CHAPTER FIVE

Magufuli's Drive to Increase Government Revenue and the Confrontation with the Mining Companies

The Untaxed Mining Sector

What stood out in Magufuli's short term in power was his confrontation with the mining companies and the passing of a series of acts to change the country's mining regime completely. Magufuli's actions should be understood within the context of his promise to increase government revenue. This could only be done by increasing revenue from the sector that had been growing rapidly in the country at an estimated rate of 12 per cent a year. The mining sector's contribution to the country's exports had risen from 1 per cent in 1997 to 52 per cent in 2013, but the sector's contribution to tax revenue accounted for a mere 2.2 per cent of the total tax collected in 2010 and 75 per cent of this was from employment taxes, which included a 6 per cent of the total wage bill (Muganyizi 2012). In fact, mining companies hardly paid any taxes. Thus, the expectation that mining would be a key driver for growth and reduce aid dependence was not being realized. Siri Lange (2011) noted that the investor-friendly contracts resulted in extremely low government revenues, totalling only 5 per cent of what the country was receiving in development aid. Thus, in 2007, the country's receipt from mining was a paltry US$ 119.2 million dollars, while the overseas development assistance (ODA) receipts for the same year were US$ 2.82 billion.

Oxfam America (2011) also noted the low revenue from mining. It attributed this to the fact that Tanzania's laws and policies governing the extractive industry carried the hallmark of structural adjustment, where the focus was on liberalizing the economy and attracting foreign investments. It then went on to state that if Tanzania had performed at par with Chile from 1998 to 2011 in terms of achieving relative ratios between levels of contribution to GDP and contribution to domestic revenue, it would have resulted in an increase in tax revenue from the mining of US$ 776 million to an adjusted US$ 1.831 billion. This would have been an increase of US$ 1.055 billion in total or US$ 75 million a year. Elaborating further, it noted that if all the six major mining companies had been paying tax, Tanzania Revenue Authority (TRA) would have generated an additional TSh 200 billion in government revenue by end of December. Instead, in 2011, TRA offset was TSh 50 billion to be

paid by the Geita Mine alone with the company's value-added tax (VAT) claim, and such no tax was paid.[1]

The 2015/2016 Auditor's Report noted that the zero-rated VAT on mineral exports resulted in refunds of TSh 1.444 trillion between 2012 and 2016 by TRA. The report further notes that the refunds were caused by loopholes provided under section 51(1) of the VAT Act of 2014 and other prior VAT Acts which allowed and still allow zero-rating of VAT on exports. This causes the VAT which was paid upon importation of capital equipment, fuels and other expenses incurred in the country to lack corresponding output tax to net off, causing an excess of the input to output VAT, which calls for a refund provided under section 83(2) of VAT Act 2014. He continues to note that the motive for zero-rated VAT was to promote the growth of domestic industries, but unfortunately, the act did not set what categories of goods and services are covered by the incentives. Thus, mineral products to be sold abroad came to be treated as agricultural and industrial products. The report further notes that the mining companies' exemptions for fuel, toll and excise duty for the year 2015/2016 amounted to TSh 126.7 billion.

Francis Mwakipalala (2014) points out that 74 per cent of tax exemptions in the country were for the extractive industry. If one adds the fact that mining companies have often understated the mineral sales, and exaggerated expenditure on capital goods and production costs, provided unjustifiable marketing and management fees, understated interest income and inflated the remittance withholding tax, the loss of income by the state becomes larger. In fact, CRC Sogoma (2013) puts the revenue loss from incentives offered by the country in 2011/2012 at TSh 1.806 trillion or 4.4 per cent of GDP, 27.4 per cent of the tax collected and 9.4 per cent of government expenditure. These are, indeed, huge losses that justified Magufuli's changing the mining regime in Tanzania. But before dealing with the changes, one needs to understand the evolution of Tanzania's policy and how the 1997 mining policy, the 1998 act and the subsequent amendments in 2010 completely altered the country's perspective on how to deal with its mineral wealth.

The Evolution of the Mining Policy in Tanzania

Following the Arusha Declaration (1967), the government passed the 1969 Mining Ordinance

1 The main gold mines at the time for which Tanzania had signed a mining development agreement (MDA) were: Bulyanhulu Gold Mine (1994); Kahama Mining (1996); The Golden Pride Gold Mine (1997); North Mara Gold Mine (1999); Geita Gold Mine (1999); Talawaka Gold Mine (2007); and Buzwagi Gold Mine (2007).

(Amendment) Act. This was to enable the government to nationalize and regulate the mining activities in the country. Four main stipulations of the Act are important to take note of. The first is the vesting of the entire property and control of all minerals in the president, on behalf of the people. The second was giving powers to the president to cancel and revoke any mining right if he considered it desirable in the national interest during the continuation of the period of its validity. The third was the granting of powers to the minister and the commissioner of minerals to refuse to renew or grant a mining right. The fourth is that the courts were prohibited from questioning the decisions of the president, minister and commissioner. It was under this act that the existing mining companies were taken over by the government.

In 1972 the government formed the State Mining Corporation (STAMICO) to supervise the operations of the state-owned mines and mineral processing plants, carry out government development plans in the mining sector, provide management and technical assistance to state-owned mining companies and rehabilitate and expand programs at existing operations. STAMICO was granted powers to form wholly owned subsidiaries or mixed enterprises and joint ventures with private investors. Apart from taking over the six mining companies from the NDC (The Williamson Diamonds, Nyanza Salt Mines, Tanzania Gemstone Industries, Tanzania Diamond Mining Company, Tanzania Merchaum Corporation and Tanzania Portland Cement), the new corporation went on to form several mining companies such as Kiwira Coal Mines, Minjingu Phosphate, Pugu Kaolin Mines, Coastal Salts Work Corporation, the Lupa Gold Mines, Tanganyika Magnetite Ltd and Kahama Gold Mines. It also had more than 30 mining projects by the time the privatization exercise started in 1992 with the passing of the Public Corporations Act. Under this act, all the subsidiaries under STAMICO were transferred to the Treasury Register in the Ministry of Finance from where they were privatized by the Presidential Parastatal Sector Reform Commission (PPSRC). STAMICO, however, was not completely shut down but remained from 1996 as a provider of consultancy services to the private mining sector that emerged. It was granted new roles following the 2010 Mining Act. These were investing in mining through explorations, holding government shares in new mines, providing technical services (drilling) and consultancy services, and the coordination of artisanal and small-scale mining subsectors into regulated, environmentally friendly, safe, productive and sustainable operations. Its full role as a mining entity came after the new laws and regulations passed by Magufuli.

A new Mining Act was passed in 1979 with the aim of providing a kickstart to the mining sector. The act stated clearly that the entire mineral property and control of minerals on, in or under the land to which the act applies is vested in the Republic (Part 2.5). The minister retained the powers

granted him by the 1969 ordinance and was further empowered to make regulations prescribing all matters that are, by this act, required or permitted to be prescribed or are necessary or convenient to prescribe for carrying out or giving effect to the Act (104.1). He was further given powers to remit in whole or in part any royalty payable in any mineral or on any mineral obtained from a particular deposit, for such a period as he may determine if he considers expedient in the interest of the mineral to do so. The act created the position of a commissioner, appointed by the president to administer the act.

The most important provision of the act was in part III, where it was prohibited to grant mineral rights to non-citizens. The act states that no mineral right shall be granted to an individual unless he is a citizen of Tanzania, and in the case of a company, it must have been established by or under a law (other than the company's ordinance) in force in Tanzania. The same is repeated in Part IV (70.2) with respect to prospecting rights. Here, it was further stated that no rights shall be issued to a company unless it is a company whose entire share capital is beneficially owned by citizens of Tanzania, or by a corporation which, in the opinion of the minister, has been established for a public purpose by or under a law in force in Tanzania or partly by such citizens and partly by such a corporation.[2] In short, the act represented what is currently referred to as resource nationalism which describes a situation in which the natural resources are under the control of nationals and are exploited for the maximum benefits of the nationals.

In 1992, the World Bank issued the Strategy for Africa Technical Paper No 181 focusing on mining. The paper started with sweet-sounding words. It stated that the mining sector is an important source of tax revenue and foreign exchange, which are essential for economic recovery. It then called on the African governments to provide incentives to the mining companies, that is, give up a great chunk of the possible revenues to the mining companies. This is what is implied when the strategy states that:

> The incentives for mining investors should be clearly determined in incentive legislation. Taxation should be consistent with the taxation of other sectors in the economy, but should take a specific nature of mining as a resource-based industry

2 The locally controlled company before being issued with a mining license must give details of the ore reserves, proposed mining program, production, capacity, financing forecasts of cost and revenue for first years of operation, proposal on pollution control and proposal on the employment and training of Tanzanians and the purchase of goods and services in Tanzania. These important requirements disappeared in the 1998 act and were not mentioned in the Mining Development Agreements.

> into account. Mining taxes should be earnings related to avoid distorting investment and operational decisions. Mining taxation needs to take account of tax levels in other mining companies to maintain or establish the competitiveness of national identity (World Bank 1992).

To this, it adds the call on governments to enter into investment agreements that should provide additional assurances to protect investors from unwarranted government interference. To sweeten this, it insisted that the recovery of the mining sector in Africa requires a shift in government objectives towards a primary objective of maximizing tax revenues in the long term rather than pursuing other economic or political objectives such as control of resources or enhancement of employment.

The main objective of the World Bank was to ensure that African governments give up control of their mineral resources to the foreign private investors, hence its insistence that government work out new policies by which they would focus on industrial deregulation and promotion of private companies to take the lead in operating and managing and owning mineral enterprises. It is then stated that the government should obtain a fair share of the economic rent of the sector through fiscal arrangements that are stable, competitive and fair rather than through ownership and operation. In short, privatize whatever mining ventures are already in existence and open the door wide for Western companies. It thus calls for the immediate privatization of state mining companies to give a clear signal to investors with respect to the government intentions to follow a private sector-based strategy.

As the spokesperson of the Western world, it stated that the specific task of bilateral and multilateral donors is to focus on African governments: to update mining and investment legislation and tax regulations, to strengthen institutions responsible for supervising the mining sector, to train staff in government institutions for improving the capacities to administer the mining code and negotiate agreements with investors to privatize parastatal mining companies, to establish databases and promotion programmes to attract potential investors.

In 1993, the World Bank initiated a five-year mineral sector technical assistance for Tanzania with a credit of SDR 8.9 million, equivalent to US$ 12.5 million, on a 40-year maturity. The government was to contribute US$ 1.4 million to the project (World Bank 1994). To understand the intentions of the Bank, one needs to go through the memorandum and recommendations of the president of the International Development Association (IDA) to the executive directors. The memorandum states clearly from the start that the principal objective of the project is to support Tanzania's private-

sector mining development policy and to expand private investment in mining. In this regard, the present fiscal policies should be reviewed, rationalized and systematized. This would lead to a formulation of fiscal incentives guided by the broad principles accepted by the government (read forced on the government) and include:

1. Favourable treatment to exploration expenditures given the high-risk nature of mineral exploration
2. Competitive and special rates of taxation in recognition of the long-term nature of, and large investments required by, medium- and large-scale mining operations (World Bank 1994).

With the consultants provided and paid for by the World Bank, a new mining policy was produced in 1997 followed by a new mining act in 1998. But before discussing these, one needs to highlight the preparatory work done by the multilateral and bilateral donors to guarantee investments for their companies. The Society for International Development (SID) noted in 2009 how Western governments hastened to enter into investment protection agreements with African governments including Tanzania. It gives the example of Canada, which became the source of the largest investment in mining in developing countries, entering into Foreign Investment Promotion and Protection Agreement with Tanzania. This was one of the 23 agreements made by Canada with developing countries. The SID notes that Canadian agreements serve as a clearinghouse for the transmission of Canadian corporate interests in foreign countries. They note further that these agreements neutralize any efforts to improve mining policy in the country and have lock-in effects working against the interests of African countries.

The SID (2009) further pointed to the European Union's (EU) efforts to harmonize mining policies in the SADC by providing technical support. It noted that this was driven by the EU's reluctance to maintain competitiveness in relation to emerging economies such as India and China and maintaining cheap natural resources and energy supply despite their knowledge that they would have negative implications on these poor countries. Harmonization was followed by the EU-SADC Investment Promotion Program, funded by the EU Development Fund with a focus on finding potential partners and facilitating deals between SADC and EU/third country entrepreneurs. It is the above that provides the context for the 1997 Mining Policy and the 1998 Mining Act in Tanzania.

Tanzania produced its Mining Policy in 1997. The main objective of the policy was to attract and enable the private sector to take the lead in exploration, mining development, mineral beneficiation and marketing. In this setup, the role of the government was to become that of providing clear

policy guidelines, stimulating and promoting the sector players and seeing to the sector's general development. Rather than directly engaging in productive activities, the government was to concentrate its efforts on being the sector's regulator and service provider (URT 1997). The government is given a further task of pacifying (the term used is 'sensitizing') the communities where large-scale mining is to take place and ensuring that good relations exist between mining companies and the local populations, as well as handling the artisanal miners who had previously dominated the gold mining sector. The policy, of course, sets some lofty aspirations like fostering economic interdependence between mining and other sectors and ensuring that benefits of mining accrue to the rest of the economy, especially through maximizing value addition, developing the country's ability to provide essential services to the mining sector and promoting forward linkages through the development of value-adding activities. How these were to be realized was not stated in the 1998 Mining Act, which became effective in 1999.

The major concern of Tanzanians was not the act itself but how the minister used the powers he was given under the act to sign development agreements with mining companies that received special mining licenses (those investing more than USD$ 100,000). Part II (10) of the act states that:

> The minister may, on behalf of the United Republic, enter into a development agreement, not inconsistent with this act, with the holder of, or an application for, a mineral right for which he is the licensing authority, relating to the granting of such a mineral right or rights, the conduct of mining operations under a special license (Mining Act 1998).

One should note that this was an expansion of the powers already possessed by the minister under the 1969 Mining Ordinance and the 1979 act. It should also be noted that the act legitimized the actions already undertaken by the minister because two such agreements had already been signed. These were the Bulyanhulu Gold Mining Agreement (first signed in 1994 with the Kahama Mining Corporation Ltd, which was taken over by Barrick Gold Corporation and for which a new MDA was signed in 1996) and the agreement signed in 1997 between Golden Pride Gold Mine and Resolute Tanzania Ltd. These were protected by the new act, which stated that:

> Where at any one time before the commencement of the act the holder of the mineral right under the 1979 Act entered into an agreement with the minister, that agreement shall after the commencement subsist under the present Act and for that purpose shall

> be read and construed with such modifications and adaptations as may be required in order to enable the execution of the agreement (Mining Act 1998).

Two other agreements were concluded in 1999: North Mara Gold Mines with Barrick Gold Corporation and Geita Gold Mines with AngloGold Ashanti. In 2003, an MDA was signed with Acacia Mining (a subsidiary of Barrick) for the Tulawaka Gold Mine, and in 2007 the minister signed an MDA with Pangela Minerals (another subsidiary of Barrick) over the Buzwagi Gold Mine. These made Barrick Gold Corporation the major beneficiary of the MDA in Tanzania.

The 1998 act further legitimized the existing arrangements by stating in 10 (2) that agreements under subsection one may contain provisions binding on the United Republic relating to a mining license or operations to be conducted under a special mining license:

1. Which guarantee the fiscal stability of a long-term mining project, and for that purpose, but not otherwise make special provisions for payment of royalties, taxes, fees and other fiscal imposts.
2. Relating to the circumstances or the manner in which the minister or commissioner will exercise any discretion conferred on them by this Act or regulation.
3. Dealing with the settlement of disputes arising out of or relating to the development agreement, the administration of this Act or the terms and conditions of a special mining license, including provisions relating to the settlement of any such dispute by international arbitration (Mining Act 1998).

In any new development agreement, the minister was to refer any proposal to the Mining Advisory Committee created by the act. The committee consisted of six people: A chairman appointed by the president, two members appointed by the minister responsible for minerals (including alternates), one appointed by the Minister of Finance, Industry and Trade and one appointed by the Minister of Environment and Lands. These, together with the Attorney-General, were to advise the minister. Their advice was to be in writing, and if the minister chose to ignore it, he was required to make their recommendations public.

The Mining Development Agreements (MDAs) entered into before and after the 1998 act protected the interests of the mining companies, to the detriment of the government and people. Muganyizi (2012) summarizes the fiscal incentives under the MDAs covering gold projects. The companies were exempted from income tax; had 100 per cent capital expenses and a 15 per cent

threshold on unredeemed qualifying capital expenses, meaning that at 15 per cent rate of return, they did not pay income tax; paid no value-added tax since they produced for export; were zero-rated for VAT and, as noted above, received VAT refunds, which then were used to cover any tax obligations; and most suppliers of goods and services to the mining investor benefited from tax relief which was essentially another form of zero-rating. Worse still, these fiscal incentives were accompanied by two types of stabilization clauses (SID 2009): a freezing clause, which ensured that the existing fiscal regimes at the time of signing the contracts (MDA) did not change over the lifespan of the project and that subsequent legislation does not apply to the relationship between the parties; and an economic equilibrium clause that required the government to compensate the investor should the government enact legislation or take administrative measures that aggravated the costs to the project. This restricts the scope of subsequent legislation whilst mitigating the impact on existing contracts. The fiscal exemptions meant that the government received very little from gold mining, and the stabilization clauses meant that the government could do nothing about it.

The agreements were signed on the assumption that gold prices would remain around US$ 300 to 350 or fall. The reality is that gold prices rose from US$ 279 in 2000 to US$ 1 225 per ounce. Because of the stabilization clauses, the entire profit went to the mining companies, which, as noted above, continued to declare unprofitability. The ring-fencing arrangements included in the MDAs meant that a company could not be allowed to offset losses from mining operations against another business income or vice versa, and thus, mining losses from one company could not be offset against the income of a related mining company. Furthermore, mining companies were allowed to carry the mining losses over for an unlimited time, unlike other businesses, where losses were carried over for five years.

It is the terms of the mining development agreements which further angered the citizens. They wondered how the minister and the government could have entered into such restrictive contracts and retained them for more than ten years despite the disgruntlement of the public. Poncian and George (2015) attribute the unresponsiveness of the government to its fear of scaring investors. They support this with a quotation from Curtis and Lissu (2008), who wrote that there is fear that too much reform will upset the companies, the donors and the international institutions, none of which is championing significant or indeed any fiscal reform. The government is, to a large extent, hamstrung by arguments about international competitiveness and the overriding priority to continue to attract foreign investors. One should not forget that the policy and the act were products of the World Bank technical assistance project, and thus the bank, at the behest of aid

donors (dubbed development partners), was exerting pressure on the government in the same way they were doing regarding privatization of parastatals. The goal of the act was to take control of the mining sector from the government and give it to Western mining companies.

The government could not turn a blind eye to public dissatisfaction with the state of affairs in the mining sector. It thus formed a series of committees to address the issue. In 2004, the government appointed the Kipokola Committee to review the 1997 mining policy. Among other things, the committee noted that the organizational structure of the minerals division was inadequate to cope with a fast-growing sector. In this regard, it called upon the government to learn from Botswana, where a dedicated mineral economic unit carried out close monitoring of mining investments and operations and set up a multidisciplinary technical team to review each draft mining contract. The committee also pointed to a lesson from Ghana, where the internal review authority has a special petroleum and mineral unit that keeps track of the costs of the big mines. It called upon the government to discuss with mining companies the need to revisit old contracts and suggested the revision of the excessive tax incentives such as the 15 per cent allowance on unredeemed qualifying capital expenditure and tax exemption on fuel and customs duties. The most important recommendation was that the government should participate strategically in the ownership of the mines through STAMICO and the National Development Corporation. This was an indictment on the government that had granted full control of the lucrative mining sector to private mining companies.

Instead of acting on the suggestions offered by the Kipokola Committee, in 2006 the government formed a new committee, the Masha Committee, to review the Mining Development Agreements and fiscal regime for the mining sector generally. The committee reported that mining companies were using legal loopholes to avoid paying billions of shillings. The immediate suggestion was for the government to increase royalties for gold, copper and silver from 3 to 5 per cent and for uncut diamonds from 5 to 10 per cent. It also called upon the government to change its taxation system from gross value to net back value. This meant using the market value of minerals FOB at the point of export from Tanzania, or in the case of consumption within Tanzania, at the point of delivery within Tanzania. The report further called for renegotiations with the mining companies.

The government responded to the new report with yet another committee to advise it on the oversight of the mining sector, known as the Bomani Commission, which gave its report in April 2008. The report highlighted several issues related to the mining sector. First and foremost, it pointed to the low contribution of the sector to GDP and the unsatisfactory contribution to government revenue thanks to the overly generous incentives. Secondly, it pointed to the poor

relations between the mining companies and the communities and the conflicts with the artisanal (small-scale) miners. Thirdly, it dealt with the weakness in the mining sector oversight, which resulted in the lack of control over the exportation of copper concentrates to Japan and China for refinery when Mwananchi Gold Refinery existed in Dar es Salaam. To strengthen the oversight capacity of the government, it called for the strengthening of the Gold Production and Investment Costs Inspection Department. Like the Kipokola report, it called on the government to take an equity share in the large-scale mining companies, without which, it was argued, the government could not effectively supervise and control national resources nor could it precisely assess the income and production from the mines and the related operating cost structure.

The Bomani Commission report resulted in the 2009 Mining Policy. The new policy did not substantially change the 1997 policy it was intended to replace. At the centre of the policy remained the need to continue attracting investments in the mining sector. This is carried through from the foreword by the Minister of Energy and Mining to the main objectives of the policy and on to the role of the government. The repeated statement is: promote an economic environment in order to attract and sustain local and international investments in the mining sector. While acknowledging the fact that the government has not benefited proportionately with the increased revenue accruing to the companies (the value of mineral exports have increased from US$ 26.66 million to US$ 1.00321 billion from 1998 and government revenue only growing from US$ 2.6 million to US$ 78 million), it still talked of the fiscal regime being fair and equitable, stable and predictable, non-distortional and internationally competitive. This was, more or less, the same language used to justify the skewed MDA entered into by the government at the prompting of the World Bank.

The new policy still talked about promoting economic integration between the mining sector and the other sectors so as to maximize its contribution to the economy. When it comes to elaborating on this principle, it talks about Tanzanians supplying services to the mines as a way of increasing benefits and calls upon the government to require mining companies to use locally produced goods and services. Local participation in the sector is further to be promoted by facilitating foreign mining companies' registration in the local stock exchange. No further word was heard about this until the 2013 budget speech when the Minister of Energy and Mining stated that mining companies would be required to register on the Dar es Salaam Stock Exchange. However, no deadline was set for this. The speech only indicated that the minister, in consultation with holders of the special mining licenses, was to make regulations prescribing the minimum shareholding requirements and procedures for selling shares to Tanzanian nationals in accordance with the Capital Markets and Security Act of 1994. The reasons for this move were that local ownership and content is a

fundamental part of any project concerning natural resources in an emerging market; it was important for locals to have more control of their country's national resources and participate in the success brought about by such resources; local participation is likely to enhance good relations between the mining companies and the people and that this is likely to stimulate the economy and improve economic independence (Clyde & Co 2013).

While the policy acknowledges some types of government participation in the mining sector as a form of assurance against political risks by foreign companies, it rejects them on the basis that dividend receipts from such investments are not guaranteed, as participation in mining projects might lead to financial loss if these projects do not succeed. This completely ignored the massive profits that were being made by the gold mining companies. It also rejected government participation on the basis that significant costs may arise in respect of government shares that it may not be able to fund. The only concession made in this regard was building the capacity of government institutions to identify feasible investment portfolios of mining projects and support the government institutions to develop mining projects, value addition, smelting and refining activities. In simple language, this means doing feasibility studies for the mining companies and undertaking the start of beneficiation projects to be ultimately taken over by mining companies. This is what was implied by the policy's statement that government should invest in the fabrication and manufacturing sector to stimulate mineral beneficiation.

The policy blames the government's failure to benefit from the expanding mining sector on the weak administration of the previous act and thus calls for the establishment of a minerals audit institution. In November 2009, the government established the Tanzania Minerals Audit Agency (TMAA) under the Executive Agency Act. The duty of the new agency was to: audit and monitor mineral production; audit quality and quantity of minerals produced and exported by mining entities; audit financial records of mining entities for the purpose of tax assessment; and audit environmental management expenditures of the mining entities for purpose of assessment of compliance to mine closure plan.[3] The TMAA was not included in the 2010 act and formed part of the mining act in 2015 with the passing of the Tanzania Extractive Industries (Transparency and Accountability) Act of 2015 (TEITA).

The 2010 Mining Act that followed the policy did not make any major changes either. Control of minerals remained vested in the Republic. The Mining Development Agreements and the

3 The extent to which TMAA helped to increase revenue from mining see: Alexander Readhead. 2017. Improving Mining Revenue Collection: Tanzania's Mineral Audit Agency (2009-2016). Natural Resources Governance Institute.

powers of the minister to enter into such agreements remained intact. The additions (which were never implemented) were the introduction of a free carried interest and state participation in the mining and the financing of any mining operations under a special mining license (now reserved for investors whose investment is not less than US$ 100 million). However, the level of free carried interest and state participation in any operation under a special mining license was to be negotiated between the government and a mineral rights holder, depending on the type of mineral and the level of investment. Another change for both the special mining licenses and the primary license holders was a demand to include in their applications a statement of their procurement plan and a plan for the employment and training of locals. The primary license holders, who under the 1998 act were exclusively to be citizens of Tanzania, were now allowed to enter into partnership with foreign investors on a 50:50 basis. In a way, this opened up small-scale mining to foreign investors under a local-foreign partnership.

The new act demanded that the mineral rights holders set aside certain amounts of minerals for smelting, processing and refining. There was also an increase in the royalty payments of minerals in Tanzania, which continued to be based on gross value. The new royalties were 5 per cent for uranium, gemstone and diamond, 4 per cent for copper, gold, silver and platinum, 1 per cent for gems, and 3 per cent for all the other minerals. Thus, nothing substantially changed, as the mining agreements remained in force and no major concessions were obtained from the large mining companies. Rapid changes in the mining sector only came with Magufuli's takeover as president in November 2015, as we see below.

Mining Regime Changes under Magufuli

What triggered the mining regime changes in Tanzania was the seizure of Acacia Mining Containers at the Dar es Salaam port in March 2017 and the ban on the export of mineral concentrates and ores from metallic minerals such as gold, copper, nickel and silver. A committee was formed by the president to deal with the 277 containers impounded at the port. The committee was to examine the contents of the containers and determine their value against the declared value by Acacia Mining. Based on the contents identified by the experts, the committee was tasked to see whether the government was receiving the right revenues according to the mining development agreements. It was further tasked to establish the number of containers of mineral sands exported from 1998 and identify the revenue received. Apart from investigating the containers, the committee was given a much broader mandate that included checking the MDAs and whether taxes were being paid.

The report was damning with regard to Acacia Mining. First, it was accused of operating in the country without a license, as only its subsidiaries – Bulyanhulu Gold Mines, North Mara Gold Mine and Pangea Minerals – were registered as operating companies in the country. "Acacia" had never presented its shareholding certificates for the companies. It is this that forced Barrick Gold Company, the controlling shareholder of Acacia (with a 64 per cent share) which had signed the original MDAs, to step in. The negotiations between Barrick and the government were only concluded in 2020.[4] But after the contents of the 277 containers had been examined, it was found that the value reported by Acacia on the containers, TSh 79.94 billion, was wrong, as the actual value was between TSh 829.86 and TSh 1.438 trillion. Using this estimate on the number of containers exported since 1998, whose value was assumed to be understated, it was established that the government lost TSh 68.59 trillion in revenue over the period. The loss was calculated as equivalent to two years' government budget on the basis of the 2017/2018 budget. Acacia was therefore accused of tax evasion, giving false reports, receiving assets under false pretences and economic sabotage. Acacia was then ordered to pay US$ 190 billion in tax arrears. Acacia responded to the accusations and fine by producing a report titled *Acacia Mining Plc Total Economic and Tax Contributions in Tanzania 2016*. In the report, it argued that Acacia's total direct, indirect and induced economic contribution in Tanzania included more than 36 000 jobs, approximately US$ 339 million in labour income and nearly US$ 724 million worth of value-added (GDP), and its tax contribution was estimated at US$ 214 million. This information fell on deaf ears.

This is not the right place to deal with the reports on the concentrates[5] and the subsequent reports on Tanzanite and Diamonds.[6] What is important is that the concentrates issue acted

4 These negotiations were only concluded in January 2020 and included Barrick agreeing to pay the US$ 300 million fine by instalment staring with the payment of US$ 100 million and then paying US$ 40 million in five instalments and the formation of a new company known as Twiga Minerals in which Barrick owned 84 per cent shareholding and the Tanzania government acquiring 16 per cent undiluted shares. This shareholding extends to the three mines of North Mara, Bulyanhulu and Buzwagi. See Fumbuka Ng'wanakilala. Barrick Gold's "Long Safari" ends with Tanzania deal. Reuters, January 24, 2020.

5 For the two reports on the concentrates, see URT. 2017. Taarifa ya Kamati Maalum Iliyo Undwa na Rais wa Muungano wa Tanzania Mhe. Dkt John Pombe Magufuli Kuchunguza Mchanga uliyo Katika Makontena wenye Mchanga wa Madini (Makinika) Yaliyopo Katika Maeneo Mbali Mbali Nchini Tanzania; Muhtasari wa Ripoti ya Pili ya Kamati Maalum ya Kuchunguza Maswala ya Kisheria na Kiuchumi Kuhusiana na Mchanga wa Madini Unaosafirishwa Nje ya Nchi.

6 See the two reports of parliament: Kamati Maalum za Bunge za Machunguzi Mwenendo ya Biashara ya Madini ya Almasi na Tanzanite, September 2017. Following the two reports there was formed: Kamati ya Rais ya Kuchunguza Biashara ya Madini ya Tanzanite. This resulted in an agreement signed between Tanzanite One and the government in May 2018, as by Taarifa kwa Vyombo Vya Habari, issued by the president's office. For an academic discussion about Tanzanite, see Wilfred

as a trigger for reviewing the entire mining regime in the country and to ensure that the sector substantially contributed to government revenue. Three main pieces of legislation were passed as a way of dealing with the possible fallout of the seizure of concentrates containers and the ban on exports of concentrates. The three pieces of legislation were: The Natural Wealth Resources (Permanent Sovereignty)[7] Act of 2017; The Written Laws (Miscellaneous Amendments) Act of 2017; and The Natural Wealth and Resources Contracts (Review Negotiations of Unconscionable Terms) Act of 2017. To this should be added the Mining (Local Content) Regulations of 2018. It is important to detail these pieces of legislation and new regulations to understand the complete shift in the mining regime in the country.[8]

The Natural Wealth Resources (Permanent Sovereignty) Act of 2017 starts with a very long preamble justifying the act and ends with a long list of the objectives. It is basically a short act with only 13 articles. Underlying the act is the argument that natural wealth resources belong to the people and this right of ownership is inalienable and that natural wealth in whatever form, while in the country, remains the property of the people of Tanzania. Thus, the mining companies do not own the natural wealth they extract from the ground, and therefore, it is the people, through their government, who should determine how their wealth should be disposed of. Thus, article 4 (1 and 2) states that the people of the United Republic shall have permanent sovereignty and that ownership and control shall be exercised by the people through the government on behalf of the people. In article 5, the president, as head of government, holds these resources in trust on behalf of the people.

On the basis of the people's inalienable rights to natural wealth and resources, every agreement made to exploit these resources must be for the benefit of the people. This provides the rationale for article 6 (1 and 2), which insists that: It shall be unlawful to make any arrangements and agreements – except where the interests of the people are fully secured and approved by the National Assembly. The securing of the interests of the people is then tied to Tanzania's independence and right to

EN Mbowe, Nicas Yabu and Moto Lugobi. 2016. Tanzanite Processing in Tanzania: Challenges and Opportunities: Applied Economics and Finance, Vol. 3, No. 2.

7 For a discussion on the evolution of the concept of permanent sovereignty over natural resources, see Endalew Lijalen Enyew. 2017. Application to the Right of Permanent Sovereignty over Natural Resources for Indigenous Peoples: Assessment of Current Legal Developments. Artic Review in Law and Politics, Vol. 8.

8 See in this regard Burure Ngocho and Sadock Magai. 2020. Mining in Tanzania: Effects of the Mining Legal Framework Overhaul. DLA Piper; Africa Group Legal Briefings. 2017. Significant Recent Changes to Tanzania's Mineral Law Regime. July. Herbert Smith Freehills; Nicola Woodroffe, Matt Genasci and Thomas Scarfield. 2017. Tanzania's New Natural Resources Legislation: What will change. Natural Resources Governance Institute. Briefing. August.

own its own resources. From these follows the right to get returns from the natural wealth and resources of the country (article 7) and the government receiving an equitable share in the ventures extracting the country's natural wealth and resources (article 8). Thus, article 7 insists that "there shall be guaranteed returns into the Tanzanian economy from the earnings accrued or derived from such extraction, exploitation or acquisition and use". Article 8 states that "arrangements shall be made or given to ensure that the government obtains an equitable share in the venture and the people of the United Republic may acquire stakes in the venture".

To maximize returns from natural wealth resources, the act insists on the beneficiation of these resources in the country. It is this that explains the demand in article 9 (1 and 2) that no raw resources are exported for beneficiation outside the country and that the mining companies should be committed to establish beneficiation facilities within the United Republic. This was one of the areas that raised concern and which was directly related to the export ban on concentrates, and it was abundantly clear that the country did not have the capacity to undertake the beneficiation of all the minerals and ores. The aim here was to gain commitment from mining companies to establish beneficiation facilities. Article 10 (1 and 2) is also tied to the maximization of benefits, hence the insistence that earnings from the disposal or dealings be retained in the banks or financial institutions established in the United Republic and that it shall be unlawful to keep such earnings in banks or institutions outside of the United Republic, except where distributed profits are repatriated in accordance with the laws of Tanzania.

The existing Mining Development Agreements had included external arbitration of disputes between the government and mining companies. This was also enshrined in the bilateral investment agreements with countries where investments in the mining sector came from. Problems had already been encountered in the other sectors where companies had taken the Tanzanian government to court and obtained compensation for the termination of contracts. It was to guard against this that article 11 (1 and 2) was inserted into the act. Since the people, through the government, have permanent sovereignty of the natural wealth resources, no foreign court or tribunal has the right to challenge this. Once this is accepted, then by extension, all disputes arising from the natural wealth and resources have to be adjudicated by judicial bodies or other organs established in the Republic and in accordance with the laws of Tanzania.

The Written Laws (Miscellaneous Amendments) Act 2017 made changes to the 2010 Mining Act. Among these changes was the insertion that "control of all minerals is vested in the president in trust for the people of Tanzania" and that "government has lien over any material, substance, products extracted from the mining operations or mineral processing". This was to bring the act in

line with the Permanent Sovereignty Act. Another major change was redefining the powers of the minister, who had been given extensive powers to manage the mining sector. In the first instance, the powers to declare any mining area a controlled area and to prescribe conditions applicable to the area are now given to the president as the trustee of the people. The powers of the minister are now limited to:

1. Preparing policies, strategies and legislative framework for exploration and exploitation of minerals
2. Monitoring the laid down government policies on minerals
3. Monitoring the operations of all bodies or establishments with responsibility for minerals and reporting back to cabinet
4. Promoting the minerals of Tanzania for research and exploitation
5. Monitoring the issuance of licenses by the commission
6. Providing support for the creation of a favourable environment for private investment in the mining industry (Written Laws (Miscellaneous Amendments) Act 2017).

Another major administrative change was the creation of a Mining Commission to replace the Mining Board, which only had advisory powers. The commission chairman is appointed by the president, and there is a permanent secretariat, with the executive secretary appointed by the president. The permanent secretaries in the Ministry of Finance, the Ministry of Lands and the Ministry of Local Government become permanent members of the commission. To this group is added the chief executive officer of the Federation of Mines Association, the deputy attorney general and two extra members appointed by the president to serve on a full-time basis with the proviso that they have proven knowledge and experience in the mining sector and that one is a female and the other a male. This commission, its secretariat and its sub-committees carry out the work of the commissioner under the 2010 act. Added to the work of the commission is what was previously done by the Tanzania Mining Audit Agency (TMAA), which, as noted above, was established in 2009 and incorporated into the 2010 act in 2015. It became the responsibility of the mining commission to:

1. Monitor and audit quality and quantity of minerals produced and exported to determine revenue generated to facilitate collection of royalty
2. Audit capital investments and operating expenditure to gather information to provide the same to TRA or other relevant authorities.

To these was added a new role: to supervise and monitor local content plan and corporate social responsibility of mineral rights owners, which emanated from the Natural Wealth and Resources Contracts (Review Negotiations of Unconscionable Terms) Act 2017.

The commission was further mandated to establish a Tanzania Gem and Minerals House,[9] which included a Minerals Auction Centre and a Minerals Exchange and Minerals Clearing House. It was also to establish a National Gold and Gemstone Reserve in which is deposited, under the control of the Bank of Tanzania:

1. All royalties that are required to be paid in refined minerals
2. All minerals impounded or otherwise confiscated in accordance with the law
3. Minerals purchased by the government
4. Dividend minerals paid under any arrangement or agreement
5. Any minerals otherwise acquired by the government

It was further required to establish a government minerals warehouse. The act demanded that any won minerals shall be stored for no more than five days at the mine before they are moved to a government warehouse to await disposal for home refining, authorized mineral dealers and, where so permitted, export. Only mineral concentrates were to be stored in a secured yard within the mines. To ensure that government obtains its tax revenue from minerals, the act mandates that all minerals are to be mined, sorted and graded in the presence of the mine's resident officer, an officer of the TRA and the relevant institutions of state organs for the purpose before being entered into the facility within the mines. This was meant to deal with the under-reporting of minerals mined.

The most important change in the mining regime of Tanzania was in section 10, which stipulated that the government should have not less than 16 per cent non-dilatable free carried interest (FCI) shares in the capital of a mining company, depending on the type of minerals and the level of investment.[10] In addition, the government shall be entitled to acquire, in total, up to 50 per cent of the shares of a mining company commensurate with the tax expenditure incurred by the government in favour of the mining company. Tax expenditure, according to the act, is defined

9 This was established under The Mining (Mineral and Gem Houses) Regulations 2019

10 Francophone states have been applying the free carried interest (FCI) to natural resources for a long time and the percentages demanded differed from 5 per cent to 15 per cent. The FCIs serve two purposes. One was to generate revenue for the host state through the receipt of dividends declared and paid by operating companies. Two helped states to rebut criticism that they are giving the country's resources away. See Fasken Martineau (n.d). Free Carried Interest in Francophone Africa Mining Legislation – Is there such a thing as a free lunch.

as the quantified value of tax incentives granted to the company by the government. This point had been raised by Sogema (2013). It was argued then that tax incentives should be seen as a tax expenditure because they represent a transfer of public resources that is achieved by reducing tax obligations with respect to a benchmark tax rather than by direct tax. This was expected to set the tone for the future renegotiation of the Mining Development Agreements that are called for in the Natural Wealth and Resources Contracts (Review of Negotiations of Unconscionable Terms) Act of 2017.

The Amendment Act demands the elimination of the stabilization principle that was enshrined in the MDAs. It prohibits the use of stabilization arrangements that entail the freezing of laws or contracting away the sovereignty of the United Republic. Thus, any stabilization arrangement shall be specific and time-bound. It is further stated that any stabilization arrangements involving tax expenditure by the government shall provide for the quantification of the value of tax expenditure and how the company shall compensate the government for the foregone revenue. However, the government would have the option to convert the quantified values into equity holdings in the company.

It had, for a very long time, been clear that the Mining Development Agreements were completely skewed in favour of the mining companies and prevented the government from benefiting from the gold boom. Unless the government was able to renegotiate these agreements, the little benefit would trickle to the government. The Natural Wealth and Resource Contracts (Review Negotiations of Unconscionable Terms) Act of 2017 was to empower the government to renegotiate the MDAs. The term 'unconscionable' was taken to mean any term in the arrangement or agreement on natural resources which is contrary to a good conscience, the enforceability of which jeopardizes or is likely to jeopardize the interests of the people and the United Republic. Part 3 of the act identifies unconscionable terms as those provisions containing any provision or requirement that:

1. Aims to restrict the right of the state to exercise full permanent sovereignty of its natural wealth and resources and economic activity;
2. Are restricting the right of the state to exercise authority over foreign investment within the country and in accordance with the laws of Tanzania;
3. Are inequitable and onerous to the state;
4. Restrict periodic review of arrangement or agreement which purports to last for the lifetime of the mine;
5. Securing preferential treatment designed to create a separate legal regime to be applied discriminately to the benefit of an investor;

6. Are restricting the right of the state to regulate activities of transnational corporations within the country and to take measures to ensure that such activities comply within the laws of the land;
7. Are depriving the people of Tanzania of the economic benefits derived from subjecting natural wealth and resources to beneficiation in the country;
8. Are by nature empowering transnational corporations to intervene in the internal affairs of Tanzania;
9. Are subjecting the state to the jurisdiction of foreign laws and forum;
10. Expressly or implicitly undermine the effectiveness of state measures to protect the environment or the use of environmentally friendly technology; or
11. Aim at doing any other act the effect of which undermines or is injurious to the welfare of the people or economic prosperity of the nation (Natural Wealth and Resources Contracts (Review of Negotiations of Unconscionable Terms) Act 2017).

The National Assembly is given powers to review contracts. These powers are enshrined in article 63 (2) of the constitution, which grants the National Assembly oversight and advisory power over the government. The National Assembly, therefore, has the right to review any arrangements or agreements made by the government relating to natural wealth and resources. Part II, article 4 (4) then allows the National Assembly to devise the procedures under its standing orders for reviewing any arrangements or agreements made by the government. Article 5 (2) stipulates that if the National Assembly finds that the arrangement or agreement contains unconscionable terms, it may, by resolution, direct the government to initiate renegotiation of the arrangement or agreement with a view to rectify the terms. This provision applies also to the existing agreements, which, if the National Assembly finds them prejudicial to the interests of the people and the United Republic by reason of unconscionable terms, may by resolution instruct the government to renegotiate the agreement or arrangement with a view to rectify the terms.

The mining companies were given 90 days to renegotiate the contracts which the National Assembly has determined contain unconscionable terms. If no agreement is reached the unconscionable terms shall cease to have effect to the extent of unconscionable terms and shall, by operation of the act, be treated as having been purged (Article 7 (1)). The following article (7.2) states that for the purpose of this subsection one (1) the provisions of this act shall have an overriding effect over any other law governing administration and management of national wealth and resources. These sections put pressure on the parties to the existing MDAs to renegotiate them.

The last piece in the set of legislative changes was the Mining (Local Content) Regulations of 2018. As the regulations focus on local content it was important that a clear definition is provided for this term. Local content means according to the regulations the quantum or percentage of locally produced materials, personnel, financing, goods and services rendered in the mining industry value chain and which can be measured in monetary terms. It was also important to define an indigenous Tanzania company for which preference was to be given. An indigenous Tanzania company must be incorporated under the laws of Tanzania and must have at least 51 per cent of its equity owned by a citizen or citizens of Tanzania and must have Tanzanian citizens holding at least 80 per cent of executive and managerial positions and 100 per cent non-managerial and other positions. The regulations start with a very long list of objectives. Most of these objectives are an elaboration of the first objective: to promote the maximization of value addition and job creation through the use of local expertise, goods and services, business and financing in the mining industry chain and their retention in Tanzania.

The regulations then create a local content committee whose task is:

1. Oversee, coordinate and manage the development of local content
2. Prepare guidelines to include targets and formats for local content plans and reporting
3. Set minimum standards for local content
4. Undertake local content monitoring and audit.

The regulations go on to demand that everybody involved in the mining sector provide a local content plan which ensures that first consideration is given to service providers within the country and goods manufactured in the country where the goods meet the specifications of the mining industry and that qualified Tanzanians are given first consideration in employment and adequate provision is made for the training of Tanzanians. Local content should also be accompanied by a technology transfer sub-plan, a legal service sub-plan and a financial service sub-plan. The seriousness of the local content is underpinned by the demand that, in order to operate, a non-indigenous Tanzanian company would, apart from being incorporated in Tanzania, have to enter into partnership with an indigenous Tanzanian company. Furthermore, the regulations demand that all foreign mining companies operating in Tanzania have to use Tanzania lawyers, insurance companies and banks or financial institutions unless permission is granted by the commission. Foreign operators in the mining sector have to adhere to their local content plan. False reporting on local content carries a fine of between TSh 50 million and TSh 500 million.

The 1998 and 2010 mining acts gave free rein to mining companies through the Mining Development Agreements. The new mining legislation has forced these companies not only to renegotiate the existing agreement, but also to abide by stringent regulations and demands. It has been argued that Tanzania's move is likely to reduce investments in the sector and hence reduce government revenue and jobs. What is often forgotten is that investments in the mining sector are not only for maximizing profits but also for securing mineral resources. It is this that fuels competition among multinational companies as they agree to national regulations to ensure security over mineral resources (Kilambo 2016).

What has been taking place in Tanzania has been referred to as resource nationalism, which has been growing across the continent (Halina Ward 2009; Sothern African Institute for Mining and Metallurgy 2012; Stefan Andreasson 2015; Noury Silvia, Bruton Leilah and Pan Annie 2016; Siri Lange and Abel Kinyondo 2016). The discussion on resource nationalism also encompasses the oil and gas sector, which in Tanzania does not fall under the mining acts but under energy resources. In the past decade, this sector has been growing steadily and is likely to dominate the economy and overshadow the current gold boom. It is important, therefore, to discuss the oil and gas sector before dealing with the resource nationalism of the Magufuli government.

The Gas Sector: Tanzania's New Mining Frontier

The increasing discoveries of gas both inland and offshore has led to Tanzania being referred to as a new Petro State (Isaksen et al. 2017). The term Petro rather than gas arose because the initial exploration was for petroleum rather than gas, which was eventually found. Explorations have moved from the original finds in the Lindi and Mtwara shores to many other areas in the country. They have now extended to the entire Coastal Basin, the Selous Basin, the Rufiji Trough, the Ruvu Basin, the Dar es Salaam Platform, the Mandawa Basin, the Ruvuma Basin and the modern rift valley basin that includes Lake Tanganyika, Lake Rukwa, Lake Nyasa and the Ruhuhu Basin. In short, the expectations have grown for more gas finds and hence a new gas mining dawn for the country (Oil and Gas Almanac 2015; Petro Fact Book 2018). The government has been caught up in the new euphoria and has responded by passing a series of policies and acts in preparation for a gas boom and to avoid a resource curse (Moshi 2014; Obadia K Bishoge et al. 2018). These have heightened citizens' expectations, causing what has been termed a pre-exploitation curse as there is no immediate growth in the economy following the announcements of the discoveries. This was captured by the Sauti ya Wananchi Brief in 2015, which notes that expectations are outpacing the realities of what Tanzania could gain from gas. The brief also notes that:

> Expectations continue to outstrip reality in terms of whether the gas is flowing (most people think it is), whether revenues are coming (most people think they are), and the size of the pie (what people expect to receive) and prospects for getting employment in the sector.

One needs to be more cautious in examining the gas sector and its possible transformative effects on the economy. It is sobering when one takes a historical approach to the gas sector. The discovery of gas, as noted by Lee and Dupuy (2017), dates back to the 1950s when Shell and British Petroleum engaged in petrol exploration. In 1969, the Tanzania Petroleum Development Corporation (TPDC) was formed and given the mandate to explore oil in partnership with AGIP (Azienda Generale Italiana Petroli). The Songo Songo gas fields in Lindi were discovered in 1974. It was not until 2004 that the exploitation of the gas was undertaken. It took so long to exploit the gas for a variety of reasons (Perdesen and Bofin 2015). First, the exploration companies were looking for oil, which was easier and cheaper to exploit and transport to distant markets. The Petroleum (Exploration and production) Act of 1980 was intended to facilitate the exploration process. Two types of licenses were anticipated under this act (which repealed the Mining (Mineral Oils) Ordinance of 1958) – the exploration license and the development license. The act further led to the creation of the Commission for Petroleum Affairs in the Ministry of Mining and Energy. The second reason for the delay in the exploitation of the gas was that the domestic market was small and not commercially attractive, the Songo Songo fields were far from the real domestic market (Dar es Salaam) and production would require large infrastructure investment, which at the time could only be financed by aid donors, who were not willing to do so at the time.

Nevertheless, the 1980 Petroleum Act led to an expansion in the exploration of petroleum, which again resulted in the discovery in 1982 of gas at Mnazi Bay in Mtwara. The non-availability of oil partially discouraged exploration, but this changed in 1999 when TPDC and Western Geco acquired open-grid 2D seismic survey tools, resulting in the mapping of blocks for exploration between 2002 and 2007. This saw the entry of new players like Petrobas, Ophir and Statoil. This was also the period for signing the Production Sharing Agreements (PSA).[11] It was the failure to find petroleum, which government had expected to cut down its huge petroleum import bill and the economic crisis, that prompted the government to pass the 2008 Petroleum Act, whose full title

11 A good discussion on Production Sharing Agreements in Africa is provided by: John Paterson. 2019. Production Sharing Agreements in Africa. University of Aberdeen, School of Law, Working Paper Series, 001/19. For Tanzania See: Zitto Kabwe (MP). 2014. Oil and Gas: Fiscal Challenges of Tanzania's Production Sharing Agreements. Dar Es Salaam and Peter Bofin and Rasmas Hundsbaek Pedersen. 2017. Tanzania Oil and Gas Contract Regime: Investments and Markets. Danish Institute for International Studies Working Paper 2017/1

was: An act to make provisions for importation, exportation, transportation, storage and wholesale and retail distribution of petroleum and petroleum products in a liberalized market and to promote for related matters. The act clearly states that it shall not apply to the exploration, development and production of petroleum. It provided for the regulation of what has come to be known as the downstream in the current gas sector under the Energy and Water Utilities Regulatory Authority (EWURA) and the creation of the National Petroleum Information System (NPIS) and the Central Registry for Petroleum Operations (CRPO).

The failure to get petroleum after so many years of exploration and the growing costs of energy production, which depended mainly on hydropower (that was becoming erratic) and petroleum consumption plants, led to a turn towards the utilization of gas to meet the growing electricity demand. It was the need for energy security and the attraction of private-sector investment in the energy sector (which had started with the Independent Producers) that prompted the World Bank to give a go-ahead for the Songo Songo project to supply gas to Dar es Salaam for electricity generation. The World Bank pumped in US$ 300 million, and the African Development Bank US$ 200 million to enable the construction of the processing facilities for the Songo Songo and Mnazi Bay gas plants, but also the building of the pipelines – the 512 km pipeline from Mtwara to Dar es Salaam and the 217 pipelines to connect the Mnazi Bay gas plant. This process involved the signing of more than 20 contracts with donors, private companies and the state that opened the domestic gas market, which is likely to grow as the country seeks to increase gas power to 10 000 MW by 2025.[12]

Benefiting from increasing gas in Tanzania is dependent on the export market, hence the current focus on negotiations for the creation of a Liguified Natural Gas (LNG) Plant in Lindi, which was one of Magufuli's flagship projects. The current negotiations are between Exxon Mobil, Statoil, Ophir, Shell (the main gas producers) and TPDC, the designated oil and gas company. The creation of the necessary infrastructure is very costly. It was estimated at US$ 30 billion in 2016. It is for this reason that Scurfield and Manley (2017) and Scurfield and Mihalyi (2017) state that the preoccupation with the current Production Sharing Agreements fails to account for the nature and enormity of the current government negotiations to govern the liquefied natural gas plant. It is here that one needs to focus, as this is the major component in the gas exploitation setup and where one needs

12 For details on gas exploitation and usage in Tanzania see: Obadia Kyetuza Bishoge et al. 2018. An Overview of the Natural Gas Sector in Tanzania: Achievements and challenges. Journal of Applied and Advanced Research, Vol. 3(4); and Tanzania Petro Factbook 2018. Michelsen Institute.

to strike a balance between the companies' expectations (the same companies having production-sharing agreements) and the government's expectations of revenue. The critical element in these negotiations is the coordination of arrangements between the offshore blocks, the pipelines to bring the gas to shore and the LNG plant, the final price for liquefied gas for domestic and export consumption and the taxation thereof. As the conclusion of the negotiations is delayed, so is the date for deriving benefit from the gas fund. The expected date for the LNG plant keeps shifting and is currently set for 2022.[13] It is within this broad context that one needs to evaluate the current policies and legislations in place. One must hasten to add that these were passed before Magufuli's presidency. Below, attention is paid to the 2013 Gas Policy, the 2015 Energy Policy, the 2015 Petroleum Act, the Oil and Gas Revenue Management Act of 2015 and the Petroleum (Local Content) Regulations of 2017.

13 For the challenges facing Tanzania in the negotiations for LNG, see Roderick Bruce. 2021. Can Tanzania Revive its LNG Export Prospects? HisMarkit.com.

The National Gas Policy for Tanzania 2013

The growth in gas findings prompted the publication of the National Gas Policy, which, in its own words, was aimed at:

1. Building an effective institutional and legal framework to administer the industry
2. Creating an environment to attract local and foreign investments in the natural gas industry
3. Developing natural gas infrastructure and ensuring security and safety
4. Developing a competitive and efficient domestic market for natural gas
5. Availability of a trusted and transparent mechanism (and its facility) for the sound management of the natural gas revenue.

One important pillar of the new policy which recurs throughout the other policies and legislations is the optimization of the benefits to the government and the people of Tanzania through strategic participation, interventions and equitable benefit sharing. This represents a new re-assertive stance quite different from the mining acts discussed earlier. The policy clearly states that the government will participate strategically, through its national companies, to develop and operate major infrastructure for national gas. To ensure this the policy talks of the establishment of an aggregator, a fully state-owned enterprise (a subsidiary of the national oil and gas company – TPDC)[14] will have exclusive rights to purchase, collect, transport and sell natural gas produced in the country onshore, shallow shore and offshore. Three other new elements of the policy are the call for the creation of a natural gas revenue fund, which was implemented in 2015 as the Oil and Gas Revenue Management Act; local content and capacity building, which focuses on employment and training of Tanzanians, investments in developing supplies and services locally and procuring supplies of services locally which culminated in the Petroleum (Local Content) Regulations of 2017; and the obligation to undertake locally prioritized community development plans under its corporate social responsibility (CSR).

14 TPDC was designated as the national oil and gas company and was expected to: promote and safeguard the national interest in the national gas industry; advise the government on policy issues pertaining to mid and downstream strategies and activities; participate in development and own strategic natural gas projects and businesses on behalf of the government; carry out specialized operations in the natural gas value chain using subsidiary companies; acquire and own land for key natural gas projects; and establish and enable an aggregator who will develop, own and manage major infrastructure for the mid- and down-stream gas sector, mainly the pipeline network, gas processing facilities and gas products.

The National Energy Policy 2015

It was noted above that the World Bank's approval of the gas pipelines was based on the fact that this would ensure the participation of the private sector in the energy sector, which was a government monopoly under TANESCO. The World Bank had previously advocated the total unbundling of TANESCO into two separate units – a generation company and a single electricity buyer. The creation of the Energy and Water Utilities Regulatory Authority (EWURA Act 2001) was part of the process of unbundling, as was the calamitous management agreement with the South African company. This was in line with the World Bank campaign for parastatal privatization discussed under industrialization. The decision to use gas for electricity generation thus necessitated a new energy policy that was to affect the Power Sector Reform Strategy and Roadmap (PSRS) 2014-2025.[15]

The major element of the new policy that became more apparent in the Petroleum Act 2015 was the clear distinction between upstream and downstream activities relating to the supply of gas for energy consumption. The upstream activities were those related to exploration, appraisal, development, production and decommissioning states of oil and gas. This is what the Production Sharing Agreements dealt with. Downstream includes activities related to the marketing and distribution of natural gas and liquid petroleum products delivered from natural gas and crude oil. The two were to be treated and regulated separately. The downstream activities were to be focused on pre-licensing, licensing and exploration, information and data management, delineation and discovery assessment, development, production and decommissioning at the end of production. The most crucial factor was the negotiations at the pre-licensing stage. It is at this stage that the government is able to exercise its legitimate jurisdiction over the resources, manage the resource base prudentially by regulating the speed, location and sequencing of petroleum activities, and in the process manage the expectations and negative impacts from planned petroleum activities and manage the petroleum revenue for sustainable socio-economic development. The midstream and downstream is to concentrate on petroleum/gas infrastructure development, transportation, distribution and marketing. The infrastructure includes pipelines, processing plants and storage facilities for liquefied petroleum gas (LPG), liquefied natural gas (LNG), gas to liquid (GTL) and

15 The PSRS 2014-2025 had identified the following problems with the energy sector: poor governance; failure of clear and up to date planning; failure to coordinate various agencies as state actors do not represent a concerted policy position; lack of institutional capacity at TANESCO; lack of finance in part emerging from government reluctance to increase private sector involvement in providing electricity, resulting in an ambiguous regulatory framework governing IPPs and PPPs; and non-negotiated deals and non-transparent and uncompetitive procurement.

natural gas liquids which act as raw materials for the production of fertilizer, methanol and ethanol. The interest here is to enhance the state and public participation in developing petroleum infrastructure. It is within the context of ensuring public participation that local content becomes important.

The Petroleum Act of 2015

The Petroleum Act maintained the upstream-downstream divide. The organ to regulate the downstream aspects of the gas industry already existed in the form of EWURA, created by an act of parliament in 2001, and became operational in 2006. The Petroleum Act thus creates the Petroleum Upstream Regulatory Authority (PURA). Its mandate includes, among other things:

1. Monitoring all spheres of petroleum exploration, discovery, evaluation, delineation, commercial evaluation of discovery reservoir performance and produce regulations and under production to ensure optimal rates of discovery, commercialization of recovery of petroleum resources etc.
2. Advising the government on the proposed field development plan (FDP), infrastructure development, tailed plan and decommissioning
3. Managing the national exploration and production (E&P) data and working diligently towards declassifying as much data as it sees fit for public interest
4. Undertaking the administration of the Petroleum Sharing Agreements (PSA) contracts and other contractual arrangements
5. Ensuring compliance and monitoring and evaluating performance efficiency
6. Cooperating with other regulatory agencies/government authorities including The National Environmental Management Council (NEMC), Occupational Health and Safety (OSHA) and the Tanzania Revenue Authority (TRA).

To assist PURA in its operations, a board composed of five people was created. The president appoints the chairman, and the minister is responsible for appointing the other four members. The act also creates a secretariat with a Director-General appointed by the president and acting as a secretary to the board. It further creates an oil and gas advisory bureau in the office of the president to advise cabinet. The act repeats the role of the national oil company outlined in the national gas policy. It also touches on the role of the Bank of Tanzania in the management of the oil and gas

revenue, which is detailed in a separate act later.

Part VII of the act addresses the issue of government participation and granting powers to the minister to specify the maximum government share when granting a license. It pays more attention to local content by insisting that preference in the provision of goods and services be given to Tanzanian entrepreneurs, citizens and local companies. When goods are not available in the local market, the supplier must enter into a joint venture in which citizens must have at least a 25 per cent share. There is a further requirement to provide a five-year procurement plan indicating the use of local services in insurance, financial, legal, accounts and health matters and goods produced in Tanzania. There is also a demand for a report on local content annually and a programme for recruitment and training. Lastly, there is a demand to provide a credible corporate and social responsibility plan jointly agreed upon by the relevant local government authority or authorities. It is these that form the core of the Petroleum (Local Content) Regulations of 2017, whose objectives are to:

1. Promote maximum of value addition and job creation
2. Develop local capacities in the petroleum industry value chain through education, skills transfer and expertise development, transfer of technology and know-how
3. Achieve the minimum local employment level
4. Increase the capacity and international competitiveness of domestic businesses
5. Create supportive industries
6. Achieve and maintain a degree of control over development initiatives by Tanzanians
7. Provide robust and transparent monitoring and reporting system to ensure delivery of local content.

Companies have to submit local content plans for approval, which should include employment and training, a succession plan where appropriate, research development and services, procurement of goods and services, technology transfer, legal services, an engineering services plan, financial services plans and insurance services plans.[16]

Apart from the local content demands, foreign investors are required under the Petroleum Act to

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16 For a detailed discussion on local content requirements, see Abel Kinyondo and Espen Villanger. 2016. Local Content Requirements in the Petroleum Sector: A Thorny Road from Inception to Implementation. CMI Working Paper 6 and REPOA Working Paper 16.4 and Jesse Salah Ovadia. 2017. Local Content in Tanzania Gas and Mineral Sectors: Who Regulates. CMI Briefing Vol. 16, No. 6.

sign an integrity pledge which includes agreeing to conduct the regulated activities with the utmost integrity and to:

1. Desist from engaging in any arrangement that undermines or in any manner prejudicial to the country's financial and monetary systems, in particular, all earnings, payments and receivables derived from or in respect of regulated activities shall be received in and accounted for
2. Desist from engaging in any arrangements that undermine or are otherwise prejudicial to the Tanzanian tax system
3. Disengage in arrangements that are inconsistent with the country's economic objectives, policies and strategies
4. Disengage in arrangements that undermine or are otherwise prejudicial to Tanzania's national security
5. Maintain satisfactory and effective insurance coverage against losses, injuries, damages to the environment, communities, individuals and properties that may be occasioned in the cause of carrying out regulated activities.

The Petroleum Act of 2015 and the Petroleum (Local Content) Regulations of 2017 make the oil and gas sector the most regulated industry in the country. This has taken place before the companies have decided whether to turn their current gas findings into commercial production. This situation is different from the gold mining sector, where production was already in full swing. There might be a stalling on the part of the companies in committing more investments to the current projects. The current call for the renegotiations of the existing Petroleum Sharing Agreements by the Parliamentary Special Committee has already made the companies jittery.[17] One should note further the existence of the many entities dealing with oil and gas (Ovadia 2017; Isaksen, Kilama and Matola 2017). Among these are the TPDC, Ministry of Energy, PURA, EWURA, National Economic Empowerment Council,

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17 The following petroleum sharing agreements are likely to be affect under any renegotiations: The Songo Songo PSA with Pan African Energy Tanzania signed in 2001; Mnazi Bay PSA signed with Artumas in 2004 and sold to Maurel and Prom; Ruvuma PSA signed with Ndlovu Resources; The Deep See block 1 and 4 signed with BG in 2005 and 2006; The block 2 PSA signed with Statoil in 2007; The Ruvu block PSA signed with Dolsal Hydrocarbons and Power (Tanzania) in 2007; The Uni area PSA signed with Ndlovu Resources in 2011; The Rukwa South block PSA signed with Heritage Oil in 2011 and; The Kilombero PSA signed in 2012 with Swala Oil

TNBC in the office of the Prime Minister, Oil and Gas Advisory Bureau in the Office of the President and the Uongozi Institute (research, training and capacity-building organization that is officially part of the government), the Extractive Industries Transparency Initiative and a chain of NGOs.

The Oil and Gas Revenues Management Act of 2015

The full title of the act is: An act for the establishment of management of the oil and gas fund, to provide for the framework of fiscal rules and management of oil and gas revenues and to provide for other related matters. The central element of the act is to create a gas fund by opening two sets of accounts – the revenue holding account and a savings account with the Bank of Tanzania. Any amount of money in the revenue holding account exceeding 3 per cent of GDP should be transferred to the savings account reserved for future use. The rest of the money in the holding account is to be transferred to the consolidated fund for budgetary use. The provision is that at least 60 per cent of the budgetary allocation should be dedicated to funding strategic development expenditure. It is further stipulated in the act that if revenues fall short of 3 per cent in any particular year, money sufficient to offset the shortfall in the budget should be drawn from the revenue savings account and deposited in the consolidated fund, and in the event that the savings account has insufficient money to offset the shortfall, the government may borrow to offset the shortfall. A 0.01 per cent of GDP fraction of the money collected should be ring-fenced to finance the national oil company to pursue strategic investments.

The oil and gas revenue to be deposited in the revenue fund includes:

1. Royalty in cash payable by a licensed producer or its subsidiaries or a company under a production sharing agreement;
2. Government profit share;
3. Taxes payable by licensed upstream, midstream and downstream operations;
4. Government participating interests;
5. Additional oil and gas entitlements and additional profit tax;
6. Dividends from the national company for government equity interest;
7. Returns on investment income from the fund;
8. Signature bonus, training fees and surface rentals paid by licensed producers; and
9. Any other revenue determined by the minister to constitute gas revenue from upstream, midstream and downstream operations.

The expected gas windfall has not yet materialized because the central element in the equation is not yet in place: the liquefied natural gas plant. But even when this finally happens, the final revenue accruing to the government is likely to be smaller than anticipated. Scurfield and Mihalyi (2017) estimate it at US$ 2.3 billion a year, given the inherent unpredictability of the gas prices. One should not expect revenues, in the short term, to reach the 3 per cent GDP threshold necessary to trigger funds to go to the savings account. At most, whatever is collected will go to the government budget. At any rate, the government should avoid basing its finance plans on the expectations of the gas revenue windfall or increasing public expectations regarding the impact of the gas revenue.

There is a growing belief among the public that the government is collecting enough funds to fund its own development projects since the introduction of changes in the gold mining sector. This belief is fuelled by public statements from the highest level. This, however, hides our continuous dependence on donors, or so-called development partners, who, apart from funding projects and government budget, have a great influence on the flow of foreign investments in the country. In fact, they act as promoters of private investments from their countries. The statements also hide the growing government debt, both local and foreign, which needs to be managed before we fall into the debt trap we found ourselves in in the early 1980s that forced the country to change its economic system completely. One, therefore, needs to manage the nationalistic goals pragmatically. The success in the gold sector cannot be simply extended to the gas sector under different dynamics in which we do not currently hold the main bargain chip. How, then, does one go about managing the ever-growing demand for greater citizen and state participation in the natural resources sector?

It is true that revenue from mining has increased from TSh 168 billion in 2014/2015 to TSh 527 billion in 2019/2020 and general tax revenue has jumped from TSh 850 billion in 2015 to TSh 1.9 trillion in 2021. But according to President Samia Suluhu Hassan's Inaugural Speech to Parliament (22 April 2021) and the Budget Speech by the Minister of Finance in June 2021, revenue collection has fallen short of expectations. Tax collection by the TRA as of April 2021 was TSh 14.54 trillion – 86.9 per cent of the target; non-tax revenue was TSh 1.8 trillion – 78.5 per cent of the target; grants and concessional loans were TSh 1.89 trillion – 70.4 per cent of the target; external non-concessional loans were TSh 1.68 trillion – 88.1 per cent of the target; and domestic borrowings were TSh 3.99 billion – 95.7 per cent of the target.

Resource Nationalism or Developmentalism

What has been taking place in Tanzania represents a growing trend on the continent whereby countries seek to maximize benefits from the natural resources being exploited by foreign companies. One wonders why it took too long for Tanzania to catch up with the call of the Africa Mining Vision 2009, which came at the time when the country was working out its 2010 Mining Act. A possible explanation is that Tanzania was still so heavily dependent on aid donors, in particular the World Bank and IMF, that it could not strongly challenge the neo-liberal orthodoxy of foreign private sector-led development. Thus, the new Mining Act only made a call for a free carried interest and possible state participation in mining without providing any specifics. This has been interpreted as the beginning of resource nationalism in Tanzania that gained momentum with the 2013 National Gas Policy and the 2015 Petroleum Act (Jacob and Pederson 2018). Magufuli's actions against the mining companies in 2016-2018 were a continuation of the trend that started under Kikwete.

The Africa Mining Vision 2009 and the 2011 Action Plan (UNECA/AU 2011) represented a growing dissatisfaction by African countries with the existing unfavourable mining development agreements that resulted in the rapid growth of the mining sector in these countries with minimal returns to the government and negligible impact on the rest of the economy. During the early negotiations of the mining agreements, Africa had been seen as a supplier of strategic minerals to industrialized countries, resulting in the focus on minerals that play that role and in the mining sector being developed as an externally oriented enclave only narrowly linked to the rest of the economy through meagre taxes paid to the state and a small pool of low-level workers (African Mineral Development Centre 2017; Besada and Martin 2015; Katz Lavigne 2017). The African Mining Vision was indeed a reaction to the World Bank-inspired mining regimes that produced a little benefit to the African countries. Its aim was to create transparent, equitable and optimal exploitation of mineral resources to underpin a broad-based, sustainable growth and social-economic development and the integration of the mineral sector into the broader economy of each country (Pedro 2012; Haslam and Heidrich 2016). This necessitated greater participation of the state and its citizens in the mining sector. It is this demand for increased participation that has been termed 'resource nationalism'.

Peter Leon (2013) defines resource nationalism as an umbrella term for different measures through which states seek to exercise greater control over their natural resources with the object of delivering a greater share of the economic benefits that accrue from the extraction of these resources. These have, in many instances, included: imposition or increase of royalties or mining taxes; a mandatory requirement for state equity carry over in mining projects; indigenization or local equity requirements; and the introduction of super profit, windfall profit or resource rent taxes and; the imposing of import taxes (on goods and services) or export taxes (on minerals) with the purpose of promoting local procurement and beneficiation and promoting local businesses and industrialization. There have been two forms of state intervention on the continent. First is the adoption of local content policies (LCPs) and laws to increase the participation of nationals in the state's extractive industries. This is represented in Tanzania by the demand for greater local participation under the 2015 Petroleum Act; the Petroleum (Local Content) Regulations 2017 and the Mining (Local Content) Regulations 2018. Second is the enactment of new laws to increase the state's interests in extractive projects and demand for renegotiations of previously concluded contracts with foreign investors. This is represented in Tanzania by the Natural Resources (Permanent Sovereignty) Act of 2017, the Written Laws (Miscellaneous Amendments) Act of 2017 and the Natural Wealth and Resources Contract (Review Negotiations of Unconscionable Terms) Act of 2017 (Nwapi and Andrews 2019).

The above developments open the opportunity for African countries to use their natural resources to promote the broader participation of their citizens in national economic development. They represent a paradigm shift from the model of mining extraction based on resource development to a model that focuses on harnessing resources to accelerate development and build resilient, diversified and competitive national economies (Nwapi and Andrews 2019). This, however, threatens to alter the global governance structures or shift the power distribution within the existing institutions, thus making the resolution of resource trade disputes more uncertain (HM Government Horizon Scanning Programme 2014). This is what is behind the opposition to the move by African countries to have more control over their natural resources. Mining companies that have been making super-profits from the current mining regimes are also strongly against the renegotiations of the existing contracts. The language is being used to indicate their opposition is that the measures being undertaken by many African countries will: decrease the reward for mining projects and result in withdrawal of investments; defer or delay in mining projects; increase operating costs and mineral cut off grades; and potentially sterilize marginal mineral deposits (Peter Leon 2013; Africa practice 2012). These represent short-term measures used by current mining companies to bargain

for better terms, but the entry of new players from China, India, Brazil and Arab countries have changed the playing field. The need to capture mineral resources will force these companies to accept increased government control and local participation in the natural resources sector in the long run. The critical element for countries like Tanzania is the timing of the state interventions and the ability to convince investors that what they are demanding would produce a win-win situation, to use the much-loved Chinese statement. This is what the Magufuli government did with respect to the gold mining and gems sector. Unfortunately, he passed away before concluding the gas negotiations. What is at stake is not the rise of resource nationalism but a redefinition of the development trajectory and the sharing of benefits from natural resources.