



# TANZANIA'S TAX REFORMS REVIVES THE SPECTRE OF RESOURCE NATIONALISM

By Rachael Nyirongo

Rachael Nyirongo is a Research Assistant at the Institute for African Alternatives (IFAA) in Cape Town and an attorney in possession of a Baccalaureus Legum (LL.B) degree from the Nelson Mandela University and a Master of Laws (LL.M) degree in International Human Rights Law from the University of Cape Town.

## THE BULLDOZER REFORMS THE MINING REGIME

In 2015, when President John Magufuli came into power, he began dealing with corruption head-on in Tanzania. This included cutting some of the benefits that government officials were entitled to as well as weeding out ghost workers in the government.<sup>1</sup> Moreover, Magufuli actively dealt with the concerns Tanzanians were facing with the multi-national mining companies. The government was of a firm opinion that mining contracts also known as Mining Development Agreements (MDA) had several unconscionable terms that denied Tanzania the benefits that it would have otherwise enjoyed had the MDAs been fair and equitable.<sup>2</sup> Under previous laws, mining companies enjoyed low royalties, highly favourable tax regulation and a largely unregulated extraction and export terms which allowed some mining companies to have landing strips on the mining fields.<sup>3</sup>

The government's stance on the problematic practices of mining multinationals and its intention to more aggressively regulate the sector led it to take regulatory action later in 2015. Tax evasion charges were filed against mining companies such as Acacia Gold, Tanzania's largest gold mining company was charged \$190 billion in tax evasion.<sup>4</sup> In addition, the government further issued a ban on the export of copper and gold ore. The ban adversely affected the operations of companies like AngloGold Ashanti (AGA).<sup>5</sup> This raised many concerns from the mining companies about the regulatory uncertainty in the mining industry. Whilst some Tanzanians supported the government's efforts in fighting corruption, others feared that economic war between the state and mining companies would ruin the country's investment climate.

In 2017, two pieces of natural resources legislation, namely the *Natural Wealth and Resources Contracts (Review and Re-negotiation of Unconscionable Terms) Act*,<sup>6</sup> and the *Natural Wealth and Resources (Permanent Sovereignty) Act*,<sup>7</sup> and an amendment to the Mining Act, *The Written Laws (Miscellaneous Amendments) Act*<sup>8</sup> were passed and came into force. The latter laws allow the government to renegotiate whatever terms of the MDAs that the National Assembly considers unconscionable. Moreover, the laws require mining companies to sell more shares to domestic groups as well as the government. These pieces of legislation were enacted to ensure that the people of Tanzania truly realize the benefits of their natural resources, mineral resources being one. However, there is debate about the extent to which this aim has been realised.

Soon after, the government opted to increase tax rates by 18 per cent, however, the option sounded unsustainable. In the year 2019, President Magufuli expressed his deep concerns over the adverse impacts that the newly enacted pieces of legislation have had on the mining industry.<sup>9</sup> The increase in taxes were weighing heavy on the smaller independent miners and as a result, miners



were evading taxes. Moreover, the new regulations made Tanzania a less desirable country to invest in when compared to the tax rates of other resource-rich countries.<sup>10</sup> To be able to situate these reforms in the case of Tanzania, it is important to analyse its immediate post-independence history.

### POST-INDEPENDENCE MINING REFORMS

Following her political independence in 1961, Tanganyika, which later becomes Tanzania following her union with the islands of Zanzibar in 1964, thrived to achieve resources-based development. Resource-based development would mean nothing but the realization of natural resources, mineral resources being one, to foster sustainable development in all dimensions and the well-being of her people.

Amid global Cold War politics and the need to build a country from a group of ethnic communities Tanzania adopted the then celebrated, Arusha Declaration in 1967. This was a document that proclaimed the socialist direction that the government had decided to take in an attempt to bring about economic development. The Declaration sought to create a self-sustaining economy that promoted equal economic standards amongst all citizens. However, it fell short of expectations. The Declaration's objective was to create a socialist state in the best interest of the people. As a result, it brought about the nationalisation of major sectors of the economy.<sup>11</sup> In 1976, the government announced that nine commercial banks, eight import-export firms and seven milling firms were to be nationalised. None of those firms were offered compensation by the government. This nationalism gave a breeding ground for monopolisation and corruption. Moreover, the state was failing to satisfy the social needs of the population and many State-Owned-Enterprises (SOEs) were on the brink of collapse.<sup>12</sup>

In 1979, The Mining Act No. 17 of 1979 (Mining Act),<sup>13</sup> was enacted and was the second piece of mining legislation to be promulgated into law by the independent Tanzanian government, following the Mining (Mineral Oil) Amendments Regulations of 1962.<sup>14</sup> The 1962 mining legislation transferred all powers to grant mining licences and leases to the Minister responsible for Commerce and Industry.

The 1979 Mining Act continued to support the Arusha Declaration in making provision for the nationalisation of the mining industry. It vested the mining rights with the State Mining Cooperation (STAMICO), a government enterprise holding control over all mines.

As a consequence, the state-planned economy led to various catastrophes, one being an unattractive investment environment. The available studies point out that Tanzania's mining industry greatly deteriorated from the 1980s to the 1990s.<sup>15</sup> The deteriorated investment environment in the mining industry was mainly caused by the unwelcoming legal and policy frameworks in place.<sup>16</sup> Furthermore, during this period Tanzania began to transition away from the command economy envisioned in the Arusha Declaration and legislation discussed above. This transition to a more liberal or free-market economy also brought about significant.<sup>17</sup>

Notably, it was during the mid-1990s that Tanzania secured MDAs with foreign investors and Bilateral Investment Treaties (BITs) for the first time in her history.<sup>18</sup> The government was successful in garnering international interest in its mining economy and managed to sign a few MDAs such as the first being signed on 5 August 1994 with Bulyanhulu Gold Mine Limited.<sup>19</sup> However, some



of these were signed before there was legislation governing them. As a result, when the Mining Act of 1998 came into effect in 1999 it had no retrospective authority, meaning that these MDAs were not governed by it.

Despite the legal and policy reforms that took the country to a free-market economy, there was a public outcry concerning the new regulation of the mining industry. The public outcry was fuelled by two main reasons. The first had to do with the opacity that surrounded mineral governance since the government had never disclosed which MDAs had been signed. The second had to do with the perception that the liberal economic reforms would not allow the people of Tanzania to benefit from their mineral resources. The mining industry was cited to have failed to transform the lives of the people.

It was due to such reasons, and perhaps other minor reasons not mentioned, that Tanzania's government started to make further reforms in the mining sector. The new reforms included the adoption of the Mining Policy in the year 2009 followed by the enactment of the Mining Act in the year 2010. The Mining Act, 2010 has sustained several amendments and is the governing Act to date. This act increased royalties of minerals, royalties in gold minerals for example was increased from 3 to 4 per cent<sup>20</sup> and also required the government to have a stake in future projects.<sup>21</sup>

Despite a strong wave of reforms that extended to fiscal policy, the people of Tanzania were not satisfied with the regulations and neither was President John Magufuli who was once quoted saying that; *"Tanzania has a lot of minerals, but there have been a lot of funny deals...we have to look carefully at our laws so that we move forward as a country"*.<sup>22</sup>

Following the president's statement three new pieces of legislation were enacted in 2017. The new laws, which will be discussed in detail further below, have led to a backlash and protest from the mines within Tanzania.

## LEGISLATION REFORMS AND BACKLASH

Tanzania's mining industry is currently regulated by the Mining Act which was passed in 2009 and came into effect in 2010. The Mining Act, 2010 has sustained some amendments. These amendments were all brought together in 2019 and thus the Act is referred to as the Mining Act, 2010 [Cap 123, RE: 2019]. As mentioned earlier, the Act had financial implications for mining companies in Tanzania. Previously, gold mines were exempted from corporate tax and enjoyed zero-rating tax at different levels of the development chain.<sup>23</sup> The 2010 Mining Act revised the royalties and taxes policies and imposed regulations that would, in theory, be beneficial to the government and the citizens of the country. However, and notwithstanding the new legal and policy environment brought up by the Mining Act, 2010, the available literature points to the fact that the Act had denied Tanzania full realization of her mineral resources while creating a ground that favours investors, mostly foreign investors, at the expense of the poor communities involving in small scale mining.<sup>24</sup> Moreover, the gaps within the laws cemented corruption as government officials were often found to be colluding with the major foreign companies.<sup>25</sup> President Magufuli's pledge to deal with corruption in 2015 and the increasing number of cases filed against the allegedly corrupt actors in the mining sector, were the catalyst of the new laws introduced in 2017. Yet despite this promise, the reality has shown that corruption is still a significant problem.





## REVIEW AND RE-NEGOTIATION OF UNCONSCIONABLE TERMS

After the *Review and Renegotiation of the Unconscionable Terms Act*<sup>26</sup> and *Permanent Sovereignty Act* (as cited earlier), another two regulations were issued. The newly issued regulations, among other things, allowed the government to revise any mining contract in existence. The aim was to ensure that the government has a greater share in the revenue of these companies.

The Natural Wealth and Resources Contracts Act 2017 Act mandates the Government to renegotiate or expunge terms from investor-state agreements that the National Assembly considers “unconscionable”. The MDAs that had been entered into before the 1998 Mining Act came into effect had never been reviewed or renegotiated as they were always protected even in instances of mergers and acquisitions. According to Article 63(2) of the Tanzanian Constitution,<sup>27</sup> the National Assembly may review any arrangements or agreements made by the government. The Act requires that the government report such agreements entered into by the Tanzanian government within six sitting days at the National Assembly.<sup>28</sup>

The National Assembly must assess whether investor-state agreements contain terms which “jeopardise the interests of” Tanzania or its people. The Act identifies eleven types of terms that “shall be deemed to be unconscionable”, including those that aim to restrict the right of the state to exercise full permanent sovereignty over the country’s wealth, natural resources and economic activity, the state’s authority over foreign investments, or are onerous to the state, and restricts periodic reviews of arrangements or agreements which purports to last for a lifetime.<sup>29</sup>

If the National Assembly considers an agreement (or terms within it) “unconscionable”, it may instruct the Government to renegotiate the agreement. This also applies to MDAs that have been entered into before this Act came into effect,<sup>30</sup> meaning that the government could revise any MDAs to date. Once the Government notifies the investor of this instruction, the parties have ninety days to revise the “unconscionable” terms unless, by mutual agreement, both parties agree to extend the negotiation period. If they fail to negotiate within the ninety days or agreed period they will be deemed as removed from the agreement.<sup>31</sup>

The amended mining laws were a necessary measure to make sure that Tanzanian people start to see the benefits from the sector, however, the new laws placed heavier restrictions on international companies and some claimed they were too heavy. For instance, the requirement that all companies should be 51% owned by Tanzanians, however, this was amended in 2019 to 20% to make it easier for international companies to operate locally. The laws may have a deterrent effect on foreign investors as they had before the 1990s, but the changes are necessary and cannot be avoided. It is evident that the government does not want to deter the international investor and is willing to make amendments but not amendments that would be detrimental to the Tanzanian people. There have been successes on the clampdown approach that the government has taken, such as weeding out and holding companies that have not been tax accountable. The laws are not without fault, but this shows that the government is on the right track.





### Box 1 – Tanzania Amendment Acts

#### a. Natural Wealth and Resources (Permanent Sovereignty) Act, 2017

This Act included two United Nations General Assembly Resolutions in its schedules;

- *Resolution 1803 (XVIII) of 14 December 1962, also known as the "Resolution of Permanent Sovereignty over Natural Resources" (RPSNR)* – Passed during a period where many states were trying to establish independent economies after coming out of World War II. This RPSNR allows for the hosting state to nationalise and expropriate the property of foreign investors, however, it also seeks to afford the investors a level of protection by providing that the compensation payable should be determined per the laws of the hosting state and international law.
- *Resolution 3281 (XXIX) of 12 December 1974, also known as the "Charter of Economic Rights and Duties of States" (Charter)* – In contrast to the RPSNR, The Charter gives the hosting state the same authority to nationalise and expropriate the property of foreign investors, however, it states that compensation should be determined only according to the laws of the hosting state and not international law.

Tanzanian took in the provisions of both resolutions thus the Act expressly provides that compensation will be calculated according to Tanzanian law, which could be lower than the international standard. Furthermore, the Act refers to the fund and prevents the repatriation of funds, it states:

- (1) Any arrangement or agreement for extraction, exploitation or acquisition and use of natural wealth and resources shall require that earnings from disposal or dealings be retained in the banks and financial institutions established in the United Republic.
- (2) For the purpose of subsection (1), it shall be unlawful to keep such earnings in banks or financial institutions outside the United Republic except where distributed profits are repatriated in accordance with the laws of Tanzania.

Section<sup>32</sup> 12 of the same Act holds that any arrangement of the agreement dealing extraction of national wealth or resources should be reviewed by the National Assembly, meaning that should the Parliament deem it to be *"unconscionable"*, the terms<sup>33</sup> would need to be revised. As a result, foreign investors are not free to extract funds or export raw resources unless it has been approved by the National Assembly.

#### b. The Written Laws (Miscellaneous Amendments) Act, 2017

This Act filled in some of the gaps that were in the other Acts and clarified more of the benefits that the Tanzanian government would receive. Some of the amendments included the amendment to Section 10 of the Mining Act to not state;

- "[i]n any mining operations under a mining license or a special mining license, the Tanzanian Government shall have not less than sixteen per cent non-dilatable free-carried interest shares in the capital of the mining company depending on the type of minerals and the level of investment".

In addition<sup>34</sup> to this free-carried interest, the Government shall be entitled to acquire up to 50% of the shares of the mining company.

*These<sup>35</sup> amendments led to AngloGold Ashanti pursuing mediation with the government. However, the results of this enquiry are unknown.*

Further Amendments have been considered this year in the Mining Act Amendment Bill, which has been passed by parliament and is awaiting accession by the President. The proposed Bill has key features that will help in ensuring a more transparent process of the mining sector in Tanzania.

1. The Bill provides definitions that had not been provided in the Act, definitions to terms such as "mineral ore" or "tailings"
2. It provides for stricter requirements to obtain a mining licence. They also need to provide clearance of the tax as well as clearance of all necessary payments
3. It also put a cap on the penalties payable for an infringement of the regulations relating to mineral rights holders. The cap has been placed to between 5 - 10 million shillings (about R32000 – R630000), which is low considering the value of the minerals being dealt with.





## ANGLOGOLD ASHANTI ARBITRATION

The Permanent Sovereignty Act, the Miscellaneous Amendments Act and the Review and Renegotiation of the Unconscionable Terms Act came into effect in January of 2018. In February of the same year, AGA voiced issues it had been facing with the government in terms of getting tax returns. Their tax returns would range from \$3 – \$4 million a month<sup>36</sup> by March 2018, they had reached an estimated \$84 million.<sup>37</sup> In protest to the new laws that came into effect, the company's two indirect subsidiaries, Geita Gold Mining Limited and Samsex Resources Limited filed a notice for arbitration.<sup>38</sup> Their claims were based on the Agreement for the Development of a Gold Mine at Geita, Mwanza between the government of Tanzania and each of GGM and Samax (the MDA) signed in 1999 and were brought in terms of the arbitration rules of the United Nations Commission on International Trade Law.

The company's main concern is the change in the working environment that will result from these laws coming into effect. These changes include the right for the Government of Tanzania to renegotiate existing MDAs at its discretion; the provision to the Government of Tanzania of a non-dilutable, free-carried interest of not less than 16% in all mining projects; the right for the Government to acquire up to 50% of any mining asset commensurate with the value of tax benefits provided to the owner of that asset by the Government of Tanzania; removal of the refund of input VAT incurred; an increase in the rate of revenue royalties from 4% to 6%; requirements for local beneficiation and procurement; and constraints on the operation of off-shore bank accounts.<sup>39</sup>

The full contents of the MDA signed by AGAs subsidiaries, Samax Resources and Geita Gold Mining, in the 1990s have not been fully disclosed to the public, the company has revealed that they are disputing one clause in the MDA which guarantees fiscal and regulatory stability, as well as the agreement between all parties before material legal and regulatory changes, are made.<sup>40</sup>

Although the arbitration proceedings have begun both parties requested that it stayed until 12 July 2019,<sup>41</sup> which has now been further postponed to January 2020.<sup>42</sup> There have been no official reports on the outcome of this arbitration, however, there have been unofficial claims that AGA dropped the arbitration and reached an agreement with the Tanzanian government the contents of which have not been disclosed to the public.

## HAVE THE REFORMS WORKED?

Despite the resistance and the expected initial backlash from many of the mining companies that already had MDAs when the laws were changed, the Tanzanian government was able to use the new legislation to place themselves in a better position. As a result, they were able to negotiate better MDAs with more shareholdings for the government and investigate tax evasion issues. In some instances, licenses were revoked and the land was opened up to more artisanal miners, who were failing to compete under previous laws. The laws seem to have had initial success in some areas, however, there is no doubt that the government is still willing to negotiate where necessary and there will most likely be further amendments to the Acts as circumstances change.

On the other hand, the laws do not address the leadership concerns such as corruption and transparency, a problem that has led to heavy consequences in the past and is still a problem today. At the moment, the content of the MDAs are not made public, which means the Tanzanian people especially the mining communities are not informed about how these MDAs are benefiting them, if at all. One of the main driving forces of changing the laws was to ensure that Tanzanian people see the fruits of mining, but without transparency fair processes are not protected, which undermines the peoples interest.





## REFERENCES

- 1 Dzimwasha T. Magufuli's High Stakes Gamble, *African Business*, August/September 2017. 84-85.
- 2 Ibid.
- 3 Woodroffe N, Genasci M, Scurfield T. Tanzania's New Natural Resources Legislation: What Will Change?, *Natural Resource Governance Institute*, 2017
- 4 Reuters Staff UPDATE 2. Tanzania charges Acacia subsidiaries with tax evasion, corruption, October 2018. Available at <https://www.reuters.com/article/acacia-mining-tanzania-corruption-idUSL8N1WX61U17>
- 5 Mtulya A. Five things Tanzania's President 'Bulldozer' Magufuli has banned, *BBC*, 5 March 2019. Available at <https://www.bbc.com/news/world-africa-47334545>
- 6 Review and Re-negotiation of Unconscionable Terms Act 6 of 2017.
- 7 Permanent Sovereignty Act 3 of 2017.
- 8 Miscellaneous Amendments Act 4 of 2017.
- 9 The Citizen Magufuli gestures for relaxation of tax regime in mining, 23 January 2019. Available at <https://www.thecitizen.co.tz/News/Magufuli-gestures-for-relaxation-of-tax-regime-in-mining/1840340-4947170-s3en4g/index.html>
- 10 Scurfield T, Olan'g Magufuli S. Seeks the Right Balance for Tanzania's Mining Fiscal Regime, 31 January 2019. Available at <https://resourcegovernance.org/blog/magufuli-seeks-right-balance-tanzania-mining-fiscal>
- 11 Dias C. Tanzanian Nationalizations: 1967-1970, *Cornell International Law Journal* 4, no. 1, Fall 1970. 59–79 at 63.
- 12 Ngowi HP. Economic Development and Change in Tanzania since Independence: The Political Leadership Factor, *African Journal of Political Science and International Relations* 3, no. 4, May 2009. 259–67 at 262–63.
- 13 Mining Act No. 17 of 1979.
- 14 GN. No. 478 of 1962.
- 15 Chimhete N. Prosperity In A Crisis Economy: The Nyamongo Gold Boom, Tanzania, 1970s–1993, *Journal Of Eastern African Studies Issue 14 Vol 3*, 2020. 572-589
- 16 Lissu, TA. In Gold We Trust: The Political Economy of Law, Human Rights and the Environment in Tanzania's Mining Industry, *Law Social Justice and Global Development Journal*, Issue 2, 2001.
- 17 Ally Sinda A. Legal Issues Arising From a Review of Mining Development Agreements in Tanzania, *International Lawyers For Africa*. Available at <https://www.ilfa.africa/legal-issues-arising-from-a-review-of-mining-development-agreements-in-tanzania/>
- 18 Nassen Smith M, Osborne C, Moolla Z, Turok B. South African gold mining and local procurement in Tanzania and Ghana, *UNU-Wider Working Paper*, October 2019
- 19 Ally Sinda A. Legal Issues Arising From a Review of Mining Development Agreements in Tanzania, *International Lawyers For Africa*. Available at <https://www.ilfa.africa/legal-issues-arising-from-a-review-of-mining-development-agreements-in-tanzania/>
- 20 Ibid.
- 21 Section 87(1) of the Mining Act 2010.
- 22 Ng'wanakilala F. Tanzania Seeks More Benefits from Resources, *Business Day*, 7 November 2016.
- 23 Ibid.
- 24 Muganyizi TK. Mining Sector Taxation in Tanzania, *International Centre for Tax and Development*, August 2012.
- 25 Lissu, TA. In Gold We Trust: The Political Economy of Law, Human Rights and the Environment in Tanzania's Mining Industry, *Law Social Justice and Global Development Journal*, Issue 2, 2001
- 26 Moloo Z. Local miners left out by Tanzania gold rush, *Aljazeera*, 8 June 2013. Available at <https://www.aljazeera.com/indepth/feature/2013/05/2013515161130258616.html>.
- 27 Chatterjee P. Tanzanian Officials Arrested For Failure to Publish Natural Gas Contract Details, *CorpWatchBlog*, 7 November 2014. Available at <https://corpwatch.org/article/tanzanian-officials-arrested-failure-publish-natural-gas-contract-details>
- 28 Review and Re-negotiation of Unconscionable Terms Act 6 of 2017.
- 29 The Constitution of the Republic of Tanzania
- 30 Section 5(1) of the Review and Re-negotiation of Unconscionable Terms Act, 2017.
- 31 Section 6(1) of the Review and Re-negotiation of Unconscionable Terms Act, 2017.
- 32 Section 5(3) of the Review and Re-negotiation of Unconscionable Terms Act, 2017.
- 33 Section 5 of the Review and Re-negotiation of Unconscionable Terms Act, 2017.
- 34 Section 10 of the Natural Wealth and Resources (Permanent Sovereignty) Act, 2017.
- 35 Section 5 of the Review and Re-negotiation of Unconscionable Terms Act.
- 36 Section 9 of the Miscellaneous Amendments Act, 2017.
- 37 Section 9 of the Miscellaneous Amendments Act, 2017.
- 38 Stoddard E. AngloGold maintains production guidance, in talks with Tanzania, *Reuters Johannesburg*. Available at <https://af.reuters.com/article/investingNews/idAFKBN1190LL-OZABS>
- 39 Stoddard E, Aruo P. AngloGold says owed \$150 mln in taxes by Tanzania and DRC, *Reuters*. Available at <https://www.reuters.com/article/ozabs-uk-anglogold-ashanti-results-taxes-idAFKBN1191EM-OZABS>
- 40 AngloGold Ashanti, Report to the United States Securities and Exchange Commission, 29 March 2019. 217
- 41 AngloGold Ashanti, News Release: AngloGold Ashanti Comments on Passage of New Legislation in Tanzania, 13 July 2017
- 42 Njobeni S. AngloGold Ashanti to take issue with Tanzania, *Independent Online*, 9 May 2018
- 43 Ibid.
- 44 AngloGoldAshanti, June 2019 Interim Report, 30 June 2019

