described as 'unacceptably high', could be revised.

The Tanzania's Development Vision 2025 envision that the mining sector will be contributing at least 10% of the Gross Domestic Product (GDP) by 2025. During the year 2017 the contribution of the mining sector to the GDP was 4.8% and 5.07 in 2018.<sup>54</sup> To achieve this goal depends on how the business environment will be structured in Tanzania. However, it has been reported that the reforms undertaken from 2016 have eroded the stability and predictability of the business environment in Tanzania. Consequently, FDI flows to Tanzania has declined by 14% to US\$1.2 billion compared to 2016.<sup>55</sup> Likewise revenues collected from the sector have declined in the past three years, a period in which these reforms were introduced.<sup>56</sup> This means the reforms undertaken have not attempted to balance the interests of investors and thus have negatively affected the investment climate in Tanzania.<sup>57</sup>

<sup>54</sup> Ministry of Minerals Budget Speech 2019-20.

<sup>55</sup> UNCTAD, 2018. *World Investment Report 2018: Investment and New Industrial Policies*. New York: UNCTAD.

<sup>56</sup> HakiRasilimali, 2019, "From Transparency to Improved Revenue Management in the Extractive Sector in Tanzania." Dar es Salaam.

<sup>57</sup> HakiRasilimali, 2019 *Extractive Resources - Industrialisation Linkages: Opportunities, Challenges and Lessons from Tanzania* at 42.



As a result of reforms in the mining sector, recently, three companies have already filed a notice of intention that there exists an investment dispute with the Government challenging the revocation of retention licenses as per Regulation 21 of the Mining (Mineral Rights) Regulations 2018. These companies are Winshear Gold Corporation relating to SMP Gold Project located in south-west Tanzania (10<sup>th</sup> January 2020), Indiana Resources related to the Ntaka Hill Nickel Project in north-eastern Tanzania (15 January 2020), and Montero Mining and Exploration (17 January 2020) relating to Montero's investment in the Wigu Hill, a rare earth element project located 170 km south-west of Dar es Salaam.<sup>58</sup> The filing of these investment disputes, though uncommon, point to challenges emerging from the implementation of what many regard as resource nationalist legislative reforms undertaken by Tanzania since 2017.

### 2.3 Current Efforts at Addressing Management and Use of Mineral Revenues

The AMV Action Plan identifies that countries face challenges in managing mineral revenues. In this regard, the expected outcome under the AMV Action Plan is improved management and use of mineral revenues. This focuses on policies, and strategies for ensuring the most efficient and productive use of revenues accruing from mining sector. AMV also emphasizes on the transparent and accountable management of the revenues accruing from the sector. A study conducted by TJNA and PF in 2017 recommended that Tanzania should also demonstrate the same commitment it made towards a sovereign wealth fund for the gas sector with respect to other minerals. The Study further recommended that in addition to the local levy, part of the mining revenues can be invested back into the community through infrastructure projects intended to enhance better health, education and water and sanitation.

It is in the context of the AMV Action Plan and the Study by TJNA and PF in 2017 that the next section examines the legislative measures undertaken by Tanzania to ensure equitable and prudent management of mineral revenues.

<sup>58</sup> <https://www.tanzaniainvest.com/mining/mining-companies-ready-to-enter-into-dispute-with-government>



### 2.3.1 Local Community benefits from Mining/Participation of local communities in partnership Agreements

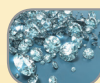
The AMV Action Plan encourages participation of local communities in partnership agreements with mining companies. In doing so it requires member states to develop the capacity of local communities to negotiate such partnership agreements with mining companies operating in their localities. In the same context, the Study by TJNA and PF recommended that, in addition to the local levy, there is a need to implement projects that will make local communities feel part of the mining projects. The Study further recommended that part of the mining revenue can be invested back into the community through infrastructure projects intended to enhance better health, education and water and sanitation.

There is no precise definition of “partnership agreements”. This may be a subject of multiple interpretations. The practice shows that different regimes in Africa have adopted different approaches. For example, in Zimbabwe partnerships take the form of local communities obtaining equity in the mining company. By contrast, in Kenya “partnership agreements” take the form of Corporate Social Responsibility (CSR) where mining companies are compelled to enter into agreements with local communities on different projects to be implemented by the mining company in collaboration with local communities. This report adopts the Kenyan approach by arguing that CSR is considered as one of the ways for mining companies to invest back their profit to the mining host communities. Further, the political economy context of resource governance in Tanzania makes CSR a viable approach to partnership agreements. This is because the state has consistently defined extractive resources as national resources whose revenues must be shared equally among all Tanzanian communities irrespective of the disproportionate negative consequences that host communities bear.<sup>59</sup>

(a) The AMV Action plan also encourages African countries to develop the capacity of local communities to negotiate partnership agreements. Section 105 of the Mining Act (as amended in 2017) now provides for a requirement on mining companies to prepare, on an annual basis, plans jointly agreed with the relevant local government authority.<sup>60</sup> The plan must take into account environmental, social, economic and cultural activities based on local government authority priorities of host community. The “host communities” means inhabitants of the

<sup>59</sup> Poncian, J. and Jose, J. 2019. *National Resource Ownership and Community Engagement in Tanzania's Natural Gas Governance*. *Energy Policy*, Vol. 133, 110903.

<sup>60</sup> Section 15 of the *Tanzania Extractive Industries (Transparency and Accountability) Act* also requires the extractive industries, including oil and gas companies, to submit an annual report on CSR projects to the Tanzania EITI Committee



local area in which mining operations take place. Section 105(4) requires local government authorities to prepare guidelines for corporate social responsibility within their localities; oversee the implementation of corporate social responsibility action plan; and provide awareness to the public on projects in their areas. The challenge is that this provision does not make CSR mandatory for mining companies. It just imposes an obligation to prepare a CSR plan and submit it as one of the local content requirements. Further to that, the law does not make it mandatory for mining companies to engage with local communities in selecting projects to be implemented. A requirement that mining companies should agree plans with local government authorities does not necessarily mean that the agreed plans will cater for the interests and/or development priorities of host communities. Also, the law does not indicate or set a threshold of a minimum amount of money mining companies should set aside for purposes of implementing CSR projects.

It should be noted that even before enactment of this law, mining companies had developed and implemented CSR project to communities around the mine site. For mining companies, CSR is the form of social license to operate. This means that mining companies, apart from obtaining licenses from the Government, they seek to foster harmonious relations with local communities so as to allow mining operations to proceed without conflicts.<sup>61</sup> Different projects have been implemented by mining companies these include:<sup>62</sup>

- Buzwagi Gold Mine has good relationship with communities due to regular discussions and engagement. The company has different ways of providing jobs and other indirect benefits to each of the three villages surrounding the mine site such as security guards of the mine's perimeter, groups of women responsible for preparing the meals of the security guards, temporary jobs for cleaning and other duties. The company has also constructed schools and a health centre and provided scholarships for vocational training through VETA, school uniforms and bursaries for around 400 children/students from disadvantaged families.
- Bulyanhulu Gold Mine funded community investments are presently driven by the needs of the surrounding

<sup>61</sup> Kessy, F., Melyoki, L & Nyamrunda, G *The Social License to Operate in Tanzania: Case Studies of the Petroleum and Mining Sectors*. UONGOZI Institute, 2017 RESEARCH REPORT 17/2 at 4.

<sup>62</sup> *Ibid* at 431-40.



local authorities. The company has implemented projects including upgrading of the Bugarama Dispensary to a health centre (at a cost of TZS 800 million) and supported women's and youth groups through employment opportunities that did not require specialized skills.

- North Mara Gold Mine allowed artisanal miners to look for residual gold in the already processed sand or gravel. The other projects implemented include employing a group of men from the neighbouring villages as security guards of the mine's perimeter, rehabilitation of the Nyamongo Health Centre, renovation of classrooms, staff houses and desks of Igwe Secondary School and primary schools, construction of two new primary schools around the mine, drilling boreholes for villages, providing water pumps, and the building of the ward government office and a police station in Nyangoto village and groups of women and youth have been contracted to provide cleaning services at the mining site.
- Petra-Diamonds (Mwadui Diamond Mine) has also implemented several projects including pipes for clean water have been connected from the mine to the communities, motorcycles were given to the chairpersons of eight villages surrounding the mining site for their daily official duties. The Company is also paying a levy of TZS 1,625,000 per month to each of the eight villages surrounding the mining site. This is in addition to paying the service levy to the District Council.
- AngloGold Ashanti has implemented a number of social projects including clean water pipeline from Lake Victoria to Geita Town, the construction of a school (Nyakumbu Girls Secondary School, Compound Primary School), including classrooms and staff housing.

- (b) Regulation 17(6)(e) of the Mining (Mineral Rights) Regulations 2018 require holders of Primary Mining Licenses in areas reserved exclusively for prospecting and mining operations by persons holding primary mining licences as per section 16 of the Mining Act 2010, to put in place mechanisms that will ensure that people living in the vicinity of the designated area secure a reasonable share of the mineral resources discovered in the designated area. This is an important element that ensures that the host communities also benefit from minerals extracted from their lands.



However, this requirement is not mandatory. Further to that the Regulations do not state how the host community will get their share of the minerals from the holders of PML (i.e purchase of minerals or obtaining equity from holders of PML). This provision not only gives an empty promise to the host communities but also may be a source of conflicts in the future between the communities and holders of PML.

### 2.3.2 Rent distribution systems

The AMV Action plan requires member states to develop rent distribution systems for allocating part of mineral revenues to communities near mining areas and local authorities. The AMV further calls for community participation in mineral revenue management, equitable revenue allocations to mining communities, building communities' capacity to negotiate benefit agreements, and the provision of non-fiscal benefits (employment and social infrastructure).

Currently, Tanzania does not have a formula or mechanism for rent (mineral revenue) redistribution. It is the government policy that all minerals (and other natural resources) belong to all Tanzanians. So there is no need to give a specific percentage of revenue to communities surrounding mine sites. According to the government, having a specific formula for sharing revenues will create unnecessary disunity in the society. For these reasons, the only available mechanism is that Local Government authorities have autonomy in their geographical jurisdiction to impose taxes, levies, fees and charges.<sup>63</sup>

These powers are exercisable through making by-laws prescribing those taxes or levies.<sup>64</sup> Currently, all companies, including those in mining industry, are supposed to pay to the local Government authorities in which they operate a 0.3 percent service levy of their business turnover (net of VAT and excise duty).<sup>65</sup> Local governments currently collecting payments from mining companies are Biharamulo, Chunya, Geita, Kahama, Kinondoni, Kishapu, Mbeya, Simanjiro, Tanga, and Tarime.<sup>66</sup> The revenues collected are budgeted and expended within the whole district and not necessarily to the local communities where mining take place. This reflects the central government framing of mineral resources and revenues that they belong to, and should be used to the benefit of all Tanzanians without giving special consideration to host communities who bears much of the consequences of extraction.

<sup>63</sup> Section 18 of the Local Government Finances Act Cap 290 (R.E 2002).

<sup>64</sup> The power to make by law can be traced under article 97(5) of the Constitution of Tanzania which permits the parliament to delegate its legislative powers to other bodies or Government agencies.

<sup>65</sup> Local Government authorities are established under article 154 of the Constitution which delegates power to the authority to impose taxes under Section 6 (1) (u) of the Local Government Finance Act of 1982.

<sup>66</sup> TEITA Scoping Study for the Preparation of the Eighth Report of the Tanzania Extractive Industries Transparency Initiative (2017) 16.



### 2.3.3 Mining Sector linkages to local economy

The AMV encourages member states to ensure that the mining sector is linked to other sectors of the economy. In this regard, the AMV action plan requires member states to develop mechanisms to facilitate local communities' access to jobs, education, transport infrastructure, health services, water and sanitation. To ensure linkages to local economy, the Mining Act was amended in 2017 and has provisions requiring mining companies to enhance local economy as follows:

- (a) The Mining (Local Content) Regulations, 2018 were promulgated in 2018. The major objectives of the Regulations include value addition and job creation, local employment, developing local capacities, local control over development initiatives and supporting mining-related industries. The Regulations cover several local content requirements including employment and training of Tanzanians, procurement of local insurance services; engineering services; legal services; and financial services and giving priority to indigenous Tanzanian companies.<sup>67</sup>

These local content requirements make it possible for local companies to secure reliable markets for their goods as well as improving their innovation in order to match requirements of mining companies. Similarly, procurement of services offered by local service providers creates opportunities for backward linkages between the mining sector and other sectors of the economy. This is one of the ways, other than taxes and royalties, for mining sector to contribute to the development of the local economy.

It should be noted that the success of these requirements depends on enforcement and monitoring mechanisms. There is also a challenge that some local companies do not have the requisite capacity to provide services and goods to the mining sector. Further, the definition of what constitutes 'local' economy is problematic. While it may be tempting to argue that this caters for the local economy and communities hosting mining projects, in practice, the local economy, local Tanzanians and so forth refer to the nation as the framing of mineral resource ownership entails. In effect, this may end up creating opportunities for well-connected urban based elites to tap into these opportunities to the exclusion of host communities.

<sup>67</sup> The indigenous Tanzanian company is defined as one that has at least 20% equity owned by Tanzanians and has Tanzanians holding at least 80% of executive and senior management positions and one hundred percent of non-managerial and other positions.



- (b) The Mining (Mineral Beneficiation) Regulations, 2018<sup>68</sup> provide guidelines for application of a license for processing, smelting or refining of minerals. The Regulations define mineral beneficiation to include the processing, smelting or refinery of metallic minerals and industrial minerals. The requirement for local beneficiation, as provided for under sections 100C (3) of the Mining Act (as amended in 2017) and section 9(1) of the Permanent Sovereignty Act, prohibits exportation of minerals and mineral concentrates without value addition. Also section 9(2) of the Permanent Sovereignty Act 2017 provides that any arrangement or agreement for the extraction, exploitation or acquisition and use of natural wealth and resources shall include commitment to establish beneficiation facilities within Tanzania. In this regard, the Regulations operationalize the state commitment to ensure that natural wealth is used to the greater benefits and welfare of its people. The Mining (Mineral Value Addition) Guidelines 2019<sup>69</sup> provides principles on how beneficiation and value addition has to be done. The Government has also called for investors on construction of smelters and refineries and so far 27 applications have been received.<sup>70</sup>

These obligations for mandatory local beneficiation and value addition have the potential to ensure maximum benefits such as foreign currency from increased exports of semi and full processed mineral products. It also has potential to create opportunities for employment and training of Tanzanians as well as local procurement of goods and services. It thus provides an opportunity for more government revenues beyond taxes and royalties. It also enhances local content through procurement of goods and services which are locally available.

Implementation of the Regulations remains a big challenge. Since the promulgation of the Regulations very little has been achieved in terms of large scale investment in mineral beneficiation.<sup>71</sup> The challenge lies on the fact that large scale smelting of minerals such as gold requires adequate supply of feedstock which may not be readily available in Tanzania. It also requires high energy which is currently limited. The laws and Regulations are also silent on interim measures where there are no beneficiation facilities in the country. For example, the recent arrangement with Barrick Gold is silent on this aspect.

<sup>68</sup> Issued in response to provisions of sections 60, 61 and 112 of the Mining Act 2018

<sup>69</sup> G.N No. 60 of 2019

<sup>70</sup> Minister of Minerals Budget Speech 2019-20 at p. 26

<sup>71</sup> It has been reported that one gold refinery has been opened in Dodoma. No details are available on the capacity of this facility





Finally, the multi-lateral and Bilateral Trade and Investment Agreements to which Tanzania is a party restrict the imposition of beneficiation and value addition obligations. For example, article XI: 1 of the General Agreement on Tariffs and Trade ("GATT") to which Tanzania is a party, restricts the imposition of prohibitions or restrictions other than duties, taxes or other measures on the exportation or sale for export any product destined for the other WTO members. Further to that, agreements for Promotion and Protection of Investments signed by the Government of Tanzania with countries like China, Canada, Mauritius, Finland, Italy Switzerland, Great Britain and Northern Ireland, Denmark, Germany, Sweden and the Netherlands have provisions which limit the extent to which beneficiation obligations can be implemented.

- (c) The Mining (Minimum Shareholding and Public Offering) Regulations, 2016<sup>72</sup> as amended by the Mining (Minimum Shareholding and Public Offering) (Amendment) Regulations, 2017<sup>73</sup> require holders of special mining license to float to the public at least thirty percent (30%) of issued and paid up shares. This creates an opportunity for Tanzanians also to benefit from the profits made by mining companies in form of dividends.

To date no single mining company has been listed in the DSE. This partly is due to the fact that this requirement does not apply to mining companies with MDAs. Surprisingly, this was not part of the recently signed deal between the government of Tanzania and Barrick.

- (d) Section 100F of the Mining Act (as amended) now provides for a requirement on mining companies to plough-back profits from minerals sector. In implementation of this legal requirement, the mineral right holders are required to file annual returns showing the efforts undertaken to enhance the performance of the Tanzanian economy and the value of such annual returns. It is not clear what ploughing-back of profit means. This requirement lacks clarity and is, therefore, difficult not only for the companies to implement but also for the government to evaluate the implementation. It remains to be seen how it will be implemented.

<sup>72</sup> GN No. 286 of 2016

<sup>73</sup> GN. No. 44 of 2017.

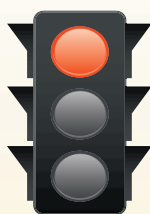


- (e) Section 8(5) of the Mining Act provides that a mining licence for mining gemstones shall only be granted to applicants who are Tanzanians. This means that only Tanzanians are given the opportunity to participate in mining gemstones.
- (f) Regulation 8(2) of the Mining (Local Content) Regulations require that an indigenous Tanzanian company should have at least 5% equity participation in a foreign company for such foreign company to qualify for grant of a mining licence (ML).<sup>74</sup> However, the Minister of Minerals has powers to waive this requirement in circumstances where an indigenous Tanzanian company is unable to satisfy the requirement of 5% equity participation.

## 2.4. Conclusions

The discussion above indicates Tanzania has performed some activities towards realization of the AMV and some developments have taken place since 2017. Tanzania has undertaken some major reorganization of her fiscal regime applicable to the mining sector over three years. These areas include review of mineral fiscal regime, measures to address the problem of tax revenue leakage, laws to guide negotiation and renegotiation of contracts, local participation, and audit of mineral production and exports and sector linkages to local economy.

The performance of Tanzania implementation of AMV for the period 2017 to 2019 is measured using traffic lights method. This method uses a metaphor for red, amber and green. In this report red means "very little or no progress made", amber means "moderate progress made" and green "very good progress and the regime is AMV compliant".



Rent distribution systems



- Review of terms of double taxation agreements and BITs
- Improving business environment
- Local Community benefits from the mining sector
- Mining Sector linkages to local economy



- Review of mineral fiscal regimes
- Negotiation or renegotiation of mining contracts
- Anti-tax avoidance and tax evasion measures
- Auditing mineral production and exports

<sup>74</sup> 18(2) There shall be at least a five percent equity participation of an indigenous Tanzanian company other than the Corporation to be qualified for grant of a mining licence.



# CHAPTER THREE

## REFORMS ON MINING FISCAL REGIMES AND RESOURCE REVENUE MANAGEMENT IN EAST AFRICA: CASE STUDY OF KENYA AND UGANDA

### 3.1 Introduction

The countries in the EAC are richly endowed with a variety of mineral resources.<sup>75</sup> For example, Kenya has four belts of minerals - the gold green stone belt in western Kenya, which extends to Tanzania; the Mozambique belt passing through central Kenya, the source of Kenya's unique gemstones; the Rift belt, which has a variety of resources including soda ash, fluorspar and diatomite; and, the coastal belt, which has titanium. Uganda also has a variety of mineral resources including copper, cobalt, tin, iron ore, tungsten, beryllium, limestone, phosphates, salt, clays, feldspar, diatomite, silica sand, glass, sand gravel, and construction materials such as granites and gneisses. The next section examines developments in Kenya and Uganda with the view to establish if there are any developments in these two countries which can be replicated in Tanzania.

### 3.2 Developments in the Kenyan mining sector 2017-2019

Kenya is generally not regarded as a mining country, yet it hosts a variety of mineral deposits, mines and exploration projects. The country-wide airborne geophysical surveys, which started in 2018 generated many new exploration targets and contribute to fully appraise Kenya's real potential for mineral development. A number of global mining companies now have operations in Kenya, although there is a significant presence of artisanal and small-scale miners who, for example, account for most of the gold production. Some of the mining companies present in Kenya include Base Titanium, Apex Africa Resources, Pacific Industrial Energy and Zhen Hua Company.<sup>76</sup> The Government is now taking various steps to make the country a more attractive destination for mining investments, including by intensifying efforts to acquire mineral and geological data through a countrywide aeromagnetic survey. From 2017 to 2019, Kenya has made some reforms on its mining sector especially on issues relating to fiscal regime and revenue management.

<sup>75</sup> <https://www.eac.int/investment/why-east-africa/investment-opportunities/mining>

<sup>76</sup> <https://www.mining-technology.com/features/featurekenyas-mining-industry-set-for-a-boom-4958923/>



The Constitution of Kenya 2010, which is the supreme law of the land, mandates the state with responsibility to ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources. The constitution also provides for equitable sharing of the accruing benefits and guarantee equitable benefit for all people from the use of the natural resources (Article 60, 62(1(f), 66(2) and 69). In this regard, the Mining Act 2016 implements these constitutional mandates with regards to creating a legal and institutional framework for prospecting, mining, processing and any dealings in minerals. The Act was preceded by the Mining and Minerals Policy 2014 which set the policy framework for sustainable mineral resource development. The major policy goal is to establish frameworks, principles, and strategies to provide for exploration and exploitation of mineral resources for socio-economic development.

Kenya has also implemented specific reforms in its mining fiscal regimes as discussed below.

### 3.2.1 Mining and Minerals Fiscal regime

Kenya has enacted a number of legislation to improve its fiscal regime for the mining sector.

- The Mining (State Participation) Regulations 2017<sup>77</sup> provides for State participation where the government (through the National Mining Corporation) is entitled ten percent (10%) undiluted free carried interest in prospecting or mining operations carried out by a holder of a mineral right.
- The Mining (Award of Mineral Rights by Tender) Regulations, 2017 requires mineral rights for large scale mining, where an area possesses high mineral prospectivity; or a mineral deposit is of significant economic or commercial value, shall be granted through competitive and transparent public tender. The Government is required to invite qualified local and international companies, through advertisement in the Gazette, a local newspaper of wide circulation and international newspapers, to submit expressions of interest.

### 3.2.2 Management and Use of Mineral Revenue

There are several pieces of legislation that address the issue of management and use of mineral revenues in Kenya as discussed below:

- Section 183 of the Mining Act 2016 provides for division of mineral royalties where 70% goes to the National Government; 20% to the County Government; and 10% to the community where the mining operations occur.

<sup>77</sup> Legal notice no.84



- Draft Sovereign Wealth Fund Bill has been presented to Senate. The Bill aims at establishing a sovereign wealth fund that would channel the nation’s mineral and petroleum revenues to three “components”, namely, savings, budget stabilization and domestic spending and investment.<sup>78</sup>
- The Mining (Community Development Agreement) Regulations, 2017 aims at, inter alia, ensuring that benefits of mining are shared between the licence holder and the community. Regulations oblige license holders to enter into Development Agreement with the Communities and to spend a minimum of at least 1% of the gross revenue from the sale of minerals in every calendar year to finance the projects under the Agreement.<sup>79</sup>
- The Mining (Use of Local Goods and Services) Regulations, 2017<sup>80</sup> set target levels of local procurement based on a procurement list to be developed and communicated by the Director of Mines. It also indicates specific support to be provided by mineral rights holders to local providers or suppliers. Further, the regulations requires the mineral rights holder to show other measures being implemented to develop the supply of local goods and services including broadening access to opportunities and technical support.

### 3.3 Developments in the Ugandan mining fiscal regime 2017-2019

The mining sector in Uganda is regulated by the Mining Act 2003 and its attendant Regulations. The Act provides for different forms of licenses for exploration and production of minerals including prospecting license (a non-exclusive right), an exploration license, retention license, a mining lease, and a location license (small scale exploration and mining).

Uganda is not regarded as a mining country. It has been argued that since the discovery of oil in 2006, Ugandans have focused on the promise that its oil sector offers for the country’s development.<sup>81</sup> The Airborne geophysical surveys undertaken in 2010 and 2011 reported resources of at least 50 mineral commodities. However, recently the Government has started to pay attention to the mining sector. For example, a new Mining and Minerals Policy was finalized in May 2018. The government intends to enact a new fiscal regime for the mining sector.<sup>82</sup>

<sup>78</sup> <https://www.treasury.go.ke/tax/finance-bills.html?download=895:draft-kenya-sovereign-wealth-fund-bill-2019>

<sup>79</sup> Regulation 12(1),

<sup>80</sup> Legal Notice No. 81 of 2017.

<sup>81</sup> IMF Technical Assistance Report—Fiscal Regimes For Extractive Industries: Next Phase IMF Country Report No. 17/367 (2017)12

<sup>82</sup> In his budget speech for 2018/19, Matia Kasaija, the Minister of Finance, Planning and Economic Development,



The Draft Policy 2018 aims, among others, to optimise collection and management of mineral revenues. Strategies to achieve these policy objectives include (a) improving collection efficiency and transparency of reporting of mining revenues; (b) levy and collect royalties, fees and rents; (c) requiring the Department of Mines (DM) to periodically audit the royalty returns submitted by mining companies and notify the Uganda Revenue Authority (URA) of any inconsistencies in the returns; and (d) requiring royalties to be spent on the development of durable and wealth creating socioeconomic infrastructure as identified in the National Development Plans and Vision 2040.

### 3.3.1 Mining and Minerals Fiscal Regime

The fiscal regime for mining sector in Uganda includes royalties, the income tax, rents, and fees. The Mining Act 2003 imposes a royalty and empowers the Minister to enter into mineral agreements with the mineral rights holder.<sup>83</sup> Royalties for precious metals are five percent (5%) and for precious stones ten percent (10%) of the gross value of the minerals. Uganda also charges corporate income tax for mining companies at a sliding scale with a minimum rate of 25 percent and maximum rate of 45 percent.<sup>84</sup> The other fiscal terms include: depreciation of exploration capital 100%; depreciation of development expenditure; unlimited loss carry forward; withholding tax on dividends at 15% for non-residents; withholding tax on interest 15% for non-residents and import duty for capital goods is 0%, for intermediate goods is 10%. As regards to VAT, exports are zero-rated. In 2018 the Income Tax Act was amended vide the Income Tax (Amendment) Act, 2018. The amendments covered taxation of income arising from change of ownership of a business; restrictions on deductible interest; a new definition of mining exploration rights and included a transfer for the whole interest of the transferor in a mining right.

### 3.3.2 Management and Use of Mineral Revenue

The Mining Act 2003 takes a very unique position in terms of revenue sharing from the mining sector. Section 98(1) of the Mining Act imposes royalties, on the gross value of the minerals based on the prevailing market price of the minerals, for all minerals obtained or mined in the course of prospecting, exploration, mining or mineral beneficiation operations. Section 98(2) provides explicitly that the royalties collected shall be shared by the Government, Local Governments and

<sup>83</sup> IMF Technical Assistance Report—Fiscal Regimes For Extractive Industries: Next Phase IMF Country Report No. 17/367 (2017) 49

<sup>84</sup> Part II of the Third Schedule of the ITA



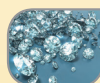
owners or lawful occupiers of land subject to mineral rights as follows: Government 80%, Local Governments 17% and owners or lawful occupiers of land subject to mineral rights 3%.

### 3.4 Lessons for Tanzania

The discussions above indicate that there are many similarities between Tanzania and Kenya and Uganda in terms of mining fiscal terms and management of revenues. The commonalities include payments of royalties, rates of corporate income tax, government free carried interests in mining operations etc. However, there are specific lessons that Tanzania can learn from these two countries especially with respect to revenue use and management. These specific lessons include:

- (a) Both Kenya and Uganda have formulas for division of mineral revenues. As discussed above, Kenya has a formula for division of mineral royalties where 70% goes to the National Government; 20% to the County Government; and 10% to the community where the mining operations occur. Also Uganda has a formula for sharing royalties as follows: Government 80%, Local Governments 17% and owners or lawful occupiers of land subject to mineral rights 3%.

Tanzania can learn from experiences in Kenya and Uganda for devising a formula for sharing mineral revenues. However, the implementation of these lessons may face some challenges in Tanzania. For one, Tanzania does not have a similar government set up like Kenya operating a devolution system. Further to that, it is the government policy that all minerals (and other natural resources) belong to all Tanzanians. According to this view, there is no need to give a specific percentage of revenue to local government authorities and communities surrounding mine sites. According to the government, having a specific formula for sharing revenues will create unnecessary disunity in the society. It is also considered that the 0.3% service levy on gross revenues charged by local government is sufficient. The same arguments apply to the Ugandan system of rent sharing. It is arguable that the landholding system in Uganda is different from that of Tanzania. Tanzania's landholding takes the form of leasehold where the government is the supreme landlord and individuals are tenants only with rights to occupy and use land. However, these country differences do not make the idea of revenue sharing between the central and local governments meaningless. Government fears



that devising a formula for sharing revenues is detrimental to national unity are unfounded. One wonders how a 10% share of revenues to local governments hosting mineral projects can disunite the nation.

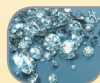
- (b) Kenya has prepared and tabled a Draft Sovereign Wealth Fund Bill which aims at establishing a sovereign wealth fund to manage mineral revenues. This is a positive step towards the implementation of the AMV goals calling for African countries to explore strategies for investing windfall earnings and mineral rents into sovereign wealth funds including stabilization funds and infrastructure funds. Here Tanzania can learn from Kenya by commencing the exploration of the best available strategy to invest windfall earnings for the benefits of both current and future generations. The lesson here is that Tanzania needs to come up with a strategy of its own which suits its socio-economic and political set up and that takes into account the unique features of the mining sector in the country.
- (c) In Kenya mining companies are obliged to enter into Development Agreement with the Communities and to spend a minimum of at least 1% of the gross revenue from the sale of minerals in every calendar year to finance the projects under the Agreement. This requirement is well in alignment with AMV Action plan which insists on partnership agreements between mining companies and local communities. This requirement also makes such partnership mandatory and sets a minimum amount of 1% of gross revenues earned by mining companies to be spent on community projects. It also makes it mandatory for mining companies to engage with local communities in signing a partnership agreement.

There are three lessons Tanzania can learn from this Kenyan experience. First, Tanzania needs to make CSR mandatory. Currently, mining companies have been undertaking CSR as way of social license to operate. It is not mandatory. There is no express provision compelling mining companies to implement CSR. The only legal requirement is to prepare a CSR plan but there are no sanctions if the company fails to implement that plan. By making CSR mandatory, it gives assurance that host communities will benefit from the mineral revenues through projects implemented. The second lesson is that Tanzania needs to make it mandatory





for mining companies to engage with local communities before preparing the CSR plan as well as during execution of the CSR projects. An engagement with local communities will ensure that priorities of the local communities are taken on board in the CSR and not superimposed by mining companies and/or local governments. The third lesson is that Tanzania needs to come up with a threshold or minimum amount of money mining companies should invest in CSR project. The Kenyan minimum amount of 1% might be too high for huge mining projects like the ones in Tanzania. However, the government can come up with a figure that is acceptable to both mining companies and host communities.



## CHAPTER FOUR

# CHALLENGES AND RECOMMENDATIONS

The discussions in the preceding chapters have demonstrated that for the period between 2017 and 2019 Tanzania has undertaken major reforms in its mining sector. The discussions have also revealed that most of these reforms are in alignment with the AMV aspirations and the AMV Action Plan. However, despite these positive developments there are still areas which should be worked on for the Tanzanian mining regime to be AMV compliant. In what follows below, these challenges are discussed and corresponding remedial measures suggested.

- (a) Tanzania does not have a formula for revenue sharing between different government levels (i.e between central government and local government authorities). The current system is that all revenues are collected and deposited in the Consolidated Fund and the redistribution is done through normal budgetary allocations without considering the source of revenues. In the Consolidated Fund all revenues are considered to be government revenue.

There is also no mechanism for distribution of revenues directly to the local communities surrounding mining sites. There is no legal requirement to transfer a specific portion of the 0.3 % local government levy to host communities around the mine sites. The local government levy collected is budgeted and expended within the whole district and not necessarily to the local communities where mining take place.

Given the impact mining operations have on local communities, the government should devise a special mechanism to ensure that part of the mineral revenues collected are returned back to the district where mining operations are taking place. This will help to address the challenges associated with mining operations. It is suggested that a feasibility study should be conducted to establish what will be the best mechanism.

As regards to local government levy, it is recommended all local government authorities should adopt bylaws of distribution of local government levy directly to villages surrounding the mine sites. This has already been implemented in the oil and gas industry. For example, Kilwa District Council sets aside a total of 20% of the 0.3% levy which it disburses to local government authority in Songo Songo village (where the actual production of



gas is taking place).<sup>85</sup> This arrangement has enabled the village government to prioritize and implement their own development projects. However, because this is not backed up by any law, there is no mechanism for the Songo Songo village government to hold the district government accountable when disbursement is not effected.<sup>86</sup>

- (b) Tanzania does not have a special fund to manage mineral revenues. This falls short of the AMV aspirations which requires all African countries to explore strategies for investing windfall earnings and mineral rent into sovereign wealth funds including stabilization funds and infrastructure funds.

It is recommended that Tanzania should explore the feasibility of coming up with an effective mechanism to manage mineral revenues effectively. For example, in 2015 Tanzania established the Oil and Gas Fund through an Act of Parliament. It is suggested that Tanzania should explore the feasibility of adopting the same structure for the mining sector so as to manage windfall mineral revenues effectively and set aside income for use by future generations.

- (c) While the Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act 2017 empowers the National Assembly to review all mining agreements, there are no procedures on how such review of mining agreements will be conducted. The law does not specify whether the review will be done by the whole house? Parliamentary Standing Committees or select parliamentary Committee? The procedure on how review is conducted is of paramount importance to ensure that the parliament discharges its oversight role effectively. Lack of such procedures will turn the parliament into a rubber stamp.

Similarly, the Act empowers the government to renegotiate unconscionable terms in any of the existing mining agreements. However, there is no procedure for renegotiation of unconscionable terms (i.e trigger mechanism) for example who will initiate the call for renegotiation, to be dealt by the whole cabinet, a Select Committee or the Ministry of Minerals).

<sup>85</sup> Kessy, F., Melyoki, L & Nyamrunda, G *The Social License to Operate in Tanzania: Case Studies of the Petroleum and Mining Sectors* UONGOZI Institute, 2017 RESEARCH REPORT 17/2 at 27.

<sup>86</sup> Poncian, J 2019 “Extractive Resource Politics and Government-Community Engagement in Tanzania: A Case of Natural Gas.” *University of Newcastle*. <https://nova.newcastle.edu.au/vital/access/manager/Repository/uon:35558>



It is recommended that the Minister should promulgate Regulations (or amend the law) to guide review of new mining agreements and renegotiation of existing mining agreements.

- (d) Currently, the law requires mining companies to prepare a CSR plan but there are no sanctions if the company fails to implement that plan. It is recommended that sanctions should be imposed for mining companies that fail to implement the submitted CSR plan.

Also there is no requirement for mining companies to engage with local communities when preparing CSR plan well as during execution of the CSR projects. It is recommended that the law should make it mandatory for mining companies to engage with local communities. An engagement with local communities will ensure that priorities of the local communities are taken on board in the CSR and not superimposed by mining companies and/or local government authorities.

Another challenge noted is that the law in Tanzania does not set a threshold or a minimum amount of money mining companies should invest in CSR project. This means the decision on how much to invest has been left to investors. The law should be amended and set up a minimum amount to be invested by mining companies in CSR projects.

- (e) The government should continue to build capacity and enhancing skills of government officials in negotiating fiscal issues and effectively monitoring compliance with taxation laws.



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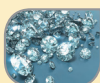
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