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Resource nationalism redux: Some recent regulatory trends in Africa

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Overview

- Introduction
- Significant changes to Tanzania's mineral law regime
- Government intervention in South Africa
- Conclusion - the need for a social compact

Introduction

- Revival of resource nationalism policies tend to correlate with commodity prices – increasing during both commodity supercycles and commodity downturns.
- According to market cycle theory, commodity supercycles prompt an increase in state intervention as governments seek to increase their share of revenue from rising commodity prices.
- Likewise, during periods of depressed prices governments of resource dependent countries implement various policy interventions, protectionist measures and new laws to increase revenue to counteract decreased revenues.
- Resource nationalism presents itself in various forms, including raising taxes and royalties, increases in local content requirements, indigenisation and local equity requirements, domestic processing, value addition, and the review and renegotiation of contracts.

Introduction

- The policies implemented by Tanzania and South Africa in 2017 however appear to be exceptions to this general trend as global commodity prices are in neither a supercycle nor a downturn.
- This suggests that the reforms introduced by the Tanzanian and South African governments were caused by factors *other* than a *pure drive* to maximising socio-economic benefits.
- The *legislative* measures adopted by *Tanzania* in July 2017 result from a sense of *mistrust* between the government and mining companies, and the government's drive to secure *greater benefits* for the country.
- In South Africa, increased resource nationalist measures are seen in *Mining Charter III* (June 2017) which like its predecessors was published to *address the racial inequality* created by the country's Apartheid past.

Tanzania

Tanzania: Introduction and background

- The government of Tanzania has over the past year implemented various measures to increase its sovereignty over the country's natural wealth and resources.
- In March 2017 the then Ministry of Energy and Minerals announced a ban on the export of unprocessed mineral concentrates and ores.
- In April 2017, President Magufuli established two committees to investigate the mining sector:
 - the first, to investigate the contents of mineral concentrates in containers held at Dar es Salaam port; and
 - the second, to investigate the amount and value of mineral sand containers exported since 1998.

Tanzania: 2017 Laws

- The watershed moment occurred on 10 July 2017 when President Magufuli assented to three new laws which significantly increased government control over mining, oil and gas operations in Tanzania:
 - *Natural Wealth and Resources Contracts (Review and Renegotiation of Unconscionable Terms) Act, 2017;*
 - *Natural Wealth and Resources (Permanent Sovereignty) Act, 2017 ; and*
 - *Written Laws (Miscellaneous Amendments) Act, 2017* which amends the *Mining Act, 2010* and *Petroleum Act, 2015*.
- Among other things, the laws allow the government to *renegotiate or remove* terms from investor-state agreements that the Tanzanian Parliament considers "unconscionable"; *restrict* investors from *exporting* raw minerals, *repatriating funds*, and *invoking international dispute resolution mechanisms*; grants the government a *lien* over all 'won' minerals; and increase *royalty* rates and government shareholding in mineral right holders.

Tanzania: 2018 Regulations

- Six months after the laws were enacted the Minister for Mines published a suite of new regulations under the Mining Act, 2010.
- These regulations, among other things, impose *further* local shareholding requirements and strict local content quotas for employment and the procurement of goods and services.
- Some of the more onerous requirements provide that a mineral right holder:
 - must be at least five per cent owned by an “indigenous Tanzanian company”;
 - must comply with minimum quotas for recruitment and training as well as the procurement of local goods and services within prescribed time periods (stipulated under the First Schedule to the Mining Local Content Regulations, 2018); and
 - may only retain the services of Tanzanian financial institutions, legal practitioners, and insurance brokerage firms.

Tanzania: Economic consequences

- Apart from the obvious consequences which the recent legislative changes will have for mining and oil and gas companies, the new laws are likely to have a wider impact on Tanzania's economic development.
- According to the United Nations' *World Population Prospect* (2017 revision) Tanzania has one of the seven fastest growing populations in the world: currently at 53.95 million people and projected to almost double by 2050.
- To address the demands of a rapidly growing population Tanzania's economy needs to grow by at least 7 per cent per year to achieve the government's development objective of becoming a middle-income country by 2025.
- While economic growth over the past decade has been relatively strong, averaging around 6.5 per cent annually (above the average for the East African Community), recent studies indicate that economic activity appears to be declining.

Tanzania: Economic consequences

- The International Monetary Fund's *Tanzania - Seventh Review under the Policy Support Instrument* (January 2018) indicates that “*strong growth and job creation are needed to address high poverty and a large underemployed youth population*”.
- Tanzania's *Five-Year Development Plan, 2016/17–2020/21* (“**Plan**”) proposes to address this through private sector led investments and for the Government to “play a facilitative role mainly in terms of providing a conducive policy and quality regulatory framework”.
- The Plan however also acknowledges that “[a]n unfriendly business environment stifles the growth and competitiveness of domestic industry and frightens foreign direct investment (**FDI**).”
- The Fraser Institute's *Annual Survey of Mining Companies 2017* indicates that Tanzania may need to reconsider the changes to its mineral laws if it wishes to attract more FDI: on the survey's Policy Perception Index Tanzania ranked 78th out of the 91 jurisdictions surveyed, which is significantly lower than Africa's top performers: Botswana (21st), Namibia (39th), Mali (46th) and Morocco (48th).

South Africa

South Africa: Mining Charter III

- On 15 June 2017, the Department of Mineral Resources (“**DMR**”) published the Reviewed Broad-Based Black Economic Empowerment Charter for the South African mining industry (“**MC III**”).
- The requirements imposed by MC III ostensibly came into force with immediate effect and replaced the preceding Mining Charter II (2010) in its entirety.
- Among other things, MC III increased the minimum requirements for:
 - Black Person ownership for new prospecting (50+1 per cent) and mining right (30 per cent) applications as well as existing mining rights holders (30 per cent);
 - the procurement of local goods (70 per cent of mining goods procurement spend) and services (80 per cent of services spend); and
 - employment equity (50 per cent at board and executive management level, 60 per cent at senior management level, 75 per cent at middle management level, and 88 per cent at junior management level).

South Africa: Local content requirements

- MC III also introduced new requirements such as:
 - the holder of a new mining right must pay a minimum of 1 per cent of its annual turnover to Black Person Shareholders *over and above* any distributions to shareholders;
 - if vendor loans to Black Person shareholders are not repaid through dividends after ten years, the outstanding balance must be *written off* by the mining right holder; and
 - prospecting and mining right holders who sell their mining assets must give Black Owned Companies a *preferential option* to purchase them.
- Within twenty four hours of MC III being published the South African Rand fell by two percent and mining companies lost approximately ZAR 50 billion of their market capitalisation on the Johannesburg Stock Exchange.

South Africa: Consequences of Mining Charter III

- The unilateral imposition of MC III resulted in a complete breakdown in the relationship between the Minister of Mineral Resources (“**Minister**”) and industry.
- The provisions of MC III (as well as Mining Charter II) are currently the subject matter of two court proceedings:
 - In 2015, the Chamber of Mines (“**Chamber**”) and the then Minister approached the High Court for a declaratory order on the interpretation of some of Mining Charter II's more contentious provisions - predominantly around ownership.
 - On 26 June 2017, the Chamber approached the High Court for an urgent injunction to prevent the implementation of MC III, pending the final determination of an application for judicial review.
- MC III's impact is also illustrated by the *Fraser Institute's Annual Survey of Mining Companies 2017's* Policy Perception Index in which South Africa scored 5 per cent lower than last year and currently ranks 81st out of the 91 jurisdictions surveyed.

South Africa: Response to Mining Charter III

- The election of Cyril Ramaphosa as the African National Congress' President (on 17 December 2017) and more recently South Africa's President (on 15 February 2018) has however resulted in a change to South Africa's economic and policy trajectory.
- At the World Economic Forum in Davos the President indicated that South Africa is entering a "new era" which included urgent action to resolve the two-year standoff over MC III.
- Subsequent to this statement the government and the Chamber agreed to suspend the litigation surrounding MC III to resolve the impasse over its implementation.
- Last week the new Minister of Mineral Resources, Gwede Mantashe (a former trade unionist), announced a June deadline for a new comprehensively negotiated Mining Charter.
- While President Ramaphosa's recent intervention in the mining sector is an important first step in the right direction more will have to be done to promote regulatory certainty.

Conclusion: The need for a social compact

Conclusion: Need for a social compact

- The mining industry involves a variety of stakeholders: various government departments, the private sector, employees, trade unions, and mine affected communities.
- To address the *increasingly fractured relationship* between the different role players it is necessary that all parties concerned must participate in the formulation of a *social compact*.
- The social compact should:
 - compel the *government* to be accountable to:
 - its citizens by delivering the public goods and services that are appropriate given the ‘contract’;
 - the private sector by providing a *predictable business environment with clear and coherent rules and policies*;
 - encourage the private sector to recognise that their responsibilities extend further than their shareholders; and
 - ensure society acts in a manner which not only focuses on benefits but also the *citizens’ obligations*.

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