

# ANALYSIS OF MINING LEGAL FRAMEWORK IN TANZANIA ON LOCAL CONTENT REQUIREMENTS IN REFERENCE OF PURCHASING LOCAL GOODS

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## ABSTRACT

When it comes to the effort of making sure there is prosperity in the country's economy, local content is one of important aspect to be considered. It goes that local content is a mechanism of which the developed countries have adopted to capture as much revenue as possible from extractive sectors in order to expand other economic sectors, such as agricultural and manufacturing. In 2017 the government overhauled the country's mining legal framework by enacting new or amending existed laws to strengthen the governance of the mining sector by introducing local content requirements.<sup>1</sup> The introduced requirements have gained popularity in the country over recent years as they are binding foreign mining companies conducting activities in Tanzania, one of those requirements is the purchase of local goods. However, there are legal challenges of implementing the same in line with the established principles under international trades agreements, such as principle of national treatment against discrimination.

The objective of this study is to test the implementation of local content requirement of purchasing local goods in relevance of international principles regulating trades agreements between states, pointing out existing pitfalls and recommend possible measures to be taken.

## **INTRODUCTION**

Due to the abundance of resources, Tanzania is one of African countries where foreign investors are attracted to make direct investment in mining sector. The government has developed several strategies to use the sector as a means of strengthen economic growth of the country. One of those strategies is the overhaul of mining legal framework in 2017 when the local content was incorporated as a one of mechanism to capture as much benefits from the sector as possible. Local content consists a number of conditions to be adhered by investment companies, one of them is the purchase of locally produced goods.

In order to attain the objective of this study, the author is focusing on the Tanzania mining sector where the key players are the foreign mining companies who are as well the subjects of the local content requirement of purchasing local goods. At international legal resume the study is going to look at the principles regulating international trades under the World Trade Organization.

## **LOCAL CONTENT IN THE MINING LEGAL FRAMEWORK**

Before 2017 the local content did not expressly appear in the mining legal framework, but there are measures which were taken by government and which on one way or another related to it. The local content initiatives began in 1990s when the big reform was made to move the mining sector from state ownership to private ownership, the government came up with a concept of Mining Development Agreements (MDC) to facilitate the procedure. The concept of the MDA was first introduced in the Mining Act of 1998 and later on adapted by the Mining Act of 2010.<sup>ii</sup>

The Mining Act of 2010 provided for requirement of mining license applications to contain a statement relating to the applicant's procurement plan for goods and services in Tanzania. This was not a requirement under any historical mining legislation in the country. However, scholars identified legal challenges in implementing that requirement and many shortfalls relating to the protection of natural resources in the country, then permanent legal solution was to be found.

## LOCAL CONTENT IN TANZANIA MINING LEGAL FRAMEWORK

The Mining Act of 2010, Cap. 123 R.E 2019 is a current Principal Legislation regulating mining activities in Tanzania. From 2017 when it was amended, the Act introduced local content and a number of new conditions which are coaching as how the mining industry was to operate in the country. One of those conditions requires the mineral right holder to give preference to goods that are produced or available in Tanzania.<sup>iii</sup>

### CONDITION OF PURCHASING LOCAL GOODS AND ITS IMPLEMENTATION

The requirement of purchasing locally manufactured goods was brought by the Written Laws (Miscellaneous Amendment) Act No. 7 of 2017 (Amendment Act) which amended other laws including the Mining Act Cap. 123 (the Act). In order to implement the said local content requirement, Section 102 (1,2,3 and 4) of the Act provides as follows:

*“S. 102: (1) A mineral right holder shall give preference to goods which are produced or available in Tanzania and services which are rendered by Tanzanian citizens and or local companies. (2) Where goods required by the mineral right holder are not available in Tanzania, the goods shall be provided by a local company which has entered into a joint venture with a foreign company. (3) ... (not applicable). (4) For purposes of subsections (1) and (2) every mineral right holder shall prepare and submit to the Commission a procurement plan for a duration of at least five years”*

From the said section it goes that the mining company has to fulfil three conditions, these are prevalence to local goods, exception to general requirement and mandatory requirement of communicating Mining Commission in respect of submitting procurement plan. The said provision is constructed in a mandatory form, that means the mining companies must adhere to what is provided. It is important to note that, those conditions did not only started to apply to new holders of mining licenses after the Amendment Act came into being, but also applied to all existed holders who were in investment agreement with the government basing on the then subsisted conditions. Therefore, the following are issues need to be taken into consideration:

- i) Tanzania is a part of international trade agreements which restrict discrimination of goods under the principle of national treatment;
- ii) Tanzania does not manufacture majority of goods required in mining operations, as such the market is supplier driven; and
- iii) Most of suppliers of goods for mining operations were not incorporated in Tanzania.

For purpose of this study, the focus is going to be on the principle of national treatment as reflected on the first issue above. In order to facilitate implementation of the requirements provided under the Mining Act, in 2018 the government formed the Mining (Local Content) Regulations.<sup>iv</sup> But still the stumbling issue which needs attention is the implementation of the requirement of purchasing local goods as reflected under Regulations 7 and 8 of the Mining Regulations vis-à-vis the restrictions imposed by international trade agreements of which Tanzania is a party.

## IMPLICATIONS

Regulations 47 and 48 of the Mining Act Regulations mandate the Mining Commission to monitor and investigate activities conducted by the mining companies to ascertain if they adhere with the requirement of purchasing local goods. The said Regulations provide as follows:

*“R. 47, The Commission shall monitor and investigate the activities of each contractor, subcontractor, licensee and other allied entity to ensure the achievement of the purpose of these Regulations within the framework of the national policy on local content. R. 48 (1) The Commission may, for the purposes of enforcing these Regulation, initiate an investigation into an activity of a contractor, subcontractor, licensee or other allied entity”*

Non-adherence of the requirement of purchasing the goods which are locally manufactured is punishable by law. Regulation 49 (6) of the Regulations provides as follows:

*“R. 49 (6). A contractor, subcontractor, licensee or other allied entity that: (a) carries out mining activities without the required local content requirement in contravention of regulation 3; (b) ... (not applicable); (c) fails to satisfy the content*

*requirement of a local content plan in contravention of Regulation; or (d) fails to inform the Commission of each proposed contract or purchase order, shall be liable to pay to the Commission an administrative penalty ... “*

In the foregoing and in a general term therefore, the importation or purchase of foreign goods is prohibited and the violation of the same is punishable under the current mining legal framework.

## **PRINCIPLES REGULATING INTERNATIONAL TRADES**

Apart from government's objective towards strengthening national economic growth, Tanzania is a part of international trade agreements made under World Trade Organizations (WTO). Whether the introduced local content requirement of purchasing local goods and services is compatible with international agreements, this study refers to the principle of national treatment against discrimination.

## **PRINCIPLE OF NATIONAL TREATMENT AND DISCRIMINATION**

This is one of the basic principles established under Article III of the General Agreement on Tariff and Trade where it entails that the imported products are not to be discriminated against the locally produced ones. It is being depicted that, Local content measures most often violate the said Article III because by their nature they discriminate goods according to their territorial origin.<sup>v</sup>

## **GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT)**

GATT is one of multilateral agreements annexed to the World Trade Organization (WTO), it is binding upon all Members (Tanzania inclusive) and is primarily concerned with trade in goods. This agreement, among other things, aims at liberalizing trade in goods through the reduction of trade barriers.<sup>vi</sup> Article III provides for national treatment on internal regulation and imported goods are not to be discriminated compared with domestic ones. Generally, GATT restricts local content measures under paragraphs 1, 4, 5 and 8a of Article III.<sup>vii</sup> The

Article refers to the fact that domestic laws and regulations should not violate the principle of national treatment against discrimination. The imported goods are to be treated equally as it is to domestic ones.

### **TRADE-RELATED INVESTMENT MEASURES (TRIMS)**

TRIMs apply to all investments in goods production which include regulatory measures for Foreign Direct Investment and local content requirements. Article 2 states that, no WTO member shall apply measures prohibited under Article III of GATT regarding the national treatment or Article XI for quantitative restrictions. Therefore, WTO members are not supposed to formulate regulations which contain discriminatory measures against foreign products or introduce quantitative restrictions.

### **WORLD TRADE ORGANIZATION (WTO)**

There is no specific provision in the WTO Agreements that outlaws local content requirements per se. However, there are stipulations of the circumstances under which the said requirements may violate several provisions in the WTO Agreements. When the countries conclude trade agreement containing clause which restricts them to implement local content requirements at domestic jurisdiction, then it has to be respected by them as an indicator of respecting that agreement.

### **PRINCIPLES OF CUSTOMARY INTERNATIONAL LAW**

Article 38 of the International Court of Justice (ICJ) Statute serves as a classical point of departure to determine the scope of customary international law. There are several norms under customary international law that are inferred as standard behaviors and that can be defined in terms of rights and duties.<sup>viii</sup> One of them is '*pacta sunt servanda*'<sup>ix</sup> which requires states to keep the Agreements they have chosen to be a party of.<sup>x</sup> Therefore, all members of WTO are restricted from imposing measures which amount into violation of principle of national treatment against discriminatory measures between imports and similar domestic products.

## **VIENNA CONVENTION ON THE LAW OF TREATIES (VCLT)**

VCLT is an international agreement governing treaties entered between states through established rules. This convention is the leading international law on treaties as it codifies customary laws that provide as to how states should approach international agreements. It goes therefore that, the countries which are parties to the international trade agreements concluded under the WTO are as well subjects to the international customary laws.

## **AFRICAN CONTINENTAL FREE TRADE AREA (AfCFTA)**

AfCFTA is a blueprint adopted under the African Union as a part of Agenda 2063 for attaining inclusive and sustainable development across the continent over 50 years to come. Article 5 of AfCFTA provides for the principle of National Treatment which requires each state to accord to products imported from other State Parties treatment not less favorable than that accorded to like domestic products of national origin in accordance with Article III of GATT.

## **SADC PROTOCOL ON TRADE**

This is an agreement between the Southern African Development Community member states to reduce barriers to trade on imported products between themselves. Article 7 of the protocol restricts application of any quantitative trade barriers, while Article 11 is insisting for member states to adhere to the principle of National Treatment.

## **THE UNITED NATIONS GENERAL ASSEMBLY RESOLUTIONS (UNGA RESOLUTIONS)**

The international community, through resolutions, has given mandate to each country to make sure the paramount beneficiaries of exploitation of resources are the citizens of the respective country. The UNGA passed resolution to affirm the right of each country to enact laws and to determine own plans for economic development within the country. The principle of Permanent Sovereignty over Natural Resources is a result of the deliberations of the United Nations General Assembly which is an international political organ.

Resolution 1803 of 1962 is the main international base of embedding local content requirements into local legal framework.<sup>xi</sup> This resolution requires states to strictly respect the sovereignty of peoples and nations when it comes to: the right to permanent sovereignty to both peoples and nations; the exploration, development and disposition of natural resources should be in conformity with the conditions which are considered to be necessary in the country; respect of independent national development of developing countries and their sovereignty over their natural wealth and resources; foreign investment agreements shall be observed in good faith.<sup>xii</sup>

The mentioned principles mandate the member states of U.N to deal with their internal affairs, such as legislating laws, without interference of one another. However, there have been discussions over the bendiness of UNGA Resolutions in contrast with international agreements.

## **BILATERAL AND MULTILATERAL AGREEMENTS**

Apart from the UNGA resolutions, there are international agreements which are considered as formal understandings or commitments between two or more countries, depending on whether it is Bilateral or Multilateral Agreement. The agreements between states are governed by concluded treaties which are part of international law by virtue of Article 2 (1) of VCLT.

## **INTERNATIONAL AGREEMENTS VIS-A-VIS THE RIGHTS OF A NATION UNDER UNGA RESOLUTIONS**

It is an extract the above that, we have two set of international instruments, UNGA Resolution and international agreements, both regulating relations between states. UNGA Resolution provides for the right of implementing the requirement of purchasing local goods and international agreements provide restrictions that may hinder the implementation of the same. The question remains is, which one is overriding the other? According to VCLT and International Customs, when a country enters into international treaties, it gives away part of its sovereignty. Doing so, the country accepts certain rules and conditions upon how it will treat foreign citizens or entities such as mining companies or foreign suppliers of goods.

In trade dispute between Banco Nacionale de Cuba v. Chase Manhattan Bank, in the final



verdict it was held that, UNGA Resolutions do not reflect international law. The U.S court engaged in custom analysis to reach this result, noting that General Assembly Resolutions "*are of considerable interest and not have force of law*" In United States Vs. India, the dispute resulted from implementation of local content requirement of purchasing local goods. The WTO dispute settlement panel rejected India's defensive arguments of protecting local industries as it violated Article 2 (1) of the TRIMs and Article III (4) of GATT, hence discriminatory.

Therefore, between the two sets of international instruments, UNGA resolutions and international agreements, the latter prevails. Tanzania is a signatory to WTO from 1995, automatically is bound by international trade agreements and principles.

## **RECOMMENDATIONS**

It is now the suggestion that, as a key area to focus on when it comes to the issue of purchasing local goods and service, the government should develop training and skills to the local manufacturers and make it as part and parcel of facilitating the implementation of requirement of purchasing local goods. It will enable local producers to manufacture goods with required quality and in affordable price compared with the imported ones so as to attract the targeted buyers.

Further, there is a need of having a specific legislation to regulate local content requirements which do not conflict with international agreements or make adjustment of the existing mining legal framework to accommodate the international benchmarks in trades. The government should come up with specific strategy of support local manufacturers of goods to make

## **CONCLUSION**

It is obvious that, in reference of the international legal instruments and case laws, it was erroneous for the government to disregard international treaties of which Tanzania is a party in favor of UNGA Resolution 1803 of 1962 while introducing local content requirement of purchasing local goods. The current mining legal framework contains provisions which are in violation of international treaties and are now need to be remedied as recommended above.

## ENDNOTES

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- <sup>i</sup> The overhaul resulted to the enactment of new legislations: The Natural wealth and Resources (Permanent Sovereignty) Act, 2017; The Natural Wealth and Resources Contracts (Review and Negotiation of Unconscionable Terms) Act, 2017; and The Written Laws (Miscellaneous Amendments) Act No. 7, 2017.
- <sup>ii</sup> CLYDE & CO TANZANIA, (2013).
- <sup>iii</sup> Refer Section 102 of the Mining Act Cap. 123 R.E 2019.
- <sup>iv</sup> Read Regulations 7 and 8.
- <sup>v</sup> HESTERMEYER H. P. & NIELSEN L., (2014), The Legality of Local Content Measures under WTO Law, Journal of World Trade, Pub. Kluwer Law International, Netherlands.
- <sup>vi</sup> International Trade Centre UNCTAD/WTO (ITC) and Commonwealth Secretariat, Business Guide to the World Trading System, 2nd ed., 1999.
- <sup>vii</sup> *Ibid.*
- <sup>viii</sup> MILL, JOHN S. (1863) *Utilitarianism*, London, Parker, Son and Bourn, West Strand, p. 10.
- <sup>ix</sup> Is one of oldest international principal popularized by 17<sup>th</sup> Century theoretician Hugo Grotius.
- <sup>x</sup> Article 26 of the Vienna Convention on the Law of Treaties, 1969.
- <sup>xi</sup> UN General Assembly Resolution 1803 (XVII), 1962.
- <sup>xii</sup> Paras 1 to 4 of the Resolution. *Supra.*
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