

AN APPRAISAL OF THE LEGAL REGIME ON THE PROTECTION AND PROMOTION OF LOCAL INVESTORS IN MINING SECTOR IN TANZANIA

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ABSTRACT

This study makes a critical analysis of investment laws in Tanzania, with a view of ascertaining their efficacy in the promotion and protection of local investors in ensuring a conducive investment environment for them. This study has been guided by the assumption that the investment law in Tanzania is not effective in ensuring the promotion and protection of local investors in Tanzania. In the course of data collection through documentary review, library search and interview, it has revealed that the concept of promotion and protection of investments has been discussed by many scholars both at the domestic and global levels. The study examined the laws, rules and policies which govern investment in Tanzania including the Constitution of the United Republic of Tanzania, The Mining Act, and The Investment Act, the policies which govern investment in Tanzania and then study examined the institutional framework which governs investment and local investors in Tanzania. The study revealed that the introduction and enactment of the laws on the mining sector has led to the protection and promotion of local investors to invest in mineral extraction in Tanzania. Also, the incorporation of the Local Content Policy and its regulations of 2018 provides for a significant milestone in the protection of local investors in Tanzania.

Keywords: Investment, Investment Laws, Promotion and Protection of Local Investors.

INTRODUCTION

Tanzania has a wealth of investment opportunities due to its strategic comparative advantages in terms of the abundance of endowments of natural resources, such as minerals, arable land, water, and wildlife. Tanzania also holds a key geographic position in the area, providing it with access to markets and supportive infrastructure.ⁱ The United Republic of Tanzanian government has been enacting various reforms, such as reviewing its investment laws and enacting new laws and policies, to guarantee that investors are suitably protected.

Tanzania has been making numerous enormous and strategic investment promotion and facilitation efforts since the 1990s. These include inter alia, the adoption of the National Investment Promotion Policy (NIPP) of 1990,ⁱⁱ the National Investment (Promotion and Protection) Act (NIPPA) of 1990,ⁱⁱⁱ and later on the Tanzania Investment Act of 1997. In order to create an environment that is favourable for investments, the government founded the Investment Promotion Centre (IPC), which later changed its name to Tanzania Investment Centre (TIC). This organization is in charge of encouraging, approving, overseeing, and facilitating the inflow of foreign private capital into the nation.^{iv}

The government's reforms did not exempt Tanzania's mining industry, which is also the foundation of the country's economy. The Mineral Policy of 1997, which emphasizes the government's role to regulate and promote the mining industry rather than being directly involved in the exploration and exploitation of minerals, was one reform in the mining sector. The introduction of the Mining Act of 1998, which plans for the development of both small- and large-scale mining, the Mineral Policy of 2009, and the Mining Act of 2010 came next.^v In order to support local businesses, the government outlawed the export of any rough tanzanite weighing more than five carats, a move that was specifically designed to bring about new reforms in the mining industry under the 2010 Mining Act. The government has taken all of these actions because, as of 2022, the mining sector will account for 7.3% of the GDP.^{vi}

The Concept of Investment

An investment can be the creation of a commercial enterprise or the acquisition of its operational assets. It can also refer to the act of an investor providing capital, either domestically or internationally. It also has to do with expanding, restructuring, improving, or revitalizing the aforementioned business.^{vii} In contrast, investing denotes the use of funds to

purchase property or assets with the intention of generating income, or a capital outlay.^{viii} To put it another way, investing is the act of dedicating time or energy to a particular project with the goal of making sure it succeeds.^{ix}

The term "investment" is generally defined by several BITs as every kind of property, such as goods, rights and interests of whatever nature, and in particular, though not exclusively, it includes: tangible, intangible, movable and immovable properties as well as any other right in rem such as mortgages, liens, usufructs, pledges and similar rights, shares, debentures, stock and any other kind of participation in companies, claims to money or any other performance having an economic value associated with an investment, intellectual and industrial property rights such as copyrights, patents, trademarks, industrial models and mock-ups, technical processes, know-how, trade names and goodwill, and any other similar rights; business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources. In the context of this study however, it is "mining investment" which is the subject matter.^x

The comprehensive definition of "investment" in a commercial basis included in several Bilateral Investment Treaties (BITs) implies the lesson that commercial interactions, in this case, investment agreements, are distinct from other political relationships. Parties must prioritize profit-making and the advancement of national interests in the commercial sphere for the growth of both sides.^{xi}

Who is an Investor?

According to the Black's Law Dictionary, an investor is a person who spends money expecting to earn a profit.^{xii} Local and foreign investors are the two types of investors defined by the Tanzania Investment Act. A foreign investor is a person or a business that is not a citizen of Tanzania and was established under the laws of another nation.^{xiii}

The BITs elaborate further on foreign investors: the "investor" is the natural person who has the nationality of either Contracting Party in accordance with the laws of that Contracting Party; legal entities, including company, association, partnership and other organization, incorporated or constituted under the laws and regulations of either Contracting Party and have their headquarters in that Contracting Party.^{xiv} In an ideal world, foreign mining investors would have a bigger influence on the nation's technological advancements than local miners

would have. Since both foreign and local investors are recognized by law, the government should have acknowledged that local mining investors should have been prepared to accept, preserve, and support any "technical knowledge" that foreign investors in the mining industry brought into the nation in order to integrate it into the mining industry going forward.^{xv}

Investment Protection

The process or system that safeguards an investor's interest in the securities market is referred to as "investor protection." It refers to actions taken with the intention of bringing about and upholding procedural transparency when interacting with an investor via certain regulatory bodies and appropriate laws. It should be mentioned that there was strong opposition to economic liberation and investment promotion during the administration of Mwalimu Nyerere, the first President of Tanzania. This ultimately led to the nationalization of investment through the Act, which drove away investors.^{xvi}

The guiding legal foundation for modern foreign investment law is customary international law.^{xvii} Because foreign direct investment (FDI) accounts for the majority of investments made in the nation, customary international law serves as its foundation. As a result, investor protection has been a key area of international law, serving to protect foreign investment from host state interference and guarantee that there is no discrimination in the conduct of international business.^{xviii}

There are five main principles of foreign investment law. The principles include; the Most Favored Nations (MFN) principle; the national treatment principle; the fair and equitable treatment principle; the full protection and security principle; and the protection of foreign investment against expropriation. These principles are employed to secure a certain level of treatment for foreign investors in host countries with different objectives.^{xix}

THE LEGAL FRAMEWORK GOVERNING LOCAL INVESTORS IN TANZANIA

In Tanzania there are different laws, policies, rules, regulations and institutional framework which governs the protection of local investors which are highlighted below;

The Constitution of the United Republic of Tanzania

The Constitution of the United Republic of Tanzania being the Mother Law provide for the rights of Tanzania Citizens over its natural resources. Article 8(1)(b) of the Constitution provides that “*the primary objective of the Government shall be the welfare of the people*”. The language of this clause makes it abundantly evident that the United Republic of Tanzanian government's main goal is to protect the welfare of the populace, which includes, among other things, encouraging and defending local investors. The Constitution also guarantees everyone's right to own property, shields legally held property from nationalization without legal justification, and stipulates that in the event that nationalization is required, reasonable compensation should be taken into account.^{xx} The provision of the Constitution which covers a right to own property among other things envisages the issue of promotion and protection of investors.

The Tanzania Investment Act of 2022

Following the introduction of the Investment Promotion Policy in 1996, the Tanzania Investment Act No. 26 of 1997 was introduced and the same was repealed by the newly introduced Tanzania Investment Act of 2022. This Act offers more favorable conditions for investors as well as related matters, with the goal of protecting and promoting both domestic and foreign investors. According to the Act,^{xxi} local investor has been defined to mean, a natural person who is a citizen of Tanzania; a company incorporated under the laws of Tanzania in which the majority of shares are held by a person who is a citizen of Tanzania, or a partnership in which the partnership controlling interest is owned by a person who is a Citizen of Tanzania. Section 29 confers protection to investors against expropriation.

Foreign and local investors receive the Certificate of Incentives upon completing the TIC registration process. However, the Certificate typically grants investors access to rights rather than privileges due to recent changes in fiscal legislation. These include the Investment Act's investment guarantees, land access, the ability to send money overseas, and the ability to hire up to five expatriates.

For investors who meet the requirements to fall under the category of strategic and special investments, the act has established further and more incentives. A business enterprise is considered a strategic investment when it is owned by a foreign national with a minimum capital of US\$50,000,000 million, or when it is owned by a citizen with a minimum capital of

US\$20,000,000 million. Further when the project is established the minimum capital of US 300,000,000 million is to be termed as a special strategic investment and, therefore, can benefit from particular incentives, however, the business must be able to create at least 1000 local jobs with a sufficient number senior position granted to citizens which don't require high and modern technology.^{xxii}

Tanzania Investment Regulations of 2023 (GN No. 477 of 2023)

Following the enactment of the new Tanzania Investment Act of 2022, the Government of Tanzania has introduced Investment Regulations (GN No. 477 of 2023). The regulatory framework has been put in place to guarantee accountability and transparency while fostering an environment that is favorable to businesses and investors. Both domestic and foreign investors must consider the numerous changes to investments brought about by the current regulations. One of the most significant changes is the redefining of the Board of the TIC's responsibilities, which now include monitoring the national and international investment climate, proposing measures to improve Tanzania's competitiveness as an investment destination, and keeping an eye on the moral behavior of TIC employees. The Board also has to constantly review the organization's functions to ensure that its objections are realized.^{xxiii} Also, the quorum for the board's meetings has been increased from four to five members,^{xxiv} however, the qualification of the board members is not provided under the new regulations.

The Mining Act

The Mining Act^{xxv} provides for the control over mineral rights is vested in the government through the Minister for Energy and the Commissioner for Minerals. In addition to drafting laws, policies, and strategies for the exploration and exploitation of mineral resources, the Minister of Energy is also charged with setting national priorities while taking the country's economy into consideration. The Minister also supports the development of an environment that is conducive to private investment in the mining sector. Considering that the government has exclusive authority over mineral rights. The Minister for Energy and Minerals (MEM), and the Commissioner for Minerals, are however authorized, subject to the requirements and conditions under the Mining Act, to grant a wide range of licenses to individuals or companies. Such licenses include prospecting licenses, gemstone licenses, processing and smelting licenses and special mining licenses.

In ensuring that Tanzanians benefit from their natural resources, the Mining Act provides indigenous rights to holders of primary mining licenses and gemstone mining licenses. These licenses are only issued to Tanzania citizens or mining companies where the composition of the board and the shareholding structure consists exclusively of Tanzanian citizens. There are however exceptions under the Mining Act concerning gemstone mining licenses. Tanzanians are the only people who are eligible to receive licenses; however, in cases where the Minister determines, after consulting with the Commissioner, that developing the gemstone resources in a territory covered by a mineral right is likely to require highly specialized knowledge, advanced technology, or substantial financial resources that Tanzanians cannot afford, he may grant a license, provided that the non-citizen's undivided participation share does not exceed fifty percent.^{xxvi} All miners are required to pay royalties to the Government on the gross value of all minerals produced under the relevant license. The main goal of these provisions is to guarantee that Tanzanians will profit from the mining of these rare minerals, which will also serve as a catalyst for local investment.

The Natural Wealth and Resources (Permanent Sovereignty) Act, 2017

This Act was enacted in 2017 when the Government of the United Republic of Tanzania decided to make several amendments to its Mineral laws. The Act declares permanent sovereignty of the People of the United Republic of Tanzania over all-natural wealth and resources and provides respect to the exploitation of resources for the benefit of the people of Tanzania and this was about the General Assembly Resolution on Permanent Sovereignty over Natural Resources and also United Nations General Assembly's.^{xxvii} The United Nations General Assembly resolution did not have any legal force of its own, even though it stated that all nations have a right to permanent sovereignty over natural wealth and resources, which must be used for the benefit of their own national development and the welfare of their citizens.^{xxviii}

It is from this act now it is well settled that the ownership and control over natural wealth and resources shall be exercised by, and through the Government on behalf of the People and the United Republic. This Act applies to both Mainland Tanzania as well as Tanzania Zanzibar in trust by the President on behalf of the People of the United Republic. Natural wealth shall be exported for the benefit of all Tanzanians and not individuals.

Section 8 of the Act^{xxix} provides that “any authorisation granted for the extraction, exploitation or acquisition and use of natural wealth and resources, arrangements shall be made or given to

ensure that the Government obtains an equitable stake in the venture and the People of the United Republic may acquire stakes in the venture.” The provision of this section aims to restrict the state’s authority over foreign investment and promote local investment. However, the Act has also brought in the need for conflict resolution, particularly in cases involving the acquisition, extraction, use, or exploitation of natural resources that must be resolved inside Tanzania. Investors were guaranteed the enforcement of their agreements because parties could select the applicable law and jurisdiction for dispute resolution prior to the act's enactment.

POLICIES GOVERNING THE PROTECTION OF LOCAL INVESTORS IN TANZANIA

Tanzania Mineral Policy of 2009

The Mineral Policy of 2009 was formulated as a result of an evaluation conducted during the ten years of implementation of the Mineral Policy of 1997. These reforms brought about changes in the mineral sector, which included the formulation of the Mineral Policy of 1997 to create a conducive environment for private investment.^{xxx} The objectives of the 2009 Mineral Policy included, but were not limited to, enhancing the economic climate to draw and maintain domestic and foreign private investment in the mineral sector; strategically engaging in feasible mining ventures and creating a conducive atmosphere for Tanzanians to hold ownership of medium- and large-scale mines; encouraging the growth of small-scale mining to augment its economic impact; and facilitating, endorsing, and encouraging greater involvement of Tanzanians in the gemstone mining industry.^{xxxi}

The Investment Promotion Policy of 1996

This policy was introduced in an effort of the Government to improve the investment climate in Tanzania and the same was introduced after the review of the Tanzania Investment Policy of February 1990. The investment promotion policy of 1996 underlines one of its specific objectives that the Government wishes to further through. These goals of the Investment Promotion Policy demonstrate the government's intention to encourage both domestic and foreign investment, which the legislation must represent. The national policy, among other things, has outlined goals that must be met in order to encourage domestic investment in the nation, like fostering the advancement of locals in the fields of science and technology. It's no secret that local and foreign investors differ greatly when it comes to how science and

technology can be applied to the use of natural resources like minerals. By lowering the gap between domestic and foreign investors and leveraging natural resources, this goal seeks to raise local investors' awareness of the importance of accessing and utilizing science and technology to create a competitive investment environment.

Local Content Policy

The mining industry in Tanzania has had a local content policy for a long time; in fact, it has been a part of the rules since the 1970s. One example is the Mining Act of 1979, which said that all requests for mining licenses had to come with plans to hire and train Tanzanians and buy goods and services that were available in Tanzania.^{xxxii} Similarly, the Mining Act 1998^{xxxiii} imposed an obligation on the applicants for special mining license to have a plan with respect to the employment and training of citizens of Tanzania.^{xxxiv} The Mining Act of 2010 took the same method, requiring companies to have a plan for hiring Tanzanians, training them, and making sure that expatriate workers can take over if they leave. The act also said that companies had to buy goods and services that were available in Tanzania.^{xxxv}

There are parts of the Mining Act that have been changed that make the Local Content strategy work better in Tanzania. Local content is what an extraction project does for the local, regional, or national economy that is worth more than the money it gets in from resources.^{xxxvi} According to the national multisector local content guidelines,^{xxxvii} It has been said that local content is the value that is added to the economy by using Tanzanian people, goods, and services on purpose in investments. This is done to encourage the growth of skills and to support local investments, ownership, and participation. It's also known as "local content," which is the amount of value added to or created in Tanzania's economy by using Tanzanian people, materials, and services on purpose in mining operations in order to help Tanzanians improve their skills and to encourage local investment and participation.^{xxxviii} This definition is further refined in the Mining (Local Content) Regulations 2018,^{xxxix} to mean the quantum or percentage of locally produced materials, personnel, financing, goods and services rendered in the mining industry value chain and which can be measured in monetary terms.^{xl}

The concept has been adopted and incorporated into Tanzania laws governing natural resources as a way of ensuring extraction of natural resources harnessed to benefit Tanzania's development the feeling which was not felt by local communities. Section 102^{xli} provides that, If someone owns a mineral right, they have to buy goods that are made or sold in Tanzania and

use services that are provided by Tanzanians or local businesses. If the mineral right holder can't find the goods they need in Tanzania, the law says they must be given by a local company that has teamed up with a foreign company to make a business. The local company must have at least a 25% stake in the foreign company's share of the business. This means that a foreign company that wants to work in the mining industry must form a joint venture with a Tanzanian business or citizen.

The goal of including this policy in our laws is to make sure that the extraction project benefits Tanzanians in both direct and secondary ways. This will be done by making sure that the extraction companies hire local workers and buy goods and services from the host country. Protecting a country's natural resources and making sure that people can benefit from them is not a new idea. This idea has been used around the world to make sure that everyone benefits from the mining industry.^{xlii} Nevertheless, it has been a way of encouraging local investment in the country.

INSTITUTIONAL FRAMEWORK GOVERNING INVESTMENT IN TANZANIA

The Tanzania Investment Center (TIC).

TIC was founded in order to provide Tanzania with an efficient and productive investment agency that would advise the government on matters pertaining to investments as well as coordinate, encourage, and facilitate investment in Tanzania. The provision of section 4(4) of the Tanzania Investment Act^{xliii} shows the overall mission of the Centre is to promote and facilitate investment for national economic growth by enhancing an environment conducive to business and entrepreneurship growth. TIC is the focal point for all investors and the first point of call for potential investors. The Institution which manages investment affairs is the Tanzania Investment Center (TIC) which is established under the provisions of section 4 of the act.^{xliv} TIC's primary goal is to serve as a one-stop shop for investors and the government's main organization for coordinating, encouraging, promoting, and facilitating investment in Tanzania. It also provides advice to the government on investment policy and other relevant issues.^{xlv} This objective is to carry out and support local investment promotion activities that are required to encourage and facilitate increased local investment, including entrepreneurial

development programs, as well as to initiate and support measures that will improve the country's investment climate for both domestic and foreign investors.^{xlvi}

The National Environmental Management Council (NEMC)

The NEMC was established in 1983 when the Government of Tanzania enacted the National Environmental Management Act^{xlvii} and it follows the response to the need for such an institution in Tanzania to oversee environmental management issues. The EMA 2004 repealed the EMA 1983 re-establishing NEMC to give it the mandate to undertake a variety of activities in the promotion, enforcement and monitoring of environmental impact assessments, in the facilitation of public participation in environmental decision-making, and in raising environmental awareness and collecting and disseminating environmental information (section 17 of the EMA 2004). In order to guarantee that the environment is safeguarded from harm, NEMC has been tasked with supervising all investment projects. Should the environment be destroyed, the responsible company is required to provide compensation.

CONCLUSION

The study examined the laws, rules and policies which govern investment in Tanzania including the Constitution of the United Republic of Tanzania, the Mining Act, and the Investment Act, the policies which governs investment in Tanzania and then study also examined the institutional framework which governs investment and local investors in Tanzania. According to the study, local investors have been protected and encouraged to participate in Tanzania's mineral extraction industry as a result of the introduction and adoption of laws pertaining to the mining industry. For both domestic and foreign investors, the current regulations bring about a number of changes to the investment that have a big impact. The TIC Board's newly defined responsibilities include, among other things, constantly assessing the organization's operations to make sure its objections are heard, keeping an eye on the national and international investment environment, suggesting ways to improve Tanzania's attractiveness as an investment destination, and keeping an eye on the staff members' moral behavior.^{xlviii} Also, the quorum for the board's meetings has been increased from four to five members,^{xlix} nevertheless, the new regulations^{xlix} do not specify the board members' qualifications..

RECOMMENDATIONS

This study recommends that the government should enact a specific and effective law and policy on local investments in Tanzania. The government through the legislature as the law-making body of the state should enact specific laws that govern the local investment for fair competition, transparency and equal treatment in investment practices. The state is also called upon to formulate a conducive investment policy to support better local investment. The reason for having an enabling policy and effective legal framework on local investments is to create an open and equal level playing field that fosters fair competition and innovation to the investors both local and foreign ones.

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