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Tanzania's New Natural Resources Legislation: What Will Change?

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Tanzania's parliament passed three pieces of legislation on 3 and 4 July 2017 that make significant changes to the legal and institutional frameworks governing oil, gas and mineral extraction: (1) the Written Laws (Miscellaneous Amendments) Act 2017 ("Amendments Act"), (2) the Natural Wealth and Resources (Permanent Sovereignty) Act 2017 ("Sovereignty Act") and (3) the Natural Wealth and Resources (Revenue and Re-Negotiation of Unconscionable Terms) Act 2017 ("Contract Review Act"). The wide scope of these acts, coupled with the relatively short period of time allowed for parliamentary and public debate, have given stakeholders a limited opportunity to understand the full impact of the legislation.

This publication serves as a guide to the new laws, and as such it is intended to help remedy the current shortfall in publicly available information. We refrain from significant policy analysis and aim instead to simply provide a description of what has changed in the laws; we hope this information can be used to inform the rulemaking process that is expected to take place, and can also be used by stakeholders to carry out the necessary analyses. An important caveat: given that the version of the legislation that was passed is not yet publicly available, this guide is based on the bills that were introduced in parliament on 29 June 2017. We also include select provisions from the Finance Act 2017 ("Finance Act"), which made a few notable changes to the extractive sector's legal framework.

INSTITUTIONAL STRUCTURE

President. Section 5 of the Sovereignty Act provides for the country's natural resources to be held in trust by the president on behalf of its citizens, replicating the current approach to land.[1] Previously, ownership and control of natural resources were simply vested in the United Republic. We do not believe that this change marks a fundamental shift in the state's responsibility for or control over the sector, though it perhaps signals a more significant role for the president's office going forward.[2] Where the minister responsible for mining could previously declare any gold or gemstone mining area as a "controlled area", the president now has this power and it extends to any area where mining operations take place.[3] The rules that can be applied to controlled areas also appear to have been extended in scope. Previously these rules were limited to the right of access to the area, which was an

1 Section 4 of the Land Act 1999.
2 The formulation of holding natural resources "in trust" may also signal an enhanced emphasis on accountability measures.
3 Section 6 of the Amendments Act, adding a new Section 5A to the Mining Act 2010.

attempt to curb the smuggling of minerals. However, it appears that these areas can now be subject to additional conditions, the contravention of which is an offense.

National Assembly. Any mineral or petroleum agreement now has to be submitted to the National Assembly,[4] which has the authority to review and require renegotiation of any existing or future agreement.[5] Section 6 of the Sovereignty Act states that it is unlawful to make any arrangement or agreement over natural resources except where the interests of citizens and the state are "fully secured and approved by the National Assembly."

Minister of Energy and Minerals. Section 11 of the Amendments Act replaces Part III (Administration) of the Mining Act 2010 ("Mining Act") and introduces significant changes to the institutional framework that is used to administer the act. Some of these changes reduce the responsibilities of the minister responsible for mining. The cabinet, rather than the minister, is now responsible for approving special mining licenses,[6] (though the minister is still responsible for granting retention and mining licenses). The minister is also no longer allowed to enter into development agreements.[7] A new commissioner of minerals is responsible for advising the minister on mining matters.[8]

Mining Commission. Many of the changes to the institutional structure set out in the Amendments Act center around the establishment of a mining commission. The commission takes over functions that were previously the responsibility of the Mining Advisory Board (MAB), the previous Commissioner of Minerals, Zonal Mines Offices and the Tanzania Minerals Audit Agency (TMAA). The Amendments Act explicitly dissolves the first three of these entities[9] and the dissolution of the TMAA is implicit in the reallocation of responsibility for its main functions. The commission will be led by representatives from a number of entities, with an executive secretary managing day-to-day operations. These entities are broadly similar to the composition of the MAB,[10] but their representatives are now required to be of a certain seniority. Ministries are now required to be represented by the permanent secretary, and the Chamber of Energy and Minerals has to be represented by its secretary. The commission has wide-ranging responsibilities, including: the review of special mining license applications before submission to cabinet; the granting of prospecting and primary mining licenses; the suspension and revocation of licenses; and the monitoring of mining operations (including the assessment of the quantity and quality of minerals produced; the audit of expenditures for tax purposes; the assessment of local content performance and investment in the local economy; and the monitoring of environmental management).

4 Section 5 of the Contract Review Act.
5 Section 12 of the Sovereignty Act; Section 4 of the Contract Review Act.
6 Section 18 of the Amendments Act, amending Section 41 of the Mining Act.
7 Section 9 of the Amendments Act, repealing and replacing Section 10 of the Mining Act.
8 Section 11 of the Amendments Act, inserting a new Section 20 into the Mining Act as part of the new Part III (Administration).
9 Section 4 of the Amendments Act, amending Section 3 of the Mining Act.
10 The differences being the replacement of the ministry responsible for environmental protection with the ministries responsible for defense and local government; the exclusion of representatives from an institution of higher learning; small-scale miners and mineral dealers; and the participation of two experts instead of one.

Mines resident officers. The Amendments Act states that mines resident officers will be stationed at every mining site, and will be responsible for day-to-day monitoring and reporting.[11] The Mining Act previously provided for "resident mines officers." Their responsibilities were not specified in the act, but a key difference between them and those of the new mines resident officers is that they were assigned to a geographical area rather than stationed at individual mining sites.

National Mineral Resources Data Bank and Mining Cadastre. The Amendments Act directs the Geological Survey of Tanzania to establish the National Mineral Resources Data Bank; the act explicitly states that all mineral data generated under the Mining Act shall be owned by the government and requires mineral right-holders to submit copies of such data to the Geological Survey of Tanzania free of charge. However, the Amendments Act also provides that the Geological Survey of Tanzania may allow mineral right-holders to market the use of data "on terms to be agreed" (presumably between the Geological Survey of Tanzania and the mineral right-holder).[12] The Amendments Act also establishes a mining cadastre, which will receive and process mining rights and mineral processing license applications and maintain public cadastral maps and cadastre registers.[13] However, it is unclear where the mining cadastre sits in the institutional framework and whether it includes an online system.

FISCAL REGIME

Minerals royalty. The Amendments Act increases the royalty on diamonds and gemstones from 5 percent to 6 percent, and raises the royalty on metallic minerals from 4 percent to 5 percent of gross value.[14] Under the Mining Act, the royalty base was previously defined as the "market value of minerals at the point of refining or sale or . . . at the point of delivery within Tanzania." The Amendments Act has now specified that "market value" shall be based on a valuation procedure requiring the presence of a mines resident officer and an officer from the Tanzania Revenue Authority.[15] Under the new procedure, the government may reject the valuation of exported or raw minerals that are rated "low" because of "deep negative volatility." Where the government rejects a valuation, it is entitled to purchase the minerals at the low price.[16] The concept of "deep negative volatility" is undefined, and no standards are provided for determining whether a price is "low." Regulations will be needed to establish clear parameters for rejecting valuations on this basis.

11 Section 11 of the Amendments Act, inserting a new Section 29 into the Mining Act as part of the new Part III (Administration).
12 Section 12 of the Amendments Act, inserting a new Section 27E into the Mining Act as part of the new Part III (Administration).
13 Section 12 of the Amendments Act, inserting a new Section 27F into the Mining Act as part of the new Part III (Administration).
14 Section 23 of the Amendments Act, amending Section 87 of the Mining Act.
15 Section 23 of the Amendments Act, amending Section 87 of the Mining Act; and Section 25 of the Amendments Act, adding new Section 100B to the Mining Act.
16 It is unclear whether this purchase option exists for any rejection of a royalty valuation (e.g., a rejection based on abusive transfer pricing), or only those attributable to "deep negative volatility". Creation of a purchase option in the case of intentional undervaluation could be seen as a means of better ensuring fair valuation. At the same time, it is unclear whether "deep negative volatility" is something that would be in the control of the mineral rights-holder. The operation of the purchase option would thus appear to require further elaboration.

Petroleum royalty. Section 31 of the Amendments Act inserts language into the Petroleum Act 2015 ("Petroleum Act") specifying that petroleum royalties are to be calculated prior to determining cost gas and profit gas allocations. This amendment appears to be intended as a clarification of existing law, and it does not change the methodology for calculating either royalty or cost/profit gas.

State equity (mining). The acts provide several provisions relating to state equity in natural resource operations. Section 8 of the Sovereignty Act requires that any natural resource contract provide for both state participation and the opportunity for participation by Tanzanian citizens. With regard to state equity, the government shall have no less than a 16 percent free carried interest in the capital of mining companies.[17] In addition to this 16 percent, where a contract or stabilization agreement provides for any tax expenditure (defined as the monetized value of tax incentives granted to the company by the government), the amount of such tax expenditure may be converted to state equity for up to 50 percent of the equity shares of the company and for up to 66 percent of total equity.[18,19] Clear methodologies for valuing tax expenditures will be crucial to understanding the full impact of this provision. The requirement that Tanzanian citizens have the opportunity to participate in resource extraction operations expands existing requirements applicable to special mining license-holders[20] to all mineral right-holders (and will require further elaboration, as mechanisms and participation levels are not specified).

Income taxes (general). The Finance Act, through an amendment to the Income Tax Act 2004 ("Income Tax Act"), prohibits losses from "speculative transactions" being deducted from taxable income.[21] This is a general provision applicable beyond natural resource companies, and it appears to attempt to reduce risks of transfer pricing abuse from practices such as hedging. The Amendments Act also makes generally applicable amendments to the Income Tax Act that are seemingly designed to reduce tax avoidance risks. It inserts a provision into the Income Tax Act stating that the value of any benefit or advantage accrued from the shifting of any tax obligation to another person through a contractual agreement or other arrangement shall be taxed at a rate of 100 percent.[22] The scope and operation of this provision will require clarification in regulations. It appears to be an attempt to strengthen the Income Tax (Transfer Pricing) Regulations 2014, but its impact will depend on the definition of "benefit" and "advantage."

Income taxes (mining and petroleum). Section 38 of the Amendments Act states that depreciation allowances for "natural resource prospecting, exploration

17 Section 9 of the Amendments Act, replacing Section 10 of the Mining Act. Section 9 of the Amendments Act refers to "not less than sixteen non-dilutable … *shares*" (our emphasis), rather than sixteen *percent* of issued equity shares; but we assume this is in error and that a percentage requirement was the intent.

18 Section 25 of the Amendments Act, adding new Section 100E to the Mining Act.

19 Section 10(2) provides: "*In addition to the free carried interest shares*, the Government shall be entitled to acquire, *in total*, up to fifty percent of the shares of the mining company commensurate with the total tax expenditures incurred by the Government in favour of the mining company" (emphasis added). By our reading, the phrase "in addition to the free carried interest shares" allows for up to 66 percent state equity. However, there is some ambiguity here, depending on how the words "in total" are interpreted. We understand that some companies and industry advisors have interpreted the Section as providing for a maximum of 50 percent state equity. We expect regulations will clarify the government's intention.

20 See The Mining (Minimum Shareholding and Public Offering) Regulations 2016.

21 Section 20 of the Finance Act, amending Section 19 of the Income Tax Act.

22 Section 33 and Section 37 of the Amendments Act, adding new Section 8(2)(h) to the Income Tax Act and amending the First Schedule of the Income Tax Act, respectively.

and development expenditure" will expire after ten years of production.[23] Given that the third schedule provides for mining and petroleum expenditure to be depreciated on a straight line basis over 5 years (i.e. by 20 percent each year for 5 years), this time limit means any qualifying expenditure incurred after the fifth year of production will not be fully deducted from taxable income. Whether this limit will also apply to multiphase projects—in which a second development phase to expand operations takes place—will need to be clarified in regulations. As it is currently drafted, it is likely that companies would be unable to recover the full cost of an expansion, as project expansions often take place a number of years after the start of production.

Income taxes (mining). Section 34 of the Amendments Act further caps depreciation allowances for mining operations by its reference to capital expenditure plans that are verified by the commission (in accordance with Section 17 of the Amendments Act). As with the amendment under Section 33, this provision appears to attempt to strengthen transfer pricing regulations and combat tax avoidance (in this case, by adding a cost control measure). As noted below, the approval and verification procedure for capital costs requires further clarification in regulations.

Income taxes (petroleum). The Amendments Act includes significant changes to the calculation of taxable income for petroleum operations. While prior law treated a contractor's share of cost and profit oil/gas as gross income and allowed deductions of depreciation allowances from income, the new legislation excludes cost oil/gas from gross income[24] and correspondingly disallows deductions with respect to any depreciable assets whose costs are recouped through cost oil/gas.[25] Apart from the potential simplification of tax administration for petroleum operations, we expect this change in the tax treatment of cost gas to result in timing changes, rather than changes in the total amount of taxable income (the Natural Resource Governance Institute will model these changes and publish the results in the coming weeks). One change that is not simply a timing issue is the non-deductibility of the petroleum royalty for tax purposes. Section 36 of the Amendments Act provides that royalties may no longer be deducted from taxable income, thereby broadening the tax base.[26]

Minerals inspection and clearance fees. The Finance Act, by amending the Mining Act, introduces a requirement for payment of an "inspection fee" before minerals are exported.[27] The Finance Act also provides for the establishment of clearance centers and requires the payment of a "clearance fee" of 1 percent of gross value prior to clearance for domestic use or export.[28] The inspection fee amount is not stipulated in the act and will presumably be provided in regulations.

23 Section 38 of the Amendments Act, amending the third schedule of the Income Tax Act. This provision refers to the "class 4 pool of depreciable assets" in the third schedule of the Income Tax Act. Section 34 of the Finance Act 2016 removed this class of assets and introduced Paragraph 5, which sets out the depreciation allowance for mining and petroleum operations. We therefore assume the intention is for this provision to refer to Paragraph 5, but both provide for straight line depreciation over 5 years.

24 Section 35 of the Amendments Act, amending Section 65M(2) of the Income Tax Act.

25 Section 36 of the Amendments Act, replacing Section 65N(1)(b) of the Income Tax Act.

26 Section 36 removes the word "royalties" from Section 65N(1) of the Income Tax Act on deductions for petroleum rights. However, allowable deductions under Section 65N(1) also include "any other amounts deductible under other provisions" of the Income Tax Act. Given that Section 11(2) allows for the deductibility of all expenditure, and royalties are not explicitly excluded elsewhere in the Act, there could be some ambiguity. The government's intention as to the deductibility of royalties will presumably be clarified in regulations.

27 Section 34 of the Finance Act, amending Section 18(3) of the Mining Act.

28 Sections 35 and 37 of the Finance Act, adding new Sections 18A and 90A to the Mining Act, respectively.

Regulations will presumably also clarify the relationship between the Government Minerals Warehouse and these clearance centers. (See below.) The Finance Act states that these requirements go into operation on the date that the Minister of Energy and Minerals stipulates in the Gazette.[29] This date is yet to be provided.

Value added tax (mining). The Amendments Act ends the granting of input tax credits for the export of raw minerals.[30] A definition of "raw minerals" is not provided in any of the acts, and so will need to be provided in regulations. However they are defined, this provision will not have a material impact going forward if the provision in the Sovereignty Act prohibiting the export of raw minerals is fully implemented (see "Beneficiation" below).

Additional profits tax (general). The Amendments Act changes the definition of "tax" in the Tax Administration Act 2015 to include "additional profits tax", and sets out the timing of its payment.[31] While these changes do not provide for an additional profits tax to become part of the legislated fiscal regime, they do represent the first time that this tax is recognized in current law. (Previously it was only provided in model production-sharing agreements, which are not legally binding.)[32]

"Guaranteed returns." The Sovereignty Act requires that any natural resources agreement must provide for "guaranteed returns into the Tanzanian Economy."[33] The meaning of this language is not clear and will presumably be elaborated in regulations. It may be, for instance, that a minimum royalty or cost oil/gas limit is required, or it may anticipate some minimum return on state equity. While notions of government take and effective tax rate do not formally relate to the concept of "return," it is also conceivable that this provision will be interpreted to require some minimum take. Or it may be possible that with the breadth of the phrase "returns into the Tanzanian Economy" the drafter might have in mind something beyond fiscal revenues (such as corporate social responsibility).

RESOURCE CONTRACTS

Approval of contracts. Section 6(1) of the Sovereignty Act appears to require approval of any mining or petroleum agreements by the National Assembly, a new requirement. Section 18 of the Amendments Act creates a new requirement that the commission submit applications for special mining licenses to the cabinet for approval after confirming that all requirements are met.

Contract review and stability. The Contract Review Act requires the National Assembly to scrutinize whether any new agreement contains "unconscionable" terms.[34] It also provides that the National Assembly may direct the government to renegotiate existing agreements if they are deemed unconscionable by the criteria laid out in the act.[35] Currently, the criteria laid out in the Contract Review Act are quite broad. For example, any clause that subjects the contract to the jurisdiction of an international arbitration body might be deemed unconscionable.[36] Terms that allow for the export of raw materials would run afoul of requirements for

29 Section 33 of the Finance Act.
30 Section 49 of the Amendments Act, amending Section 68 of the Value Added Tax Act 2014.
31 Sections 46 and 47 of the Amendments Act, amending Sections 3 and 54 of the Tax Administration Act 2015, respectively.
32 This tax was provided for in the Income Tax Act of 1973, but is not provided in the current Income Tax Act.
33 Section 7 of the Sovereignty Act.
34 Section 5(1) of the Contract Review Act.
35 Section 5(3) of the Contract Review Act.
36 Section 6(2)(i) of the Contract Review Act.

local beneficiation,[37] and any stabilization clauses not meeting the requirements of the Amendments Act (as discussed below) might violate the requirement that there be no restrictions on the periodic review of terms.[38] Section 4(2) states that "there shall be implied in every arrangement or agreement that the negotiation are [*sic*] concluded in good faith and fairly". It is not clear whether the term "implied" refers to a principle of interpretation to be applied by the National Assembly against existing contracts, or whether it refers to a goal for the renegotiations. Section 7(1) provides that if the parties fail to reach agreement on terms the Nationally Assembly has declared unconscionable, "such terms shall cease to have effect . . . and shall . . . be treated as having been expunged." Currently, the act does not address whether such terms will be replaced by other terms, particularly where the exclusion of such terms would render the contract as a whole unworkable.[39] It is therefore presumed that regulations will provide additional detail on the process for review and renegotiation; provide clarity on the application of the "good faith" principle; and elaborate on how expunged terms necessary to the working of a contract might be replaced.

Further, the Amendments Act prohibits the use of stabilization arrangements that entail "the freezing of laws or contracting away the sovereignty" of Tanzania.[40] Any stabilization arrangements are to be specific (presumably meaning limited to specified terms) and time-bound, as well as must provide for periodic renegotiation. Requirements for what constitutes allowable time periods will presumably be provided in regulations. Similarly, regulations may specify the categories of terms, fiscal or otherwise, that may be stabilized. Renegotiation under such provisions is to be "based on the economic equilibrium principle," which will also presumably be elaborated in regulations.

Contract principles. Section 30 of the Amendments Act requires petroleum agreements to observe a handful of principles, including equitable distribution of benefits, favoring the national interest, participation, transparency, accountability and non-derogation from generally applicable law. Section 6 of the Sovereignty Act echoes this requirement, making it unlawful to make any agreements where the interests of the Tanzanian people are not fully secured and requiring contracts to be made "to further Tanzania's independence based upon respect for permanent sovereignty over natural wealth and resources."

Dispute resolutions. Section 11 of the Sovereignty Act stipulates that permanent sovereignty over natural resources requires that any disputes relating to resource extraction be adjudicated in judicial bodies or other organs established in Tanzania. This would appear to rule out many of the arbitration clauses commonly seen in natural resource contracts in both Tanzania and other host countries. Reconciliation of this requirement with the obligations of various bilateral investment treaties would be required.

Status of existing contracts. The Amendments Act stipulates that all minerals development agreements signed prior to the new legislation shall remain in force, subject to the terms of the Contract Review Act. Section 10 of the Amendments Act also repeals Section 11 of the Mining Act (allowing for development agreements to cover the duration of a special mining license) and Section 12 of the Mining Act (providing for review of such development agreements every five years).[41]

37 Section 6(2)(g) of the Contract Review Act.
38 Section 6(2)(d) of the Contract Review Act.
39 For example, if a production-sharing formula is determined to be inequitable and is expunged, a new formula would be required to take its place.
40 Section 25 of the Amendments Act, adding new Section 100E to the Mining Act.
41 Section 10 of the Amendments Act, replacing Section 11 of the Mining Act.

The Amendments Act does not include a similar stipulation that petroleum agreements signed prior to the new legislation shall remain in force.

Role of contracts. Section 9 of the Amendments Act deletes the provision in the Mining Act allowing the minister to enter into development agreements, and the "Objects and Reasons" addendum to the Amendments Act states that the law aims to "eliminate all provisions which currently empowers the Minister responsible for minerals to enter into Mining Development Agreements [*sic*]." The Amendments Act correspondingly deletes a number of references to development agreements in the Mining Act. The following were deleted: the review of applications for a special mining license was to "[take] account of any relevant stipulation" in a mining agreement;[42] the minister could agree to conditions for any retention license in a development agreement;[43] conditions for the suspension or cancellation of a license could be modified by a development agreement;[44] and insurance obligations could be altered by agreement.[45] With the deletion of these references to minerals development agreements, and given the stated goal of eliminating the power of the minister to enter into such agreements, it would appear that the new requirements for natural resource agreements reflected in the Sovereignty Act are meant to apply solely to agreements relating to petroleum. It is also unclear how the elimination of development agreements interacts with the provisions dealing with stabilization arrangements (if development agreements are no longer allowable, would the stabilization arrangements under consideration then be agreed to on a stand-alone basis?). Apart from stabilization agreements, the amendments appear to limit the scope for any negotiated terms. The extent to which the elimination of development agreements standardizes terms across mining contracts will depend on how restrictively regulations on stabilization agreements are drafted.

MINERALS LICENSING REQUIREMENTS

Integrity pledge and local content. The Amendments Act states that applications for prospecting licenses,[46] retention licenses,[47] special mining licenses,[48] mining licenses[49] and primary mining licenses[50] must include: (1) an "integrity pledge" in a prescribed form, and (2) a local content plan. The integrity pledge is "a formal and concrete expression of commitment by mineral right-holder to abide ethical business practices and support a national campaign against corruption and prepared by the Commission [sic]".[51] "Local content plan" is not defined, but it presumably refers to one or more of the plans required by Section 28 of the Amendments Act (which cover procurement, training and employment, and technology transfer). Section 27 of the Amendments Act grants authority to draft regulations relating to the local content and integrity pledge obligations.

Scrutiny of submitted capital investment plans. Section 17 of the Amendments Act adds a new provision to Section 41 of the Mining Act that requires the commission to scrutinize and verify forecasted capital investment plans. Such plans were previously required to be submitted, but apparently were not subjected to

42 Section 42 of the Mining Act.
43 Section 38(3) of the Mining Act.
44 Section 63(1) of the Mining Act.
45 Section 111(1) of the Mining Act.
46 Section 13 of the Amendments Act.
47 Section 15 of the Amendments Act.
48 Section 17 of the Amendments Act.
49 Section 20 of the Amendments Act.
50 Section 21 of the Amendments Act.
51 Section 4 of the Amendments Act, amending Section 3 of the Mining Act.

special scrutiny and verification. The purpose of such verification is to check "mis-invoicing and any other form of malpractice in respect of mining license and special mining license holders." While Section 41 deals with applications for special mining licenses and amendments to the Income Tax Act make clear that the verified amount is meant to establish the depreciable basis for capital expenditures (see "Income Taxes" above), we presume that monitoring mis-invoicing would be an ongoing task. It is also unclear whether companies will be permitted to make amendments to their verified capital investment plans or to apply for additional capital expenditure to be included in the calculation of taxable income (for example, expenditures resulting from unforeseen operational factors). We would expect that regulations would be required to clarify the timing and procedure for this new verification requirement (i.e., whether it is ongoing or applies only at the point of the application).

Disqualified license holders. Section 7 of the Amendments Act adds a new residency requirement for individual mineral license-holders who are non-citizens. This clause also includes a prohibition on license holdings (or technical support to primary license-holders) by an individual convicted of a crime of dishonesty or the violation of mining act, or by a corporation with such an individual on its board or as a shareholder.[52] Under the new legislation, the commission may allow primary license-holders to contract with foreign persons and companies for technical support.

Transfers of mining licenses. While prior law provided that consent for any transfer of a mining right could not be unreasonably withheld or delayed, Section 8 of the Amendments Act removes the reference to unreasonable delay or withholding of consent and stipulates that consent of the licensing authority to a transfer of a mining right shall not be given unless there is proof that substantial developments have been effected by the holder of a mineral right. We presume that "substantial developments" would be defined in regulations in a manner aimed at preventing license-holders from holding land without undertaking significant exploration or development activity. Further, permission to transfer shall take into account the extent of any "ploughed back returns" into the Tanzanian economy. Presumably regulations will be needed to specify the requirements with respect to the "ploughed back returns" necessary to receive permission to transfer. (See "Local content and investment in domestic industry" below.)

OWNERSHIP AND SALE OF MINERALS

Permanent sovereignty. Sections 4 and 5 of the Sovereignty Act assert that the people of Tanzania shall have permanent sovereignty over all natural wealth and resources and that their ownership and control of these resources shall be exercised by the government on their behalf. These resources are inalienable "in any manner whatsoever." The Amendment Act furthers provides that that government shall have a lien on all extracted minerals.[53] The effect of this provision is unclear with respect to a company's ability to "book" reserves, for example.

Beneficiation requirements. Section 9 of the Sovereignty Act requires that any natural resource agreement shall ensure that no raw minerals will be exported for beneficiation outside of the country and must include a "commitment to establish beneficiation facilities" in Tanzania. In furtherance of this policy, as noted above, export of raw minerals is also excluded from receiving an input tax credit under

52 We note that the shareholder requirement does not have a de *minimis* threshold or a public company exception, which we expect would have to be provided in regulations for the prohibition to be practical.

53 Section 25 of the Amendments Act, adding new Section 100D to the Mining Act.

the VAT system.[54] However, as also noted above, a definition of "raw minerals" is not provided in any of the acts, making the scope of these provisions unclear. It is not clear how the prohibition on the export of raw materials interacts with the notion of a "commitment to establish beneficiation facilities." The "commitment" concept appears to be forward-looking, presumably taking account of the fact that significant investments in local capacity will be required over a sustained period of time to allow for the eventual beneficiation of all minerals extracted in Tanzania. While there is no explicit mention of a transition period or phase-in, new sections 100A and 100C appear to consider that permission to export raw materials may be granted in some circumstances. As noted below, regulations are required to clarify the conditions under which raw materials may be exported. Presumably, this will require a plan for significant investment in building local capacity on the part of companies *and* the government.

Storage, sorting, valuation and removal of minerals. Section 25 of the Amendment Act contains a number of provisions that appear aimed at exercising the government's permanent ownership over minerals on the behalf of the people; combating undervaluation of minerals; and preventing the unauthorized export of minerals (adding new sections 100A through 100D to the Mining Act). Under the new Section 100A, mineral right-holders are now required to construct storage facilities for extracted minerals, with access to the facilities requiring joint authorization from an appointed mining company official and a mines resident officer. Each entry must be detailed in a logbook. Minerals may be held in these facilities for no more than five days before transfer to the Government Minerals Warehouse, a facility established under the Amendments Act to house all the minerals extracted by mineral rights-holders in Tanzania before transfer for local beneficiation, to authorized mineral dealers or, as permitted, for export.[55] The Finance Act 2017 suggests that minerals will have to enter a clearance center before transfer for these uses, but it is not immediately clear whether this is an additional step following the transfer to the Government Minerals Warehouse, or if the warehouse will also serve as a clearance center. The Amendments Act provides for regulations to elaborate on standards and procedures for storage. Both the phrasing "where so permitted, for export", and the later specification that where exportation of raw minerals is authorized, such exports shall not receive the benefit of law for promotion of Tanzania products abroad[56], indicate that under some conditions, raw minerals may be exported. It is expected that regulations will specify under what terms exemptions from the local beneficiation requirement will be allowed.

Section 100B requires sorting and valuation in the presence of a mines resident officer, an officer from the Tanzania Revenue Authority and "the relevant of state organ of the state for that purpose" (the third required official is not clear). Reports on sorting and valuation must be made and verified jointly by an authorized official of the mineral right-holder and the mines resident officer and submitted to the commission for use in calculating royalties. Section 100C requires government supervision and authorization of any removal of raw minerals from the mine and forbids removal of raw minerals from the Government Minerals Warehouse (except for local beneficiation, use by authorized mineral dealers, or export [under conditions to be specified]). Section 100D specifies a government lien on all mineral concentrates; requires storage in a secure yard within the mines (in a manner to be later specified in regulations); and prohibits mineral concentrates that have

54 Section 49 of the Amendments Act, amending Section 68 of the Value Added Tax Act.
55 Sections 12 and 25 of the Amendments Act.
56 Section 25 of the Amendments Act, adding new Section 100C(5).

been analyzed and valued by the commission from being later disposed of for mineral processing within Tanzania as a "trading commodity." Provisions related to the removal and transportation of raw minerals are also extended to mineral concentrates under this section.

Distribution of profits. Section 10 of the Sovereignty Act stipulates that any natural resource agreement must include requirements that earnings from mineral sales be retained in local financial institutions, except where they are distributed as profits. Thus, operational bank accounts would need to be held in Tanzanian banks rather than offshore (as is common under many project finance structures).

National gold and gemstone reserve. One-third of payments in lieu of royalty (paid by licensed dealers) is to be paid in kind into the National Gold and Gemstone Reserve.[57]

LOCAL CONTENT, INTEGRITY PLEDGE AND CORPORATE SOCIAL RESPONSIBILITY

Local content and investment in domestic industry. Local content is defined as "the quantum of composite value added to, or created in, the economy of Tanzania through deliberate utilization of Tanzanian human and material resources and services in the mining operations in order to stimulate the development of capabilities indigenous of Tanzania and to encourage local investment and participation."[58] Local content plans are required in applications for various mining licenses. (See "Licensing requirements" above.) Section 28 of the Amendments Act adds several new provisions on local content. Mineral rights-holders are to give preference to goods that are produced or available in Tanzania and to services rendered by Tanzanian citizens or local companies. Where such goods or services are not available locally, they must be procured from companies that have entered into joint ventures with a "local company", with the local company holding at least 25 percent of the joint venture. To qualify as a "local company, "a company must be either 100 percent owned by a Tanzanian citizen or be a joint venture at least 50 percent owned by Tanzanian citizens.[59] Mining license-holders are required to ensure that local providers of goods and services notify the commission about health, safety and environmental standards, upcoming contracts, and compliance with local content plans.[60] Mineral rights-holders must also develop a procurement plan at least five years in duration that covers the use of a range of local services. While it is not explicit in the legislation, we presume that this procurement plan is part of the local content plan. There is a separate requirement to submit a detailed plan for training and employing Tanzanians. Mineral right-holders must submit: (1) an annual report on their "achievements in utilizing Tanzanian goods and services," (2) a report on their execution of "a programme prescribed in the regulations,"[61] (3) a detailed local supplier development program "in accordance with approved local content plans" and (4) an annual report on their program for training and recruiting Tanzanians. The annual report on training and recruitment shall also include a "clearly defined

57 Section 24 of the Amendments Act, adding new subsection 88(2) to the Mining Act. The National Gold and Gemstone Reserve is an entity under the control of the Bank of Tanzania. It was established under the Amendments Act to house minerals acquired by the government, whether as royalties, impounded minerals, purchased minerals, dividend minerals or otherwise (Section 12 of the Amendments Act, adding a new Section 27C).

58 Section 4 of the Amendments Act, amending Section 3 of the Mining Act.

59 There does not appear to be a residency requirement for Tanzanian citizens involved in such entities.

60 It is not clear who is actually supposed to be providing notice to the commission—whether it is the mining rights-holders or the local content providers.

61 The frequency of such reports is not clear.

training program" for a company's Tanzanian employees as well as a commitment to knowledge transfer. It should be noted that the Amendments Act specifies that technology transfer shall be a shared responsibility between the government and mineral right-holder. It is expected that regulations or a subsequent policy will provide further detail on implementation of technology transfer. Progress on the training programs is also to be reported annually, and license renewals or approvals of license transfers are to take into account performance under this new obligation.

Specific local content provisions are made in the Insurance Act 2009. These require raising the local ownership proportion of insurance brokers from one-third to two-thirds and require insurance coverage to be purchased from Tanzanian insurers (except where the relevant coverage is not available from Tanzanian insurers and approval is granted).[62]

In addition to these requirements, a new Section 100F of the Mining Act requires companies to "plough back" a portion of returns from the mining sector into the local economy. Annual reports are required to detail such efforts. While the required "portion of returns" to be invested is unclear, subsection 100F(4) considers the non-mandatory creation of a local investment plan, which would presumably provide an agreed basis for evaluating performance.

Integrity pledge. The integrity pledge "implies" that mineral rights-holders (1) "desist to engage in any arrangement that undermines or is in any manner prejudicial to" the country's financial, monetary and tax systems, (2) disengage from arrangements that are inconsistent with the country's economic objectives or prejudicial to national security and (3) maintain adequate insurance against various losses, injuries and damage. Noncompliance with the terms of the integrity pledge results in cancellation of the license and takeover of the facilities by the government.

Corporate social responsibility. Mineral rights-holders are also required to produce, on an annual basis, a corporate social responsibility (CSR) plan that must be jointly agreed-to with the relevant local government authority (in consultation with the minister responsible for local government authorities and the Minister of Finance and Planning). Local government authorities are also required by the act to prepare guidelines for CSR within their localities, oversee implementation and provide awareness to the public on CSR projects in their area.[63] Section 27 of the Amendments Act grants authority to draft regulations relating to local content and CSR obligations.

ENVIRONMENTAL PROTECTION

The Amendments Act specifies in a new Section 106 that the license-holder "and any other person who exercise or perform functions, duties or powers [sic]" under the Mining Act "in relation to mining operations shall comply with environmental principles and safeguards prescribed in the Environmental Management Act (EMA) and other relevant laws". The provision appears to be intended to explicitly extend environmental obligations under relevant laws beyond the mineral right-holder to anyone lawfully engaged in the mining operations (such as contractors). License-holders and contractors are also responsible for ensuring that the management of production, transportation, storage, treatment and disposal of waste from mining operations are carried out in accordance with the principles and safeguards

62 Sections 40 and 42 of the Amendments Act, amending Sections 67 and 133 of the Insurance Act.
63 Section 28 of the Amendments Act, adding new Part VIII to the Mining Act.

prescribed under the EMA and other relevant laws.

License-holders must now contract a separate and "competent" entity to manage transportation, storage, treatment and disposal of waste from mining operations; however, the license-holder remains responsible for these activities. These contractors must be licensed by the minister responsible for environment, with penalties of a fine or imprisonment for violations. However, the section also provides that the National Environmental Management Council may, in consultation with the commission, grant a license for the management, transportation, storage, treatment or disposal of waste to a person contracted by the license-holder to do same. It is unclear how this interacts with the subsequent subsection, which requires such a contractor to be licensed by the minister responsible for environment.

The Amendments Act imposes strict liability on license-holders for pollution damage. However, it also provides for the reduction of liability in cases of acts of nature, war or similar events beyond the control of the license-holder that contribute to the damage to a considerable degree.[64] Strict liability for pollution damage is also applied to those conducting mining operations without a license and extends to any other person who took part in the operations and knew or should have known that the activities were conducted without a license.[65]

The Amendments Act bars claims for damages against persons—other than license-holders and contractors—who attempt to mitigate pollution damage (unless such measures were taken in contravention of prohibitions imposed by the commission or by law). Persons employed by a license-holder or by a person who attempts to mitigate pollution damage (except in contravention of prohibitions) are similarly protected against claims for damages. Where a license-holder or contractor fails to pay compensation for pollution damage within the time stipulated by a judgment, the injured party may bring action against the party who actually caused the damage. License-holders and contractors may also bring an action for recourse against those who actually caused the damage. However, claims may not be made against persons exempt from liability, unless such person acted willfully or negligently. Recourse liability may also be mitigated to the extent considered reasonable in view of "manifested conduct, economic ability and the circumstances in general." It is not clear whether these mitigating factors will be further specified in regulations or whether determination of mitigating factors will be left to the courts. Jurisdiction over pollution damage suits has been specifically granted to courts "in the area where the effluence or discharge of mining operations takes place or where the damage is caused."[66]

64 Section 28 of the Amendments Act, adding new Section 108 to the Mining Act.
65 Section 29 of the Amendments Act, adding new Section 108 to the Mining Act.
66 Section 29 of the Amendments Act, adding new Sections 110-112 to the Mining Act.