TANZANIA'S MINING LOCAL CONTENT REQUIREMENTS: UNVEILING REGULATORY AND PRACTICAL CONTROVERSIES

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Abstract

The article analyses Tanzania's Local Content Regulations with a view to establishing the extent to which the objectives behind the local content requirements can be achieved. It finds regulatory and practical controversies which, if not addressed, stand to inhibit the realisation of the intended objectives. These challenges include: (i) unrealistic and unreasonable requirements which necessitate every goods or service provider to comply with the Regulations, thus likely to frustrate the mining industry; (ii) stringent compliance regulatory requirements without regulatory clarity; and (iii) inconsistency between the Regulations and the parent Act, the Mining Act in this regard. The article argues that in a bid to realise the objectives behind local content requirements, the Regulations should be amended with a view to creating an enabling-environment through which the objectives behind local content requirements can be achieved while ensuring viability of investments.

Key words: *mining, local content regulations, national development, Tanzania,*

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1.0. INTRODUCTION

Tanzania is one of the African countries endowed with massive quantities of minerals. She depends on the mining sector, among others, for economic development.[1] The available minerals include gold, tin, nickel, iron, copper, zinc, lead, diamonds, uranium, and other various gemstones, including tanzanite which are exclusively found in Tanzania.[2] Other minerals available in Tanzania include coal and industrial minerals such as soda, kaolin, gypsum, phosphate, and dimension stones. Tanzania's mineral resources, among other natural wealth and resources, collectively belong to the people.[3] Such resources are inalienable in whatsoever manner and remain the people's property.[4] This responds to the national constitution which enjoins every person to protect the natural resources of the United Republic, the property of the State authority, all property collectively owned by the people, and also to respect another person's property.[5]

Based on this constitutional position, prospecting for, and mining of, minerals in Tanzania draws legal basis from the constitution and is implemented through statutes and regulations. The Government exercises the ownership and control of such resources on behalf, and for

[1]The Ministry of Finance and Planning, "A Speech on the Estimates of Government Revenue and Expenditure", 2020/2021, at p. 9; Poncian, J., "Mineral Extraction for Socio-Economic Transformation of Tanzania: The Need to Move from Papers to Implementation of Mining Policy and Law", 2(2) *Journal of Social Science Studies,* 2015, at p. 161.

[2] UNEP, "Analysis of Formalization Approaches in the Artisanal and Small-Scale Gold Mining Sector Based on Experiences in Ecuador, Mongolia, Peru, Tanzania and Uganda: Tanzania Case Study", 2012, at p. 4; Laporte, B., Quatrebarbes, C. and Bouterig, Y., "Mining Taxation in Africa: The Gold Mining Industry in 14 Countries from 1980 to 2015", 2017, at p. 24.

[3] Natural Wealth and Resources (Permanent Sovereignty) Act, Act No. 5 of 2017, s. 4(1).

[4] Id, s. 5(1); See also Written Laws (Miscellaneous Amendments) Act, Act No. 7 of 2017, s. 5(1).

[5] Cap. 2 of Laws of Tanzania, art 27(1).

the benefits, of the citizens.[6] Thus, all activities relating to the exploration of the mineral wealth and resources are conducted by the Government on behalf of the people.[7] How mineral resources are accessed and the extent to which the people, as the owners of such resources, benefit from such resources depend on the system devised by the Government – in particular through legal, regulatory, institutional and contractual frameworks.

In 2018, the Government of Tanzania introduced the Mining (Local Content) Regulations (the Regulations).[8] The Regulations are meant to implement the local content requirements in the mining sector as provided under section 102 of the Mining Act.[9] The Regulations intend to implement such aspects as: mineral right holders' preference to locally-obtainable goods and services; preference to local suppliers of such goods and services; employment and training of Tanzanians; investors' succession of non-Tanzanian employees over time; and technology and skills transfer to locals. As such, the Regulations intend to ensure that the mining sector contributes effectively and adequately to national development. This responds to the Mining Policy of 2009 which aims at maximising the mining sector's contribution to national development, in terms of employment and training of Tanzanians and procuring local goods and services while giving preference to local suppliers and producers with a view to creating local mining capacity.

The local content requirements are not new in Tanzania's mining industry. Applicants for various mineral rights under the Mining Acts of

[6] Act No. 5 of 2017, s. 4(2).
[7] Section 5(3).
[8] They came into force on 10 January 2018. However, the mining investors and other stakeholders were given a three month grace period within which to start complying.
[9] The Mining Act, Cap. 123 [R.E. 2019].

1979[10] and 1998[11] were required to accompany their applications with plans regarding procurement of locally produced goods or available services and proposals for employment and training of Tanzanians.[12] Thus, promulgation of the Regulations in 2018 did not introduce a new requirement, rather signified and bolstered the significance of the requirements for Tanzania's mining industry. A challenge that ensues is how to strike a balance between the country's economic objectives to be realised through local content requirements and viability of investments.

This article examines the adequacy of the Regulations with a view to establishing the extent to which they enable the mining sector benefit Tanzanians – owners of the entire mineral property. It finds that the intention behind the Regulations is worth cherishing – insofar as they intend to capacitate local population and ensure that Tanzanians do not remain revenues-oriented, rather, they participate in the mining operations as employees and goods and service suppliers. However, there are issues worth addressing. Such issues include unrealistic and unreasonable regulatory requirements which necessitate every goods or service provider to comply with the Regulations; stringent compliance requirements without regulatory clarity; imposition of imprisonment punishment in contravention of the parent Act, the Mining Act in this regard; and lack of enabling environment that would support successful implementation of the Regulations.

In light of the above-identified issues, the article argues for the amendment of the Regulations with a view to creating enabling environment for the local content objectives to be achieved. In a bid to create such environment and realise the intended objectives, it is

[10] Act No. 17 of 1979.
[11] Act No. 5 of 1998.
[12] Ss. 27(f), 29(3)(c), 31(2)(b), 37(2)(k), 39(3)(d)&(e) and 41(2)(b); See also ss. 38(4)(f), 39(1)(e), 41(2)(c), and 45(1)(c).

submitted that Tanzania needs to assess the existing environment in terms of availability of skilled personnel ready to replace the expatriates under succession plans; availability of goods and services and the impact of the local content requirements in ensuring that the sector contributes greatly to national development while at the same time creating investment-enabling environment. It further notes that not only the enforcement of the local content laws that triggers challenges, as it has been argued by some authors, rather, it is both the design and the enforcement of the laws. Apart from this introductory part, this article consists of other four parts. The second part addresses the meaning and rationale behind local content requirements and their significance to the resource-rich countries. The third part analyses Tanzania's mining local content Regulations. In doing so, the article adopts a descriptive approach with a view to addressing what is actually provided by the Regulations. The fourth part discusses the major regulatory and practical issues pertaining to local content requirements in Tanzania's mining sector. In so doing, it adopts analytical approach by indicating whether the local content requirements can be achieved and what should be done to address the identified challenges. The last part proffers conclusion.

2.0. MINING LOCAL CONTENT REQUIREMENTS: MEANING AND RATIONALE

2.1. Meaning of local content

There exists no clear-cut definition of the terms "local content". As Ramdoo puts it, local content is a multidimensional concept with substantially varying scope and depth.[13] It is defined as the value created and added to the communities surrounding the mines or rather areas

[13] Isabelle Ramdoo, "Unpacking Local Content Requirements in the Extractive Sector: What Implications for the Global Trade and Investment Frameworks?" International Centre for Trade and Sustainable Development, 2015, at p. 1; See also Boniphace Luhende, "Examining the New Local Content Regime in the Mining Sector in Tanzania", 47(2) Eastern *African Law Review*, 2020, at pp. 40-41.

where mining operations are carried out.[14] Various criteria that are normally used in defining local content include local ownership of companies servicing the sector in question; local employment and training; local procurement of goods and services and local value addition in view of creating economic linkages. The Organisation for Economic Cooperation and Development (OECD) defines local content as:

Local content (also referred to as "National Content" or "Name of country or other geographic area Content") is generally understood to be the local resources a project or business utilises or develops along its value chain while investing in a host country. This may include employment or inputs, goods and services procured from local sources, locally hired workforces, operations carried out in partnership with local entities, development of enabling infrastructure, the improvement of domestic capacity, or the improvement of local technological capabilities.[15]

From the OECD's definition, it is clear that local content generally denotes tools or methods which countries with natural resources deploy to generate economic benefits from their endowed natural resources by reinforcing the use of local goods and services and employment and training of local persons, among others.[16] In Tanzania, section 3 of the Mining Act defines local content 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 of indigenous of Tanzania and to encourage local investment

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[14] Ramdoo, 2015, at p. 1.
[15] OECD Collaborative Strategies for In-Country Shared Value Creation: Framework for Extractive Projects, OECD Development Policy Tools, Paris, 2016, at p. 22.
[16] Asiago, B.C., "Fact or Fiction: Harmonising and Unifying Legal Principles of Local Content Requirements", 34 J Energy & Nat Resources L, 2016, at p. 337.

and participation. As such, local content entails creating local capacity by requiring strict involvement of local population throughout the mining value chain, that is, from prospecting through to beneficiation of the won raw minerals in terms of employment, supply of goods and services such as insurance, legal and financial services.

2.2. Rationale behind local content requirements

Regarding the rationale of local content requirements, there exist various debates on how African resource-rich countries can benefit from their natural resources. Studies and reports indicate that economies of resource-rich countries, especially in Africa, perform poorly compared to resource-poor countries. The narration regarding such poor economic performance on the part of resource-rich countries and good economic performance in other countries without abundance of natural resources is described as a resource curse paradox.[17] Resource curse literature indicates that African resource-rich countries experience abject poverty, human rights violations, brutal and arbitrary displacement of indigenous people, corruption, rent seeking, environmental pollution and worse, the host communities experience more risks than other areas in terms of health and safety, among others. These result from poor resource management, corruption, and poor negotiating power, lack of transparency and accountability, and weak institutions in determining the relevance and impact of the resources, among others.[18]

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[17]Jingi, M.J., "Integrity First: Why Mineral Wealth not a Blessing for Africa", The Citizen Dar es Salaam), 4 June 2017 available at https://bit.ly/3xK7Hl7 (accessed 13 June 2022); Hamilton, K., Ruta, G. and Tajibaeva, L., "Capital Accumulation and Resource Depletion: A Hartwick Rule Counterfactual", *Environmental & Resource Economics,* 2006, at p. 517; Carmignani, F. and Chowdhury, A., "Why are Natural Resources a Curse in Africa, But not Elsewhere?", at p. 3.

[18] World Bank, "Strategy for African Mining: Mining Unit, Industry and Energy Division", *World Bank Technical Paper Number*, 1992; Leong, W. and Mohaddes, K., "Institutions and the Volatility Curse", 2011; Williams, A., "Shining a Light on the

The most cited countries include Nigeria especially in the Niger Delta that rather than any affluence from the oil reserves, only poverty, diseases, environmental pollution, and arbitrary displacement of citizens without compensation have accrued to the local population.[19] Other notable resource curse indicators in Nigeria include the country's protection of international mining companies' interests over those of local population, thereby depriving the citizens' rights over natural resources.[20] This has resulted in frequent conflicts between the citizens and the government, on the one hand, and between the citizens and IMCs, on the other.[21] The same situation appears in the Democratic Republic of Congo (DRC)[22] and South Sudan.[23] On the other hand, the situation in few African countries such as Botswana and Namibia is

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Resource Curse: An Empirical Analysis of the Relationship between Natural Resources, Transparency and Economic Growth", 39(4) *World Development,* 2011, at p. 490.

[19] *Olawuyi, D.S., Extractives Industry Law in Africa,* Springer, 2018, at p. 6; Africa: Why Nigerian Activist Ken Saro-Wiwa was Executed?, available at https://bit.ly/3zB3CkE (accessed 13 June 2022); See also Wifa, E. and Adebola, T., "Triumph for Farmers and Fisherfolks: The Hague Court of Appeal finds Shell Liable for Oil Spills in Nigeria", available at https://bit.ly/3OeLvFg (accessed 13 June 2022).

[20] Africa: Why Nigerian Activist Ken Saro-Wiwa was executed?

[21] Cyril Obi, C., "Oil and Conflict in Nigeria's Niger Delta Region: Between the Barrel and the Trigger", 1 *The Extractive Industries and Society*, 2014, at p. 150; Ukeje, C., "Oil Communities and Political Violence: The Case of Ethnic Ijaws in Nigeria's Delta Region", 13(4) *Terrorism and Political Violence*, 2001; See also Poncian, J., "Extractive Resource Ownership and the Subnational Resource Curse: Insights from Tanzania" 6 *The Extractive Industries and Society,* 2019, at p. 334.

[22] Mcferson, H., "Governance and Hyper-corruption in Resource-rich African Countries" 30(8) *Third World Quarterly*, 2009, at p. 1536; Haber, S. and Victor Menaldo, V., "Do Natural Resources Fuel Authoritarianism? A Reappraisal of the Resource Curse" 105(1) *American Political Science Review*, 2011, at p. 1; Poncian, J. and Kigodi, H.M., "Natural Resource Conflicts as a Struggle for Space: The Case of Mining in Tanzania" 4(3) International and Multidisciplinary Journal of Social Sciences, 2015, at p. 273.

[23] M Suliman, K., "Understanding and Avoiding the Oil Curse in Sudan", in Elbadawi, I. and Selim, H. (eds), *Understanding and Avoiding the Oil Curse in Resource-Rich Arab Economies*, Cambridge, Cambridge University Press, 2016, at p. 430.

gratifying.[24] Such a positive situation stems from good natural resources management associated with institutional quality.[25]

As a result of devastating situation in most African mineral-producing countries, African countries have adopted various measures with a view to ensuring that they benefit from their resources. Such initiatives include local content requirements which, in addition to fiscal benefits, are generally intended to generate economic benefits for the local economy by maximising value-addition and job creation through use of local expertise, locally produced goods and services, businesses and financing in the mining value chain; developing local capacities in education; skills transfer and expertise development; transfer of technology know-how; achieving minimum local employment level and in-country spending for provision of locally obtainable goods and services; and increasing competitiveness of domestic businesses.[26]

Tanzania is no exception in terms of opportunities and challenges from mineral resources and wealth. The historical survey of the Tanzanian mining sector and its legal framework reveals a situation similar to other African countries endowed with natural resources. There have been human rights violations evidenced by loss of people's lives, destruction of properties, and brutal eviction of Tanzanians from their settlements

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[24] World Bank, "Skills Implications of Botswana's Diamond Beneficiation Strategy", 2014, at p. 2; Nalule, V.R., *Mining and the Law in Africa: Exploring the Social and Environmental Impacts,* Springer, 2020, at p. 3.

[25] Robinson, J.A., Torvik, R. and Verdier, T., "Political Foundations of the Resource Curse", 79(2) *Journal of Development Economics*, 2006, at pp. 448-449; Holm, J.D., "Botswana: One African Success Story", 93(583) *Periodicals Archive Online,* 1994, at p. 201.

[26] Ramdoo, 2015, p. 1; Maliganya, W. and M K Bengesi, K.M.K., "Policy Enabling Environment of Mining Sector in Tanzania: A Review of Opportunities and Challenges" 11(4) *Journal of Sustainable Development,* 2018, at p. 4; Lange, S. and Kinyondo, A., "Resource Nationalism and Local Content in Tanzania: Experiences from Mining and Consequences for the Petroleum Sector" 3 *Extractive Industries and Society,* 2016, at p. 1096; Tanzania's Mining (Local Content) Regulations, 2018, reg. 4; See also Ghana's Minerals and Mining (Local Content and Local Participation), 2020, reg.1.

even against court rulings.[27] Besides, despite the mining policy and legal reforms that have been undertaken by the Government, ensuring that Tanzanians benefit from the endowed mineral resources remains a challenge. Such a poor nexus between mineral resources and socio-economic development has triggered various Presidential commissions and committees in view of looking into challenges retarding Tanzania's mining sector.

Notable is the Presidential Probe Committee of Experts formed in 2017 to investigate economic and legal issues related to the exportation of mineral concentrates.[28] The Committee found that for 19 years, Tanzania had lost 108.46 Trillion Tanzanian Shillings from mining operations. Consequently, the Government reformed the mining legal and institutional framework by amending the Mining Act through the Written Laws (Miscellaneous Amendments) Act[29] by establishing the Mining Commission; increasing royalty rates, introducing mandatory domestic state mining participation; and limitation of exportation of raw minerals. Also, the Government enacted the Natural Wealth and Resources (Permanent Sovereignty) Act [30] which reasserts the people's resource sovereignty and the Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act[31] which regulates the review and renegotiation of natural resources-related agreements. The Government has described these seemingly

[27] Chachage, C.S.L., "The Meek Shall Inherit the Earth but Not the Mining Rights: The Mining Industry and Accumulation in Tanzania" in Gibbon, P. (ed), *Liberalized Development in Tanzania: Studies on Accumulation Processes and Local Institutions* (Nordiska Afrika institutet, 1995, at pp. 38-39; See also Tundu Antiphas Lissu, T.A., "In Gold We Trust: The Political Economy of Law, Human Rights and the Environment in Tanzania's Mining Industry" 2 *Law, Social Justice & Global Development,* 2001 available at https://bit.ly/3aSLU1n (13 June 2022).

[28] Shiyo, J., "Tax Justice in Tanzania: Magufuli Investigating Contracts with Acacia Mining", available at https://bit.ly/3MFdCvW (accessed 13 June 2022).

[29] Act No. 7 of 2017.

[30] Act No. 5 of 2017.

[31] Act No. 6 of 2017.

"nationalistic and revolutionary" reforms as efforts towards addressing the long-term historical injustices in the extractive sector.[32] It is **in** the same spirit of resource nationalism, Tanzania adopted the local content requirements.[33]

3.0. LEGAL, REGULATORY AND INSTITUTIONAL FRAMEWORK

The local content provisions in the Mining Act are implemented through the Regulations. The Regulations enjoin contractors, subcontractors, corporations, licensees or allied entities carrying out mining activities to comply with the local content requirements.[34] The Regulations give preference to an Indigenous Tanzanian Company (ITC) in the acquisition of goods and services relevant to mining activities.[35] To acquire an ITC status, a company should be incorporated under the Companies Act,[36] with at least 20% of its equity owned by Tanzanians; and with Tanzanians holding at least 80% of executive and senior management positions, and 100% of non-managerial and other positions.[37]

The Regulations also create mechanisms through which the Mining Commission can establish the amount of local content levels to be achieved by mining investors and other stakeholders. The minimum local content levels that should be achieved are established under the First Schedule to the Regulations. For example, the schedule sets the relevant

[32] Jacob, T. and Pedersen, R.P., "New Resource Nationalism? Continuity and Change in Tanzania's Extractive Industries", 5 *The Extractive Industries and Society*, 2018, at p. 290.
[33] Poncian, J., "Galvanising Political Support through Resource Nationalism: A Case of Tanzania's 2017 Extractive Sector Reforms", 69 *Political Geography,* 2017, at p. 78.
[34] Reg. 7.
[35] Reg. 8(1) & 14.
[36] Cap 212 of 2012.
[37] GN. No. 3 of 2018, reg. 3; the Mining (Local Content) (Amendments) Regulations 2019, GN. No. 3 of 2019 reg. 2.

percentages of local employees of all available employees from the start 30% for management staff; 20% for technical core staff; and 80% for other staff); after five years (increase to 50-60% for management and technical core staff and 90% for other staff; and after ten years (increase to 70-80% for management and technical core staff and 100% for other staff). The same applies to goods and services procured by the contractors, subcontractors, licensees and allied entities.

3.1. Monitoring mechanisms: local content plans and performance reports

All contractors, subcontractors, corporations, licensees or allied entities carrying out mining activities are required to submit local content plans; both five year and annual plans.[38] Such plans should include sub plans addressing employment and training; research and development; technology transfer; legal services; and financial services.[39] Besides, the contractors, subcontractors, licensees or allied entities are enjoined by the Regulations to submit quarterly forecasts indicating the proposed contracts or purchase orders to be procured in the next quarter.[40] This can be translated as quarterly procurement plans. As indicated below, the submitted sub plans should address provision of goods and services available in Tanzania; provision of such goods and services by Tanzanians, in particular ITCs; training and employment of Tanzanians; and technology transfer, among others.

3.1.1. Provision of goods and services by Tanzanian entrepreneurs

All right holders in Tanzania should give preference to the goods produced or available in Tanzania, or services provided by Tanzanians

[38] Id. reg. 10.
[39] Id. reg. 12(3).
[40] Id. reg. 17.

or local companies.[41] Where the required goods are not available in Tanzania, they should be provided by local companies which are in joint ventures with foreign companies,[42] and such local companies should own shares of at least 25% in such joint ventures or otherwise as indicated in the regulations.[43] In implementing this requirement, the right holders are required to prepare and submit to the Mining Commission procurement plans for at least five years.[44] The submitted procurement plans should indicate, *inter alia*, the use of local insurance, financial, legal, accounts, security, cooking, catering, and health services provided or available in Tanzania; and works, goods, and equipment manufactured, produced, or available in Tanzania.[45]

The mineral rights holders are required to notify the Mining Commission on the quality, health, safety, and environmental standards they require; upcoming contracts as early as practicable; and compliance with the approved local content plans.[46] The goods and service providers should add value to meet health, safety, and environmental standards of the mining operations.[47] Besides, the right holders are required to report to the Mining Commission, within 60 days after the end of each calendar year, their achievements in utilising the Tanzanian goods and services in that year.[48] The holders are further required to report to the Mining Commission the execution of work programmes, and the detailed local supplier development programmes as per the approved local content plans.[49]

[41] Mining Act, 2010, s. 102(1).
[42] Mining Act, 2010, s 102(2).
[43] Id, s. 102(3); GN. No. 3 of 2018, reg. 8(6).
[44] Id, s. 102(4).
[45] Id, s. 102(4) (a) & (b).
[46] Id, s. 102(5).
[47] Id, s. 102(6) (a).
[48] Id, s. 102(7).
[49] Id, s. 102(8).

3.1.2. Training and employment of Tanzanians

Training and employing Tanzanians by the mineral rights holders in conducting mining operations is one of the licensing requirements under the Mining Act. The applicants are required to submit plans on the employment and training of Tanzanians and succession of expatriate employees. As part of the local content plans, the mineral rights holders are required to submit the detailed programmes for recruitment and training of Tanzanians. Such submission should be done within 12 months after the grant of a mineral right and on each subsequent anniversary of that grant.[50] In recruiting and training Tanzanians in all phases of mining operations, adherence should be on gender, equity, persons with disabilities, host communities, and the succession plans.[51] For promoting equality and fairness in the workplace, it is prohibited to practise discrimination concerning payment of salaries to employees of the same cardre regardless of their colour, faith, and nationality.[52] The programme or scholarship approved by the Mining Commission, execution of which should be reported annually by the right holders, cannot be amended without the Mining Commission's permission.[53]

3.1.3. Training and technology transfer

The annual report submitted by the mineral right holder to the Mining Commission on the execution of the training and recruitment of Tanzanians programme should address various aspects. First, it should address a clearly defined training programme of the right holder's Tanzanian employees, which may be carried out within or outside Tanzania. This programme may include scholarships and other financial support for education. Secondly, it should address the mineral right

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[50] Id, s. 103(1).
[51] d, s. 103(2).
[52] Id, s. 103(3).
[53] Id, s. 103(4) & (5); GN. No. 3 of 2018, reg. 37.

holder's commitment to maximise knowledge transfer to Tanzanians. In doing so, the holder should establish management and technical capabilities and facilities for the technical work such as interpretation of data. Thirdly, it should address the holder's commitment to reserve adequate practical training opportunities for studies from local training institutions.[54]

The right holder's support on the technology transfer may be through the formation of joint ventures, partnering of licensing agreements between ITCs or citizens and foreign contractors, and service companies or supply companies.[55] Through the Minister's consultation, the relevant government agencies, by collaborating with the Mining Commission, may propose fiscal incentives to assist the foreign companies to develop technical capacity and skills of citizens, and the ITCs to establish factories and production units in the country.[56] Despite these requirements on the right holders, ensuring the technology transfer is a shared responsibility between the government and the right holders.[57] The right holder is required to report the progress by Tanzanians in the training programme and measures taken to address the identified learning gaps.[58] The technology transfer report is submitted annually to the Mining Commission stating the technology transfer initiatives being pursued and the current results concerning the technology transfer sub-plan.[59]

[54] Id, s. 104(1)(a-c).
[55] GN. No. 3 of 2018, reg. 28(1).
[56] Id. reg. 28(2) & (3).
[57] Mining Act, 2010, s. 104(2).
[58] Id, s. 104(3).
[59] Id, s. 104(4); See also GN. No. 3 of 2018, reg. 29.

3.1.4. Legal, financial and insurance services

Under the Regulations, contractors, subcontractors, corporations, licensees or allied entities carrying out mining activities are required to only retain the services of Tanzanian legal practitioners or law firms of Tanzanian legal practitioners whose principal offices are located in Tanzania.[60] This should be indicated in the legal services sub plan which indicates a comprehensive expenditure report on legal services utilised in the preceding 6 months; forecast of legal services required during the following 6 months and an annual legal services budget. Although a Tanzanian legal practitioner is not defined by the Regulations, these are likely to be those who are advocates of the High Court of Tanzania and appear in the Roll of Advocates.

Further, contractors, subcontractors, corporations, licensees or other allied entities carrying out mining activities must only retain the services of a Tanzanian financial institution or organization. According to the Regulations, "a Tanzanian financial institution or organisation" and "foreign financial institution or organization" have the meaning ascribed to them under the Banking and Financial Institutions Act.[61] The Bank and Financial Institutions Act defines a financial institution as an entity engaged in the business of banking, but limited as to size, locations served, or permitted activities, as prescribed by the Bank or required by the terms and conditions of its licence.[62] To engage foreign financial institutions, the Mining Commission's approval is required.[63] In the same vein, contractors, subcontractors, corporations, licensees or other allied entities are required to maintain a bank account with a Tanzanian bank and transact business through banks in the country.[64] A Tanzanian Bank

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[60] Id, reg. 32 and 33.
[61] Id, reg. 34(3.
[62] Banking and Financial Institutions Act, Act No. 5 of 2006, s. 3.
[63] GN. No. 3 of 2018, reg. 34(2).
[64] Id, reg. 36(1).

means a bank that has 100% Tanzanian or not less than 20% of Tanzania shareholding.[65] This should be read in conjunction with section 10 of the Natural Wealth and Resources (Permanent Sovereignty) Act which requires the mineral right holders to retain their earnings in the banks and financial institutions established in Tanzania.

As such, financial services sub-plans must specify the financial services utilised in the past six months and expenditure thereon and forecast of financial services required during the following six months.[66] Besides, all insurance covers should be procured from Tanzanian Indigenous brokerage firms or where applicable indigenous reinsurance brokers. Offshore insurance services relating to a mining activity in Tanzania may be allowed if a written approval obtained from Commissioner of Insurance, upon exhaustion of Tanzania's capacity.[67]

3.1.4. Citizen's participation in mining operations

The amendment of the Mining Act through Act No. 7 of 2017 came with the mandatory state participation in mining operations by acquiring a minimum 16% non-dilutable free carried interest shares in the capital of the mining company holding a mining licence or special mining licence.[68] Besides, section 8 of the Natural Wealth and Resources (Permanent Sovereignty) Act requires that in any authorisation granted for the extraction, exploitation or acquisition and use of natural wealth and resources, there should be arrangements made to ensure that the Government obtains an equitable stake in the mining venture and the people of the United Republic are able to acquire stakes in the venture. This cements on what is provided by section 126 of the Mining Act

[65] Id, reg. 36(2).
[66] Id, reg. 35.
[67] Id, reg. 30 and 31.
[68] Mining Act, 2010, s. 10.

which empowers the Minister for Minerals, in consultation with holders of special mining licences, to make regulations prescribing a minimum shareholding requirement and procedures for selling shares to Tanzanian nationals, in accordance with the provisions of the Capital Market and Securities Act with a view to offering shares to the public through listing with the Dar es Salaam Stock Exchange.

The Mining (Minimum Shareholding and Public Offering) Regulations require the minimum local shareholding of a holder of special mining licences to be 30% of the total issued and paid up shares.[69] Such minimum local shareholding is obtained through public offering in accordance with the Capital Markets and Securities Act. This requirement may be waived by the Minister upon application by the holder of special mining licences who fails to secure minimum local shareholding.[70] It is also noted that where a special mining licence holder enters into an agreement with the Government and the agreement provides for non-dilutable free carried interest shares in the mining company's capital and economic benefits sharing arrangement, the minimum local shareholding does not apply to such holder.[71] All these are Government's efforts to ensure the mining sector's contribution to the national economy is greatly maximised.

4.0. MAJOR REGULATORY AND PRACTICAL CONTROVERSIES

This part discusses the available regulatory and practical issues as posed by the Regulations. It indicates, among others, that although it is not the apparent spirit of the Regulations, in practice, the Regulations are

[69] GN. No. 286 3 of 2018, reg. 4(1) as amended by the Mining (Minimum Shareholding and Public Offering) (Amendment) Regulations, GN. No. 181 of 2020.
[70] Id, reg. 4(2).
[71] Id, reg. 6A.

implemented to cover almost all services and goods providers in Tanzania despite the fact that some of the goods or services provided do not directly relate to the mining activities. It also indicates inconsistency between the Regulations and the parent Act, the Mining Act in this regard. The part addresses such aspects as; local content as a dance floor for all; inconsistency between the Regulations and the Mining Act; and issues relating to ITC and Joint Venture Companies.

4.1. Local content compliance as a dance floor for all

Primarily, the Regulations apply to the contractors, subcontractors, licensees, corporations and other allied entities carrying out mining activities.[72] As indicated above, these entities should ensure that local content is a component of their mining activities.[73] This requirement is enhanced through conditions imposed by the Mining Act in applications for mineral rights.[74] As indicated elsewhere in this article, all applications for mineral rights should be accompanied by local content plans, among other supporting documents. It is important to look at the definitions of the subjects to which the Regulations apply especially contractors, subcontractors and allied entities.

In terms of Regulation 3, whereas a contractor is a person who is a party to a contract with a licensee within or outside the United Republic for provision of goods and services, a subcontractor is a third party to whom a corporation or contractor has entered into a contract for provision of goods and services for mining operations.[75] These definitions came following the amendments to the Regulations in 2022. Prior to the 2022 amendments, while a contractor was a person who was a party to a

[72] GN. No. 3 of 2018, reg. 7.
[73] Id, reg. 14.
[74] Mining Act, 2010, ss. 41(3)(j); 49(2)(j); and 54(2)(d).
[75] See also the Mining (Local Content) (Amendment) Regulations, GN. No. 479 of 2022, reg. 2(a) and (b).

mining agreement with the United Republic to undertake mining exploration and production activities, a subcontractor was a third party with whom the corporation or a contractor had entered into a mining contract for the provision of services for mining operations. Despite the above, the Mining Commission enforced the Regulations against service providers with no mining agreements or contracts, such as law firms on the ground that they offer services to the mining sector. This triggered the debate among mining sector stakeholders. Consequently, the 2022 amendments came in. These amendments have widened the scope of the application of the Regulations, that is, whoever is contractually obliged to provide goods or services to the mineral right holder/licensee falls squarely within the meaning of the term "contractor" and thus, liable to comply with the Regulations. With these amendments, therefore, all service providers, including telecom companies, caterers, law firms, financial institutions are legally enjoined to submit local content plans and performance reports to the Mining Commission, among other reporting requirements under the Regulations.

The Regulations do not define the term "allied entity". However, regulation 7 attempts to provide the meaning of the term "allied entity" in as far as compliance with the Regulations is concerned. In terms of regulation 7, a contractor, subcontractor, licensee, the Corporation or other allied entity carrying out a mining activity should ensure that local content is a component of the mining activities engaged in by that contractor, subcontractor, and licensee, the Corporation or other allied entity. Reading regulation 7 suggests that such an entity should be 'allied' to a contractor, subcontractor, corporation or licensee and should be carrying out a mining activity. As such, if an entity is allied to a contractor, subcontractor, corporation or licensee, but is not carrying out mining activities, it is not an allied entity for purposes of complying with the Regulations and, therefore, should not be subjected to such Regulations.

It is clear from the Regulations, as indicated above, that mining companies should secure financial, legal, insurance and even telecommunication services from Tanzanian institutions. The institutions providing such services should be indicated in the local content plans and performance reports submitted to the Mining Commission by contractors, subcontractors, licensees or allied entities carrying out mining activities. From the author's experience, there has been an emphasis from the Mining Commission, even prior to the 2022 amendments, that all service or goods providers to mining companies should comply with the Regulations, including submission of local content plans, forecasts and performance reports, both annual and quarterly. Such a practical, not regulatory, requirement targeted banks and other financial institutions for financial services; law firms for legal services; telecommunication companies for telecommunication services; catering companies, and insurance companies, among others. To make it regulatory, the 2022 amendments not only widened the scope of contractors and subcontractors, as indicated above, but also the meaning of mining activities which now includes provision of goods or services for purposes of mining operations.[76] Thus, whatever the nature of the agreement between the service provider and the licensee, so long as there is provision of goods or services, the goods or service provider should comply with the Regulations.

Based on the above, for banks, law firms, insurance, telecom and catering companies, complying with the Regulations is no longer a matter of practice, rather, a matter of law. However, some areas may need clarity. For example, in terms of regulation 10, all contractors, subcontractors, licensees or allied entities are required to submit local content plans to the Mining Commission when applying to undertake mining activities. Service providers including law firms and other service providers of a

[76] Id, reg. 2.

similar nature do not apply to the Mining Commission to undertake mining activities, i.e., provision of goods and services. This communicates clearly the initial intention of having only those engaging in activities related to the exploration for, development and production of minerals; acquisition of data, mining and extraction or mining of minerals, storage, transportation and decommissioning and the planning, design, construction, installation, operation and use of any facility for the purpose of the mining operations complying with the Regulations.[77]

It is submitted here that although legal services, telecom services, financial services and insurance service providers do provide services to mining companies, they should be exempted from the reporting requirements under the Regulations, lest all service and goods providers will be subjected to the Regulations. This stands to frustrate the industry to the detriment of Tanzania and those to whose benefits the Regulations were promulgated. To address the issue, the Regulations should be administered against those involved in the mining activities or supplying goods and services that are directly relevant to the mining activities such as, acquisition of data, storage, transportation and decommissioning and the planning, design, construction, installation, operation and use of any facility for the purpose of the mining operations.

It is sufficient to ensure the contractors, subcontractors and licensees, among others subjects, indicate the source of their services and institutional set ups of such service providers. This will not defeat the objectives for which the local content requirements are imposed. In other words, requiring a contractor to indicate the law firm, a number of lawyers who supply legal services and such lawyers' nationalities is line with regulation 32 which requires a contractor to retain legal services from a Tanzanian law practitioner or a law firm of Tanzanian law practitioners suffices. For meaningful implementation of the

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[77] Id, reg. 3.

Regulations, those whose services, such as technical services, are wholly and exclusively consumed by the mining companies should be required to comply with reporting requirements. With other service providers who service the mining sector along with other sectors should be left out of the scope of the Regulations.

4.2. Regulatory issues pertaining to ITC and joint venture arrangements

All contractors, subcontractors, licensees or allied entities carrying out mining activities must give preference to an Indigenous Tanzanian Company (ITC). The Regulations define an ITC as a company incorporated under the Companies Act; has at least 20% of its equity owned by a citizen or citizens of Tanzania; Tanzanian citizens holding at least 80% of executive and senior management positions; and 100% of non-managerial and other positions.[78] These three criteria are not mutually exclusive; they must co-exist for such a company to be an ITC. By giving preference to an ITC, the Regulations aim to ensure that Tanzanians participate in the mining operations and the benefits thereof in terms of employment opportunities and providing locally-produced goods and locally-obtainable services. This implies that non-ITCs can only service Tanzania's mining industry in the absence of capable ITCs.

However, for non-ITC to service the mining sector, it should incorporate a company and operate it from Tanzania[79] and supply goods or services with an ITC by incorporating a joint venture company where an ITC holds at least 20% of shares in the incorporated joint venture company.[80] It is noted that where a foreign company incorporates an ITC with 80% of its shares owned by such foreign company and proceeds to

[78] Id, reg. 3.
[79] Id, reg. 15(5)(a).
[80] Id, reg. 8(6) & 15(5)(b); See also GN. No. 479 of 2022, reg. 5.

incorporate a joint venture company with such ITC holding 20% of the shares in the joint venture company, some issues may arise in relation to the ultimate benefits accruing to Tanzanian shareholders. Given that 20% of the proceeds distributed to ITC from the Joint Venture Company would be shared between the foreign company that holds 80% and Tanzanians who hold 20% shares in such ITC, ultimately Tanzanians will remain with only 4% ownership, and not 20% as intimated by the Regulations. It is also noted that such a provision, on joint venture arrangement, may be used by multinational companies to hinder the Government from achieving the objective of the Regulations by either adopting the above structure which leads to local ownership of 4% or use Tanzanians as a conduit, thus circumventing the Regulations and their objectives.

In practice, the Mining Commission critically scrutinises the Joint Venture arrangements for purposes of local content compliance. It may go further to avoid such arrangement on the ground that such arrangement waters down the objectives for which the Regulations are meant.[81] It is noteworthy that for successful local content initiatives, as it is indicated in the introductory part, there must be serious investment in the infrastructure, but also, economic capacity of the service and goods providers should be considered. This intends to avoid having comprehensive Regulations which cannot be implemented successfully. This was a case with Botswana, one of the cited African countries that have a gratifying record regarding benefits from the mining sector, diamond mining in particular.[82] If a foreign company has huge capital, it may be hardly possible to have an ITC capable **of** contributing 20% to the Joint Venture Company. Although such arrangements may be

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[81] Mining Commission Official, Interview by author (17 May 2022, Dar es Salaam).

[82] Acemoglu, D., Johnson, S. and Robinson, J.A., "An African Success Story: Botswana", 2003, at pp. 4-21 available at https://bit.ly/3Qi4tMU (accessed 13 June 2022); Serikbayeva, A., "Botswana: an African Success Story", 2017, https://bit.ly/3txIZSh (accessed 13 June 2022).

intentionally designed to distort local content objectives, there are genuine possibilities where capable local companies are not available for local ownership purposes, thus necessitating such Joint Venture arrangements.

With the above analysis, it is important to note that there are legal and economic issues associated with the local ownership requirement and Joint Venture arrangements. First, the 4% local ownership would only arise if 20% of a Joint Venture Company's shares, which is held by an ITC, is divided between local shareholders and foreign shareholders of such ITC as indicated above. In such circumstances, the ITC's foreign shareholders would be entitled to 16% of benefits obtained from the Joint Venture Company and the local shareholders would be entitled to 4% of such benefits.

It is noteworthy, however, that this division only intends to establish the ultimate economic effect of the Joint Venture arrangement in as far as local ownership is concerned, i.e., who ultimately benefits more from the arrangement and whether the economic impact of 20% local ownership is implemented to the letter. This is unfortunately true that, economically, local personnel would own 4%, and not 20%. Given that an ITC is a local person in law, its 20% in a Joint Venture Company is sufficient to establish local ownership as required by the Regulations. A Joint Venture Company will have, therefore, complied with the Regulations regarding local ownership. As such, any argument regarding 4% local ownership should take note that such arrangement is in line with the Regulations. Such arrangement cannot, unfortunately, be termed as a crime, in a strict legal sense, unless the Joint Venture is used as a conduit for ulterior purposes. The only way to avoid this perceived pseudo arrangements is having capable local personnel and companies.

4.3. Sole sourcing vis-à-vis competitive tendering

Contractors, subcontractors, corporations, licensees or allied entities carrying out mining activities are required to inform the Mining Commission in writing of each proposed contracts or purchase orders related to mining activities which are to be sole sourced and the proposed contracts or purchase orders which are to be sourced by way of competitive bidding, provided that their value is estimated to be in excess of 100,000 US Dollars.[83] This implies that the Mining Commission should be informed of the proposed contracts or purchase orders which are to be sole sourced regardless of their value, provided that such contracts or orders relate to mining activities. On the other hand, in the case where such contracts or purchase orders are to be sourced by way of a competitive bidding, the Mining Commission is only informed if the value of such contracts or orders is estimated to exceed 100,000 US Dollars.

Regulation 16(2) imposes an obligation on the contractors, subcontractors, corporations, licensees or allied entities carrying out mining activities to submit various documents to the Mining Commission for approval. The Mining Commission communicates its decision within 10 working days of receipt of the submitted documents.[84] If no decision (without good cause) within 10 days, documents are deemed approved. The submitted documents are advertisements relating to the expression of interests; request for proposals; prequalification criteria; technical bid documents; technical evaluation criteria and; and other information as may be requested by the Mining Commission. It is important to note that the Mining Commission allows sole sourcing sparingly. In other words, it discourages procurement through sole

[83] GN. No. 3 of 2018, reg. 16(1).
[84] Id, reg. 16(3).

sourcing and encourages competitive bidding in view of giving bidding opportunities to Tanzanians and local companies.

As already indicated, the Regulations give preference to locally obtainable goods and services and local suppliers, i.e., ITCs. However, **the** unexpected may happen where the required goods or services are not available in Tanzania. The situation may be exacerbated by the fact the that the foreign supplier is unwilling to comply with the Regulations, such that he is not willing to incorporate a company and operate it from Tanzania and supply the goods and services through a joint venture company with the ITC. The Regulations did not envisage such a situation.

Consequently, in practice, those facing the above situation would attempt to apply to Mining Commission for exemption. This would result in sole sourcing from a foreign company that had no ITC and Joint Venture Company. From the author's engagement with the Mining Commission, the Mining Commission required a sound justification for sole sourcing. The reasons for sole sourcing would include uniqueness or special character of the services or products to be sole sourced; unavailability of the product or services in Tanzania or the available goods or products lacking the required standards for the business. Despite such justification, regulation 16 of the Regulations would still need to be complied with by indicating efforts made to procure the products or goods from within. Thus, advertisements made in terms of regulation 16 were important. The Mining Commission would then assess the whole situation, all facts and circumstances before approving sole sourcing or procuring goods from a foreign company that had no ITC or Joint Venture Company.

With the 2022 amendments, the conditions for sole sourcing are now in place. Sole sourcing is only possible: first, where a contractor, sub-contractor, licensee or other allied entity has issued an advertisement

relating to expression of interest for the provision of the particular goods or services and has been able to obtain only one particular tenderer who is suitable for the provision of the goods and services; or secondly, there is an urgent need for the goods and services and engaging in tendering proceedings would, therefore, be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by a contractor, sub-contractor, licensee or other allied entity nor the result of dilatory conduct on its party. With these conditions, the Regulations communicate exceptionality by which contractors, subcontractors or licensees may be allowed to procure goods or services through sole sourcing, i.e., procuring goods or services without undergoing competitive bidding procedures. Despite such conditions, the Regulations bring some sense of certainty regarding the circumstances under which procurement of goods or services to the mining sector can be done through sole sourcing.

With the above, some issues are noteworthy. First, given the capital-intensive nature of the mining industry, the minimum value of contracts or purchase orders procured through competitive bidding, i.e., 100,000 US Dollars is low such that it causes frequent filings, hence unnecessary notifications to, and approvals from, the Mining Commission. Secondly, given the requirement to inform the Mining Commission of the purchase orders or contracts procured through sole sourcing regardless of value of such contracts or purchase orders, absence of fixed value for sole sourcing, which would need the above conditions to be met, stands to frustrate the business through the required advertisements and the Mining Commission's approvals especially on urgent purchase orders.

4.4. Intra and inter-conflicts in the regulations and the Mining Act

The Regulations, through regulation 49, criminalise submission of false plans, returns, reports or other documents and making of false

statements in respect of local content. Commission of these offences leads to a fine of between 50 Million Tanzanian Shillings and 500 Million Tanzanian Shillings or a term of imprisonment of between two to five years, or both. Acting as a front or conniving with a foreign citizen or company to deceive the Mining Commission as representing an ITC to achieve the local content requirements is also an offence punishable by a fine of between 100 Million Tanzanian Shillings and 250 Million Tanzanian Shillings or to a term of imprisonment of between one and five years or both. Other offences include a foreigner conniving with a citizen or an ITC to deceive the Mining Commission as representing an ITC to achieve local content levels. Upon conviction, such a foreigner is liable to a fine of up to 10 Billion Tanzanian Shillings or to a term of imprisonment between five to 10 years, or both.

Besides, failure to support and carry out a programme in accordance with national plan on technology transfer; failure to support and facilitate technology transfer; or failure to communicate local content policies; procedures and obligations to all its personnel is an offence punishable to an administrative penalty of 100 Million Tanzanian Shillings in the first instance and further penalty of 5% for each day of continued contravention payable to the Mining Commission. Further, failure to comply with request to furnish information or record within a specified period is an offence punishable by paying an administrative penalty of 2 Billion Tanzanian Shillings in the first instance and a further penalty of 10% for each day of continued contravention to the Mining Commission. Furthermore, non-submission of local content plans or non-satisfaction of the content of the requirement of a local content plan; failure to inform the Mining Commission of proposed contracts or purchase orders attract cancellation of contracts on mining activities; administrative penalty of 5% of the value of the proceeds obtained from the mining activity in respect of which the breach is committed or 5

Million US Dollars whichever is greater.[85] In the case where penalties are not paid on time, they become debts owed to the Republic and are recoverable under summary procedure.[86]

It is also noteworthy that, as indicated in the introductory part of this article, under section 102 of the Mining Act, mineral rights holders should give preference to goods which are produced or available in Tanzania and services which are rendered by Tanzanian citizens and or local companies. Where goods required by the mineral rights holders are not available in Tanzania, the goods should be provided by a local company which has entered into a joint venture with a foreign company. The "local company" for purposes of the Mining Act should own a share of at least 25% in the joint venture or otherwise as provided for in the Regulations. When the Mining Act is read together with the Regulations, there ensue issues worth addressing. First, the provision is in conflict with the Regulations which require a foreign company to service the mining sector through a joint venture with an ITC that owns at least 20%. Although the Act uses the phrase "or otherwise as provided for in the Regulations", it is hardly justifiable that the Mining Act intended the Regulations to provide any shares below 25%. Having this argument would mean that the Regulations would require 10% shares or below. This stands to defeat the purpose of the Mining Act, which is to ensure local persons participate in the mining operations. It would have been legally sensible, had the Regulations required an ITC to own the shares above 25% in the Joint Venture.

Secondly, whereas section 102 defines a local company as a company or subsidiary company incorporated under the Companies Act, which is 100% owned by a Tanzanian citizen or a company that is in a joint venture partnership with a Tanzanian citizen or citizens whose

[85] GN. No. 479 of 2022, reg. 10(a).
[86] Civil Procedure Code, Cap. 33 [R.E. 2019], o. xxxv.

participating shares are not less than 51%, regulation 3 of the Regulations defines an ITC, which can form a joint venture with a foreign company for purposes of servicing the mining sector, as a company incorporated under the Companies Act, with at least 20% of its equity owned by Tanzanians, among other qualifications. This is also a clear conflict which results from poor drafting. Thirdly, whereas, under section 102(1) of the Mining Act, a mineral right holder should give preference to goods which are produced or available in Tanzania and services which are rendered by Tanzanian citizens and or local companies, subsection 2 only allows a local company to form a joint venture with a foreign company for purposes of providing goods which are not available in Tanzania. This is an intra-conflict within the Mining Act itself because while subsection 1 requires preference to be given to both Tanzanian citizens and or local companies, subsection 2 gives preference to local companies only. Reading these provisions does not suggest any mischief the Act is trying to address. With this, individuals are denied of an opportunity to invest in the mining sector through joint venture arrangements with foreign companies. An assumption that no individual would be able to participate with a foreign company in providing services to the sector is unwarranted.

It is noteworthy further that under section 129(2)(u) of the Mining Act, the Minister responsible for minerals has powers to promulgate Regulations with a view to addressing, among others, local content principles including the requirements for provision of goods and services by Tanzanian entrepreneurs, training and employment of Tanzanians and technology transfer. In exercising his power, the Minister promulgated the Regulations.

In terms of section 129(6) of the Mining Act, the Regulations made thereunder may provide for any breach thereof. In case of breach of matters relating to local content, a fine not exceeding ten billion shillings or a sum equivalent to the amount of gain or profit made as a result of

the breach, whichever is greater, or imprisonment for a term not exceeding three years or to both; and in any other case where no specific penalty is prescribed, a fine not exceeding 150 Million Tanzanian Shillings or imprisonment for a term not exceeding two years or to both. As we have noted above, regulation 49 of the Regulations imposes imprisonment punishment which ranges from one year to ten years. This contravenes the celebrated principle of law that subsidiary legislation should be consistent with the Parent Act from which it derives its legal force, and in case of conflict between the two, the Parent Act should prevail to the extent of the conflict.[87] This principle of law is also reflected under section 36(1) of the Interpretation of Laws Act,[88] such that, a subsidiary legislation should not be inconsistent with the parent Act, and in case of any inconsistency, such subsidiary legislation becomes void to the extent of such inconsistency. Regarding imprisonment in the mining sector, there is a clear inconsistency between the Mining Act and the Regulations. It is mind-boggling how this could be tolerated since 2018, given the multiple amendments that have been made to both the Mining Act and the Regulations. In the same vein, it is also surprising that this anomaly has escaped the minds of those enforcing the Regulations, i.e., the Mining Commission, among others.

It is submitted here that it is legally untenable to have the subsidiary legislation contradicting the principal legislation from which it carries its foundation. This calls for amendment of regulation 49 that creates offences and the punishments thereof to align itself with section 129 of the Mining Act. In the case where the imprisonment terms imposed by

[87] Driedger, E.A., "Subordinate Legislation" 38(1) *Canadian Bar Review,* 1960, at p. 5; See also Bakshi, P.M., "Subordinate Legislation: Scrutinising the Validity", 36(1) *Journal of the Indian Law Institute,* 1994.

[88] Cap. 1 [R.E. 2019].

section 129 of the Mining Act appear too low given the nature of the industry, then the Act should be amended.

4.5. Minerals domestic beneficiation

Minerals beneficiation means processing, smelting, and refining metallic or industrial minerals.[89] The beneficiation process adds value to such minerals and brings more revenues to the Government, among other benefits. Thus, beneficiation is one of the crucial aspects in minerals valuation process. Besides sorting and storage, the Mining Act provides for ways through which raw minerals are valued before they are released for export or domestic use. The restrictions provided by the law aim at curbing unauthorised mineral trading, undervaluing, and exporting minerals through which the government's mineral revenue leaks to no avail. It is the Mining Commission's responsibility to sort and assess the value of minerals produced by large, medium, and small-scale miners to facilitate the collection of payable royalty. In doing so, the Mining Commission produces indicative prices of minerals while referring to the prevailing local and international markets for that purpose.[90]

It is important to note that valuation of minerals is a crucial aspect in regulating and monitoring mining operations and handling of minerals, particularly on taxes and royalty payment. This is so because mineral prices are generally and specifically volatile. Some high-value minerals such as diamonds attract higher prices in the markets.[91] Also, the mineral prices differ depending on the form of a mineral sold, whether in a group of different minerals or one category of minerals. For example, in the case where metals are sold in concentrates, which is normally the case,

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[89] Mining (Mineral Beneficiation) regulations, GN. No. 5 of 2018, reg. 2.
[90] Act No. 7 of 2017, s. 22(r) & (s).
[91] Otto, J. and others, *Mining Royalties: A Global Study of their Impact on Investors, Government, and Civil Society,* The World Bank, 2006, at p. 17.

their market value differs from when they are refined.[92] Thus, if the value is determined by relying on the content of one mineral, say copper, it is hardly possible to recognise the value of by-products or co-products sold alongside copper.[93] Besides, minerals of the same nature may attract different monetary value depending on their mines.[94] This is more relevant to coal whose quality may vary with the mine temperature.[95]

Determining the mineral prices is not a simple exercise. It enjoins current and accurate information on the mineral market prices without which accurate valuation cannot be attained. Not only accessing relevant and current information but also adding value to the minerals before they are exported is crucial. It is in this spirit, the law requires mineral right holders to establish beneficiation facilities in Tanzania.[96] Implementing such a requirement, however, remains a challenge. Diamonds, for example, are auctioned in their raw state, that is, before they are cut, polished, and treated. The Government's experts participate at these auctions to avoid understating the prices at which minerals are sold, thus ensuring the government's revenue in terms of royalty and taxes is not minimized. It is further noted that not only cutting and polishing that increase value by around 50% to the gemstone but also manufacturing the gemstones into jewellery increases further the stones' market prices.[97] As such, notwithstanding the Government's participation at auctions, the need for beneficiation facilities in Tanzania cannot be underestimated.

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[92] Otusanya, O.J., "The role of Multinational Companies in Tax Evasion and Tax Avoidance: The Case of Nigeria", 22 *Critical Perspectives on Accounting*, 2011, at p. 318.
[93] Otto and others, 2006, at p. 51.
[94] Otusanya, 2011, at p. 318.
[95] James Otto, J., "The Taxation of Extractive Industries: Mining" in Addison, T. and Roe, A. (eds), *Extractive Industries: The Management of Resources as Driver of Sustainable Development,* Oxford, Oxford University Press, 2018, at p. 293.
[96] The Natural Wealth and Resources (Permanent Sovereignty) Act, s. 9.
[97] Shortell, P. and Emma Irwin, E., "Governing the Gemstone Sector: Lessons from Global Experience" Natural Resource Governance Institute, 2017, at p. 14.

Despite the lack of strong beneficiation industry in the country, there are potential developments towards having this industry in operation to a large extent. For example, one nickel mining company has been awarded a refinery licence in view of building a refinery plant in Kahama region. This shows potential development to the domestic beneficiation industry. Through domestic beneficiation policy, Tanzania stands to increase economic benefits in terms of revenue, employment opportunities and technology transfer, as the government will now transport high-valued minerals at low transportation cost. The transportation cost becomes low because, first, refined minerals' weight and space are less than raw minerals; and secondly, as a result of variation of mineral content in concentrates and ores, which can incentivise misreporting the value of the exported commodities, beneficiation industry stands to reduce chances of tax avoidance and evasion.[98]

This potential development was influenced by the Government's ban on the exportation of mineral concentrates in 2017 with a view to promoting in-country mineral value addition.[99] Besides, the Budget Speech of the Minister for Finance for the year 2022/2023 proposes reduction of royalty rate for gold from the current 6% of the market value to 4% for raw gold that is sold to refinery centres. This intends to incentivise local beneficiation which will support the growth of the mining sector, thus increasing benefits to Tanzania, in terms of employment, technology transfer and Government revenue, as indicated above.[100]

In calculating the amount of payable royalty, the Government may reject the valuation if the ascertained value is steeply low on account of deep

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[98] *Scurfield, T., "The Challenge of Adding Value in Tanzania's Mining Sector", Natural Resource Governance Institute, 2017.*
[99] Uongozi Institute, "Enhancing Value Addition in the Extractive Sector in Africa: Why is it Important and How can it be Achieved?", 2017, at p. 4.
[100] The Ministry of Finance and Planning, "A Speech on the Estimates of Government Revenue and Expenditure 2022/23", at p. 64.

negative volatility unless the raw minerals are disposed of for beneficiation within Tanzania.[101] The law neither defines the deep negative volatility nor provides for considerations to determine deep negative volatility under which valuation may be rejected. Where the government rejects valuation, it has a right to buy the minerals at such ascertained low value.[102] Rejecting the ascertained value of minerals and the option to buy the minerals at a lower price appears advantageous to the Government. The Government may dispose of such minerals when there is high positive volatility in that the mineral prices are high – the boom period. The pertinent issue, however, is whether the Government has such financial muscles to buy minerals for the future fair market. This calls for establishment of beneficiation facilities or attracting beneficiation companies to invest in the country with a view to maximising value to the exported minerals. This has a direct impact on valuation of minerals in determining royalties payable. Although mineral commodities may not be 100% locally-beneficiated, investing in beneficiation facilities stands to enable Tanzania to maximise mineral value before minerals are exported, thus maximising revenue for the Government. This is in addition to other benefits in terms of employment opportunities and technology transfer.

5.0. CONCLUSION AND RECOMMENDATIONS

The article has analysed the mining local content Regulations. It notes that the Regulations are necessary in ensuring the mining sector contributes greatly to national development. This is enhanced if the mining investors and other stakeholders are given means through which they can comply with local content requirements as provided under section 102 of the Mining Act. This responds to the Mining Policy, 2009 which aims at maximizing the sector's contribution to national

[101] Act No. 7 of 2017, s. 23(c).
[102] ibid.

development, in terms of employment and training of Tanzanians and procuring local goods and services while giving preference to local suppliers and producers with a view to creating local capacity. All this responds to the negative relationship between mineral resources abundance and poor economic development that haunts most of African countries, which is described as a paradox of plenty.

The article further notes that despite the good intention behind the local content requirements, there are issues regarding their implementation and enforcement. The Regulations appear to apply to all persons supplying services to the mining sector regardless of the degree of connection between the services supplied and the mining sector. With this, the Regulations are made to apply to all service or goods providers to the mining sector. It has been submitted that this practice stands to frustrate the mining industry to the detriment of Tanzanians, i.e., collective owners of the mineral wealth.

Further, the article noted a clear inconsistency between the Regulations and the Mining Act regarding imprisonment terms and the shares the qualifying local companies can own in joint venture arrangements with the foreign companies for servicing the mining sector. The Mining Act also contains provisions which contradict each other, which, as argued by this article, results from poor drafting.

Furthermore, the Regulations do not take cognizance of the local environment in terms of local companies' capacities in partnering with the foreign companies for serving the mining sector, and in view of ensuring such capacities are created, the foreign companies are likely to take away everything and the local partners remain with nothing or little. Although such foreign and local companies' arrangements are legally justifiable, economically they are circumventing the local content requirements' ultimate objectives. With these identified issues, the article argues that to realise the objectives behind local content requirements,

Tanzania needs to assess the existing environment in terms of local companies' capacity to partner with foreign suppliers; availability of skilled personnel ready to replace the expatriates under succession plans; and the impact of the requirements in creating investment-enabling environment while ensuring that the sector contributes greatly to national development. As such, it departs from those who argue that the challenges associated with the local content laws are triggered by enforcement of such laws. It argues that both the design and enforcement of the local content laws trigger the challenges as discussed above.

Based on the conclusions above, the following recommendations are made.

First, the Government is called upon to effect necessary amendments either through the Mining Act or the Regulations in view of addressing the inconsistency between the two laws regarding imprisonment terms and the shares the qualifying local companies can own in joint venture arrangements with the foreign companies for servicing the mining sector.

Secondly, with a view to avoiding unnecessary filings and approvals, the Regulations, vide regulation 16, be amended to increase the sole sourcing contract value to at least 100,000 US Dollars such that all purchases below such fixed amount do not necessitate the mineral rights holders to seek Mining Commission's approval subject to the above sole sourcing conditions. Equally, the value for competitive bidding contracts should be increased to avoid unnecessary notifications and approvals.

Besides, the Regulations should be amended by replacing the phrase "provision of goods and services for purposes of mining operations" in the definition of "mining activities" with "provision of goods and technical services for purposes of mining operations" so that certain service providers such as lawyers/law firms should not be required to

submit local content plans. This should go hand in hand with amendment of the definition of contractors and subcontractors in view of narrowing down the scope of subjects of the Regulations, considering the degree of connection between the services supplied and the mining sector.