ISSN 0012-8678

EASTERN AFRICA LAW REVIEW

ISSUE NO. 2	VOLUME 50	DECEMBER	2023

A JOURNAL OF LAW AND DEVELOPMENT

Published by University of Dar es Salaam School of Law
This issue was published in February 2026

EASTERN AFRICA LAW REVIEW
A Journal of Law and Development

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P.O. Box 35093,
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Price

Price per issue exclusive of postage is TShs. 20,000 (within Tanzania) USD 20 (outside Tanzania)

Frequency of publication

The publication is biannual: It is published in June and December.

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MANDATORY MINING STATE PARTICIPATION IN TANZANIA: ANALYSIS OF LEGAL AND REGULATORY IMPLICATIONS ON INVESTMENTS

Theophil Romward[*]

Abstract

The need to reinforce Tanzania's resource sovereignty to maximise revenues while creating investment-friendly environment has triggered debates in Tanzania for quite long. To realise this objective, in 2017, Tanzania introduced the seemingly revolutionary legal reforms which the government has described as 'nationalistic' in addressing historical injustices in Tanzania's extractive sector. Among these reforms is mandatory state participation in the mining operations by which the Government acquires a minimum of 16% non-dilutable free carried interest (FCI) shares in the mining companies' capital. This article proffers critique on the law with a view to establishing the extent to which Tanzania can successfully realise the intended objective. It argues that the FCI requirement has occasioned clear controversies which, if not addressed, stand to unnecessarily exasperate investors, thus incentivising their undesired behavioural responses to the legal system or resorting to relocating their investment projects to other destinations. As such, amendments to the law cannot be underestimated.

Key words: *State participation, Free carried Interest shares, resource sovereignty, mining investments*

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1. INTRODUCTION

A historical survey of the African countries' mining sectors and their legal frameworks reveals that despite their natural resources, the nexus between such resources and socio-economic development is a rare commodity; the countries are custodians of social unrests, environmental pollution, economic and political instability, and corruption, arbitrary displacement of land owners without compensation and human rights violations.[1] Instead of cherishing the resource abundance as a blessing, in most

African countries, such resources are viewed as a curse.[2] Although these countries have been at a forefront in designing legal

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1 Lange, S., "Gold and Governance: Legal Injustices and Lost Opportunities in Tanzania", 110/439 *African Affairs*, 2011, p. 233, at p. 234; Collier, P. and Venables, A., "Natural Resources and State Fragility", European Report on Development, 2010, at p. 3; Kumah, A., "Sustainability and Gold Mining in the Developing World", 14/3 *Journal of Cleaner Production*, 2006, p. 315, at pp. 317-18; 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, p. 271, at p. 273; Madoshi, H. et al., "Calling for Justice in the Goldfields of Tanzania" at 8, available at <https://www.researchgate.net/publication/265946177> (accessed 3 August 2023); Mlowe, P. and Olengurumwa, O., "Killings around North Mara Gold Mine: The Human Cost of Gold in Tanzania-the Shootings of the Five", Fact Finding Mission Report, 2011, at p. 5.

2 Jingi, M. J., "Integrity First: Why Mineral Wealth not a Blessing for Africa", *The Citizen* (Dar es Salaam), 4 June 2017, available at <http://www.thecitizen.co.tz/oped/Why-mineral-wealth-not-a-blessing-for-Africa/1840568-3955284-format-xhtml-mlwbmtz/index.html> (accessed 10 August 2023); Hamilton, K. et al., "Capital Accumulation and Resource Depletion: A Hartwick Rule Counterfactual", *Environmental & Resource Economics,* 2006, p. 517, at p. 517; Holden, S., "Avoiding the Resource Curse: The Case of Norway", 2013, at p. 2; Carmignani, F. and Chowdhury, A., "Why are Natural Resources a Curse in Africa, But not Elsewhere?", at p. 3; Boschini, A. D. et al., "Resource Curse or Not: A Question of Appropriability" 109/3 *Scandinavian Journal of Economics*, 2007, p. 593, at p. 594; Boschini, A.D., et al., "The Resource Curse and Its Potential Reversal", *World Development,* 2013, at p. 1; Stevens, P. et al., "The Resource Curse Revisited", *Research Paper,* 2015, at p. 1; Auty, R., "Political Economy of African Mineral Revenue Deployment: Angola, Botswana, Nigeria and Zambia Compared", 28 *Working Paper,* 2008, at p. 4.

frameworks to create investment-friendly environment for potential investment projects, a critical challenge is how to design such frameworks without killing "the goose that lays the golden egg".[3]

Tanzania has not been exempted from these challenges. Despite resource abundance, Tanzania's mining sector's contribution to national development has raised public concerns and debates for years. These concerns include the minimal share Tanzania receives from the extractive sector; the prevalent abject poverty; and poor social services in mining areas.[4] Other concerns that have been facing Tanzania's mining sector include unfair compensation in land acquisition; uneven concessions, and lack of transparency in the management of mineral wealth.[5] To address these concerns and "to regain its legal rights to own and control resources for national development",[6] in 2017, the Government reformed the mining legal framework by introducing the Natural Wealth and Resources (Permanent Sovereignty) Act of 2017 with a view to re-enforcing resource sovereignty and control; the Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act of 2017 to regulate the review and renegotiation of natural resources agreements; and the Written

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3 Otto, J. et al., *Mining Royalties: A Global Study of their Impact on Investors, Government, and Civil Society,* World Bank, 2006, at p. 8; Owusu-Koranteng, D., "Mining Investment and Community Struggles", 35/117 *Review of African Political Economy,* 2008, p. 467, at p. 467.

4 Tanzania Extractive Industries Transparency Initiative <https://eiti.org/tanzania>accessed (10 March 2025).

5 François Bourguignon, 'Political and Economic Development of Tanzania: A Brief Survey' (2018) Tanzania Institutional Diagnostic 10<https://edi.opml.co.uk/resource/tanzania-institutional-diagnostic-chapter-2/> (accessed 07 March 2025).

6 Id, p. 273.

Laws (Miscellaneous Amendments) Act of 2017 which substantially amended the Mining Act.

A notable amendment to the Mining Act was the introduction of mandatory state participation in mining operations by which the Government can acquire from the mining companies holding Special Mining Licences (SMLs) and Mining Licences (MLs) a minimum of 16% non-dilutable FCI shares.[7] It is noted that to translate the endowed mineral resources into development path, which is the desired outcome of the resources extraction, the mineral-producing country's capacity in formulating and implementing policies cannot be underestimated.[8] This capacity depends, on the one hand, on the state's fiscal capacity, i.e., its ability to generate revenue which depends on, among others, the structure of the national tax system, its enforcement capabilities,[9] political structures, and, on the other hand, on the state's legal capacity, i.e., the ability to regulate markets, enforce contracts, and deal with behavioural responses to the tax and legal systems such as tax avoidance and evasion.[10] There is a strong relationship between fiscal capacity, legal capacity and economic growth: while fiscal capacity can contribute to gargantuan income, its success

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7 S. 10. Prior to 2017, the government's participation was on negotiated terms, such that, not in all companies the government had participation interests.

8 Lindvall, J. and Teorell, J., 'State Capacity as Power: A Conceptual Framework', 2016, 1. <https://robobees.seas.harvard.edu/files/pegroup/files/lindvallteorell2017_updated.pdf> (accessed 26 February 2024).

9 Besley, T. and Persson, T., 'Taxation and Development', 2013, at pp. 3-4. <https://econ.lse.ac.uk/staff/tbesley/papers/TaxationAndDevelopment.pdf> accessed 28 February 2024; Bird, R. M., 'Administrative Dimensions of Tax Reform', 2004, 10 Asia-Pacific Tax Bulletin 134, at p. 135.

10 Besley, T. and Persson, T., 'State Capacity, Conflict and Development', 2009, NBER Working Paper 15088, at pp. 2, 25, 37. <https://www.nber.org/papers/w15088.pdf> (accessed 28 February 2024).

depends on legal capacity.[11] Thus, the state's fiscal and legal capacities are important for economic growth. This implies, in the context of mineral resources, that the state's legal capacity is key in translating its natural resources into development trajectory.

As such, this paper addresses the relationship between the Tanzanian Mineral Policy and its implementing tools - legal and regulatory frameworks - with a focus on state participation in mining operations to understand whether and to what extent the latter can contribute to maximising the sector's contribution to the national development. In doing so, the article establishes the extent to which Tanzania uses her resource sovereignty, through mandatory mining state participation, to achieve the intended policy objectives, i.e., augmenting mineral benefits while keeping long-term investment relationships. Specifically, the paper analyses the Mining Act, Cap. 123 [R.E. 2019] and the Regulations on state participation to establish the extent to which Tanzania can achieve the intended policy objectives.

Based on the analysis made, this article notes legal and practical issues which stand to exasperate the mining investors at the country's expenses. It thus argues that the FCI requirement has occasioned clear controversies which, if not addressed, stand to unnecessarily exasperate investors, thus incentivising their undesired behavioural responses to the legal system or relocating their investment projects to other destinations. In addition to this introductory part, this article contains other five parts. The second part sets the context of the article by addressing legal issues associated with mining industry; the third part addresses the

11 Besley and Persson, 2013, at p. 34; Besley and Persson, 2009, at p. 30.

concept of state participation, its forms; and the practice; the fourth part makes a legal analysis of the law, which informs the discussion on its implications on investments. The last part offers the conclusion and recommendations.

2. SETTING THE CONTEXT

Following the public dissatisfaction regarding mineral benefits that Tanzania has been generating from mineral resources for decades, in 2017, the Presidential Probe Committee of Experts was formed to investigate economic and legal issues related to the exportation of mineral concentrates in view of establishing their value. The Committee's report indicated that Tanzania had lost TZS. 108.46 trillion as revenues from mining operations for 19 years. This loss was comprised of corporate tax, withholding tax, royalty, anchoring and offloading charges.[12] It is noted that these losses were triggered by the International Mining Companies' (IMCs) malpractices, including tax avoidance practices, understating revenue and the value of exported mineral concentrates.[13] Although it repudiated the government's accusations as unfounded, the Committee noted that Acacia Mining Company

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[12] The United Republic of Tanzania, 'A Summary Report of Presidential Committee of Experts to Investigate Economic and Legal Issues Related to Exportation of Mineral Concentrates' (2017) 33; Curtis, M., and Lissu, T., 'A Golden Opportunity? How Tanzania is failing to Benefit from Gold Mining' (CCT, BAKWATA and TEC 2008), at pp. 18-21; The Interfaith Standing Committee on Economic Justice and the Integrity of Creation (ISCEJIC), 'The One Billion Dollar Question Revisited: How Much is Tanzania now Losing in Potential Tax Revenues?' (TEC, BAKWATA & CCT 2017), at pp.13 & 27.

[13] The United Republic of Tanzania, 2017, at p. 32; See also *African Barrick Gold Plc v Commissioner General of Tanzania Revenue Authority*, Civil Appeal No. 144 of 2018; *Bulyanhulu Gold Mine Limited v Commissioner General (TRA)*, Consolidated Civil Appeals No. 89 & 90 of 2015.

(now Barrick) was one example of IMCs that undervalued the mineral concentrates.[14]

Consequently, as indicated above, the government amended the Mining Act by introducing, among others, mandatory state participation where the government has a right to acquire non-dilutable FCI shares of not less than 16% in the mining company's capital. This requirement is substantiated in the Mining (State Participation) Regulations, 2022 (FCI Regulations). As rightly put by Noe, the 2017 amendments were meant to protect resource sovereignty by buttressing the government's control and ownership of mineral resources and operations.[15] The government describes these reforms as part of resource nationalism that addresses the long historical injustices in Tanzania's extractive sector.[16] To the contrary, some studies argue that resource nationalism has also been exercised in Tanzania to gain political popularity and good standing in national political competitions, implying that the reforms are not intended to regain sovereignty for the benefits of the people, owners of this mineral property.[17]

State participation is aimed at reaffirming the government's sovereignty and control of mineral resources, acquisition of new skills and employment by the citizens, prevention of revenue

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14 The United Republic of Tanzania, 2017, at p.18; Aglionby, J., 'Acacia Mining 'Strongly' Rejects Accusations of Tanzanian Government' *Financial Times* 12 June 2017, available at <https://www.ft.com/content/ae2503f0-274d-38f8-8aef-d44263c6a015> (accessed 10 June 2024).

15 Noe, C., "Graduated Sovereignty and Tanzania's Mineral Sector', 14(2) *UTAFITI*, 2019, p. 257, at pp. 272-73.

16 Jacob and Pedersen, 2018.

17 Ibid.

leakage, thus securing a fair share of profits.[18] However, participation through FCI shares has not been fruitful to most African countries. Ghana, for example, is noted to have lamented that FCI shares have not generated any tangible revenue to her.[19] Despite the expected benefits by governments from participation in mining activities,[20] to investors, such a requirement augments burden on businesses.[21] The requirement is viewed as confiscatory and imposing unnecessary conditions which negatively affect investments. As such, mining investors resort to malpractices which reduce the would-be benefits from state's participation, including avoiding prompt payment of distributable dividends in favour of reinvesting the earnings obtained.[22]

In Tanzania, whereas the state participation requirement is informed by the Mineral Policy of 2009 that seeks to ensure not only the government but also citizens participate in mining activities, it is the same policy that seeks to have a legal framework

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18 Omalu, M. K. and Zamora, A., "Key Issues in Mining Policy: A Brief Comparative Survey on the Reform of Mining Law", 17(1) *Journal of Energy & Natural Resources Law*, 1999, p. 13, at p. 16; Baunsgaard, T., "A Primer on Mineral Taxation", 1(139) *Working Paper,* 2001, p. 19, at p. 13.

19 Ibrahim, A., "10% Carried Interest in Mining Companies is 'Virtually Useless' – Bawumia", (Ghana, 8 May 2018), available at <https://www.myjoyonline.com/business/2018/May-8th/10-carried-interest-in-mining-companies-is-virtually-useless-bawumia.php> (accessed 6 July 2023).

20 Omalu and Zamora, 1999, at pp. 17-18; Baunsgaard, 2001, at p. 13; 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 University Press, 2018, p. 286, at p. 289.

21 World Bank, "Strategy for African Mining: Mining Unit, Industry and Energy Division", *World Bank Technical Paper Number 181*, 1992, at p. 34.

22 Kaba, D., "Free Carried Interests in Francophone Africa Mining Legislation - Is there Such a Thing as a Free Lunch?" at p. 1, available at <https://www.lexology.com/library/detail.aspx?g=7e65240f-b85e-4162-9af8-f8ec70ba0136> (accessed 18 July 2023).

that creates investment-friendly environment.[23] As such, the government finds itself at the centre of the ground trying not only to balance its interests with those of investors but also its two roles, i.e., regulatory and commercial. Besides, it is noted that despite the intention of the FCI requirement and other nationalistic changes as so described, some authors such as Noe submit that "the 2017 legal changes are silent about the complex issues arising from local residents' moral right to benefit from these mineral resources".[24] While this remains critical to people's resource sovereignty, we should be mindful of the legal and regulatory measures such as Corporate Social Responsibility requirements that are geared towards ensuring that host mining communities benefit from mineral resources besides taxes and royalties that are enjoyed collectively by all citizens. It is from this background this article was developed. Besides, findings from the author's interviews with the Mining Commission officials and personal experience obtained through research, engagement with the Mining Commission and attendance of various conferences organised by the Ministry of Minerals form part of this article.[25]

3. UNDERSTANDING STATE PARTICIPATION

3.1 Ownership and control of mineral resources

Ownership and control of mineral resources are key to mineral-producing countries. This is so because of the contribution of such resources, if well managed, to national development. The extent to

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23 Part 4.0(a), 5.1 & 5.5 of the Policy.

24 Noe, 2019, at p. 274.

25 These include a three workshop held at the JKN Convention Centre, Dar es Salaam from 1 to 3 August 2023; and a one day conference held at Johari Rotana Hotel, Dar es Salaam 19 July 2023.

which mineral-producing countries benefit from these resources depends on the ownership and control approach of such resources and the available mechanisms devised by the government of the respective country.[26] This raises social, political, economic, and, more importantly, legal issues. Following the importance of resource ownership and control, several approaches exist, including absolute ownership approach (particularly of hard minerals).[27] This approach is pegged on the doctrine of *ad coelum*, in which the landowner owns everything above it and everything underneath it.[28] In this regard, under absolute ownership approach, natural resources in situ are owned by the landowner, and are thus his personal property. This is the practice in some countries, including the US and Canada.[29]

The domanial ownership approach vests ownership of natural resources in situ in the state.[30] Most legal systems, especially in

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26 Okonkwo, T., "Ownership and Control of Natural Resources under the Nigerian Constitution 1999 and Its Implications for Environmental Law and Practice", 6(1) *International Law Research,* 2017, p. 162, at p. 162.

27 The approach has undergone some modification, particularly on oil and gas whose fugacious nature has led to the emergence of other approaches, such as the qualified approach which is built on the rule of capture.

28 Wieland, P., "Going Beyond Panaceas: Escaping Mining Conflicts in Resource-Rich Countries through Middle-Ground Policies", 20 *N.Y.U. Environmental Law Journal,* 2013, p. 199, at p. 204; Ownership of Crude Oil and Natural Gas 1. Available at <http://www.katolawcentre.com/user/image/ownership-theory.pdf> (accessed 13 August 2023).

29 *Borys v CPR and Imperial Oil Limited* [1953] 7 WWR (NS0 550 – 551; Omorogbe, Y. and Oniemola, P., "Property Rights in Oil and Gas under Domanial Regimes" in McHarg, A. et al (eds), *Property and the Law in Energy and Natural Resources,* Oxford University Press, 2010, p. 115, at p. 117.

30 Wieland, 2013, at p. 208.

Africa, including Tanzania, have adopted the domanial ownership of natural resources.[31] These mineral resources, therefore, remain the property of all the people collectively, whose exploitation is exercised by the government for and on behalf of the people. It is on this ownership approach governments in these countries conduct mining operations through national mining companies (NMCs) or allow IMCs to conduct mining operations through licensing systems.[32] The common practice is that mineral-producing countries' participation in mining operations, through such NMCs, is either through joint venture (JV) arrangements with IMCs or by acquiring shares in IMCs' capital. A noteworthy practice is that states participate in mining activities through acquisition of shares by operation of law, i.e., without the government subscribing for such shares.

3.2 State participation through share acquisition

Governments, mostly through NMCs, acquire a participating interest or share the after-tax profits in JVs with IMCs.[33] Full state participation without involving private investors is no longer the industry practice. The current practice is partial participation in which the government acquires minority interest shares in the mining companies' capital, either in incorporated or unincorporated form.[34]

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31 Mining Act of Uganda 2003, s. 3; Nigerian Minerals and Mining Act 2007, Act No. 20 of 2007, s. 1; Mining Act of Kenya 2016, Act No. 12 of 2016, s. 6; The Basic Law of Governance of Saud Arabia, Royal Order No. A/91 of 1992, art. 14; Constitution of Kuwait of 1962, art. 21; Oil and Gas Act of Papua New Guinea 1998, Act No. 49 of 1998, s. 6(1); Petroleum Law of Mozambique 2001, Act No. 3 of 2001, art. 6.

32 Wieland, 2013, at p. 209.

33 Otto, 2018, at p. 289.

34 Id, at p. 288.

Under the incorporated form, the government purchases its equity shares (working interest equity).[35] This arrangement can either be under commercial or concessional terms where the government acquires its equity share at arm's length or below market price, respectively.[36] This practice is applicable in some countries, such as Botswana, where upon issuance of an ML, the government acquires up to 15% interest in which it contributes its working interest percentage of all audited arms-length expenditure incurred by the company.[37] In other countries, the government may acquire equity shares by offering infrastructural facilities as a non-cash contribution.[38]

Under unincorporated form, the government participates in mining operations through a JV with IMCs.[39] Under this arrangement, each party contributes monetary and human capital to the undertaking and participates in its management.[40] Consequently, the government generates income through profit-sharing as a contracting party under the JV, subject to its contribution. Both working interest equity and JV arrangements are preferred by investors because they allow the sharing of investment reward and risks. However, these forms of state participation raise some issues regarding their funding. The

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35 Id, at p. 289.
36 Baunsgaard, 2001, at p. 14.
37 Mines and Minerals Act 1999, Act No. 17 of 1999, s 40(1).
38 Baunsgaard, 2001, at p. 14.
39 Otto, 2018, at p. 277.
40 Shishido, Z., et al *Joint Venture Strategies: Design, Bargaining and the Law,* Edward Elgar Publishing Ltd., 2015, at p. 1.

funding risks public funds and sacrifices other national-developmental priorities.[41]

Alternatively, the investor may carry the government by paying its (the government's) contribution to the mining operation for later proceeds sharing. This takes different forms where the investor is compensated by the government; and such compensation may or may not be with interest to reflect the value of money. These forms are carried interest equity and free carried interest equity. With the carried interest equity, the investor's carry of the state's equity goes with compensation. The government compensates the private investor by contributing its (government) entitled share of proceeds.[42] This form of contribution signals the arrangement that the government's entitled share of proceeds is retained by the mining company as the government's contribution for its acquired shares. This implies that the government does not receive any dividend for some years until its shares are fully paid. To reflect the value of money, such compensation carries with it an interest.[43] This type of participation may be contractual in which a state acquires a share for which it is not able to make instant payment.[44] Unless the government compensates and pays interest to the investor out of public funds, which would make it working interest equity, the relevance of carried interest equity remains opaque. This is so because of the interest that accrues on the amount due

41 McPherson, C., "State Participation in the Natural Resource Sectors: Evolution, Issues and Outlook", in Daniel. P. et al., (eds), *The Taxation of Petroleum and Minerals: Principles, Problems and Practice,* Routledge, 2010, p. 261 at pp. 269-70.

42 Baunsgaard, 2001, at p. 14.

43 McPherson, 2010, at p. 267.

44 Otto, 2018, at p. 290.

to the investor from the state. This minimises the chances for the government to generate revenue.

On the other hand, under free carried interest equity, the investor carries the government without any interest that accrues on the compensation due to that investor. It is in the form of an interest-free loan which, to investors, is an indirect tax that increases a business burden.[45] This may incentivise mining companies to avoid prompt payment of dividends in favour of reinvesting the earnings obtained.[46] It may thus take longer for the government to receive any payback out of such equity shares. This was the case with Zambia where despite the copper price boom, she noticed negligible benefits.[47] It is also the case with Ghana where although the government is entitled to a 10% FCI,[48] the country gets zero benefits from such shares.[49] Besides FCI participation, the government may participate freely by acquiring free equity.

Through free equity interest, the host state owns shares in a mining company's capital free from any cost. In the states' perspective, free equity is justified by the state's ownership of natural resources.[50] The state only participates in dividend distribution as other shareholders. In practice, such free equity may be offset through reduced tax liability.[51] However, offsetting free equity through other tax payments negates the 'free' notion of such equity. Free equity is applicable in some countries, such as Guinea where the grant by the state of a mining permit immediately

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45 Ibid.

46 Kaba, at p. 1.

47 McPherson, 2010.

48 Minerals and Mining Act, No. 703 of 2006, s. 43(1)

49 Ibrahim, 2018.

50 Otto, 2018, at p. 289.

51 Baunsgaard, 2001, at p. 14.

accords the state an ownership interest, at no cost, of up to a maximum of 15%. Such equity participation is often contested by investors because it increases investment costs.[52] It is noteworthy that in some countries such as Tanzania, FCI and free equity concepts are used interchangeably.

Regardless of the form of state participation, it is argued that the government being a shareholder and a regulator at the same time raises a conflict of interest.[53] This is so because mining companies and the government have heterogeneous purposes, that is, commercial and regulatory; and the modern business practice demands separation of a commercial domain of mining operations under the mining companies and a regulatory domain under the government.[54] It is also argued that effective taxation is more economically viable than state equity participation.[55] Thus, the use of state participation demands a holistic examination of all fiscal tools to establish the efficacy of state equity participation over effective taxation and other applicable fiscal tools.

4. STATE PARTICIPATION IN TANZANIA

As already noted, the Mining Act creates mandatory state participation in mining operations. The government has a right to acquire a participating interest or share the after-tax profits of the Mining Companies holding MLs or SMLs. It has a right to acquire non-dilutable FCI shares of not less than 16% in the mining company's capital or the capital of any other person holding an ML

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52 Otto, 2018, at p. 289.
53 Baunsgaard, 2001, at p. 14.
54 Omalu and Zamora, 1999, at p. 19.
55 McPherson, 2010, at p. 272.

or SML.[56] The level of participation depends on the type of minerals and the level of investment. To enhance the implementation of this requirement, in 2022, the Minister for Minerals issued the FCI Regulations. [57]

Besides FCI shares, the Government can hold other shares in mining companies, including shares acquired by contributing its reversionary mineral rights to the JV; shares acquired through quantification of tax expenditures enjoyed by the mining entity during its establishment; and shares mutually negotiated and agreed upon between the Government and the mining company.[58] The next paragraphs analyse, discuss and offer critique on the FCI requirement and its implications on investments in Tanzania.

4.1 Free carried interest shares

As indicated above, in terms of section 10 of the Mining Act, the government can acquire from the companies holding SMLs and MLs a minimum of 16% non-dilutable FCI shares in their capital depending on the type of mineral and the level of investment. Introducing the FCI shares was intended to bolster the government's control and reaffirm people's sovereignty over natural resources, thus maximising mineral benefits to the government.

It should be noted at the outset that while under the Mining Act, the government is entitled to acquire FCI shares in the mining company's capital, under regulation 7(1) of the FCI Regulations, the government is entitled to acquire FCI shares in the mining

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56 Act No. 7 of 2017, s. 9.
57 GN. No. 574 of 2022.
58 Id, reg. 6(4).

company's equity capital. This implies that while, under the Act, FCI shares are acquired from the company's total capital, under the Regulations, FCI shares are acquired only from the company's equity capital. Given that companies can be financed through equity and loans, it implies that, under the FCI Regulations, FCI shares cannot be acquired from the loan part of the company's capital, which is against the Mining Act. If this remains unchanged, the government stands to lose more given that companies prefer financing by loans to equity.

Further, the above creates inconsistency between the Parent Act and the subsidiary legislation against a well celebrated principle that a subsidiary legislation should not be inconsistent with the Parent Act from which it derives validity and, in case of inconsistency, the Parent Act should prevail to the extent of such inconsistency.[59] This deserves a serious government attention.

Furthermore, under regulation 6(2), holders of MLs or SMLs are required, within 90 days from the date of publication of the FCI Regulations, to give notice to the Mining Commission to initiate negotiations for the JV arrangement to enable the government to acquire shareholding in the mining venture. In negotiating the percentage of FCI shares over and above 16%, the parties to the JV should consider the extent of government development of public infrastructure servicing the mining venture, or any specific infrastructure put in place by the government which is intended to make the particular venture feasible.[60] The FCI shares form part

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59 Driedger, E. A., "Subordinate Legislation", 38/1 *Canadian Bar Review,* 1960, at p. 5; Bakshi, P. M., "Subordinate Legislation: Scrutinising the Validity*",* 36/1 *Journal of the Indian Law Institute, 1994:* See also the Interpretation of Laws Act, Cap. 1 [R.E. 2019], s. 36(1).

60 GN. No. 574 of 2022, reg. 7(2).

of the economic benefits sharing arrangement in the joint venture arrangement.[61] It is argued here that developing infrastructure is the role of the government enjoyed by whoever lives, does business or conducts investments in the country. Acquiring shares in mining companies because of infrastructural development raises questions without answers regarding the Government's itch to attract investors.

On the one hand, regulation 7(2) entitles the government to more than 16% FCI shares in the mining company's capital depending on the extent of government development of the public infrastructure servicing the mining venture, or any Government's specific infrastructure that can enhance the mining venture's feasibility. On the other hand, under regulation 10, the Mining Commission, in consultation with the government Shareholder and Tanzania Revenue Authority (TRA), is required to determine the types of minerals or level of investment made by SMLs or MLs holders on which the government is entitled to acquire the 16% non-dilutable FCI shares or more. Regulation 10 implies that issuance of 16% FCI shares is not mandatory for every company. It depends on the type of minerals or level of investment, and the government can acquire 16% FCI shares or more.

Two observations are noteworthy from regulations 7 and 10. One, not all mining companies are required to issue 16% FCI shares to the Government. The type of minerals or level of investment are determining factors; two, for the mining company required to issue 16% FCI shares, development of the public infrastructure servicing the mining venture; any Government's specific

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[61] Id, reg. 7(3).

infrastructure that can enhance the mining venture's feasibility; and type of minerals or level of investment can entitle the government to more than 16% FCI shares. The maximum number of shares the government can acquire is not set, thus leading to a serious uncertainty. This is so because, as discussed below, under the Mining Act, besides the 16% FCI shares, the Government can acquire up to 50% of the mining company's shares corresponding to the total value of tax expenditure.[62] This implies that all shares acquired by the Government including the FCI shares should not exceed 50%. However, regulation 6(4) only pegs the 50% limit to the shares acquired through quantification of tax expenditures. It reads:

(4). The Government equity interest shall comprise of any or a combination of the following:

(a) statutory allocation of shares by every mining interest in the form of undilutable free carried interest as prescribed by the Act and described in Part IV of these Regulations;

(b) shares acquired by the government through contributing its reversionary mineral rights to the joint venture, which shall reflect the surrender value of such rights;

(c) shares acquired through quantification of tax expenditures enjoyed by the mining entity during its establishment, provided that the total government shares in such entity shall not exceed fifty percent thereof; and

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62 Mining Act, s 10(2) and (3); GN. No. 574, reg. 6(4) (c).

(d) shares mutually negotiated and agreed upon between the Government and the mining company.

Regulation 6(4)(c) above implies that only shares acquired through quantification of tax expenditures enjoyed by the mining entity should not exceed 50%, otherwise the proviso should have been placed after paragraph (d) to indicate that the 50% limit applies to all shares acquired by the Government. This causes uncertainty and inconsistency with the Parent Act, if not clarified.

It is further noteworthy that neither the Mining Act nor the FCI Regulations provide for types of minerals that may entitle the Government to 16% FCI shares or a higher level of participation, i.e. above 16% of the company's share capital. It is also not clear how the level of investment may be used by the government to acquire more participating interests in the mining projects. It remains in the discretion of the Mining Commission in consultation with the office of the Treasury Registrar and the TRA to determine the types of minerals and how the level of investment made by ML and SML holders can enable the Government to acquire the 16% FCI or more. The FCI Regulations only provide for considerations, such as capital invested; mining technology involved; profit; and total value of tax expenditures enjoyed by the mining company in determining the level of investment.[63] For start-up companies, it is not clear how the third criterion can be applied to determine the level of investment to warrant the government's acquisition of 16% shares or more.

[63] Id, reg. 10(2).

This attracts discretionary decisions which occasion legal uncertainty worth addressing either in the Mining Act or the FCI Regulations. The listed determinants of level of investment can be useful for existing companies. With the new companies, if type of minerals is not determined, it proves difficult to determine the level of investment on which the Government can acquire 16% FCI shares or more. This is so because there is no profit made by the Company unless the Government relies on the projected profit. Regulation 10(1) requires existence of all considerations for the level of investment to be determined.

For clarity purposes, the law ought to have required this criterion to determine the level of investment upon which the government could acquire more than 16% FCI shares in the course of operations upon negotiation with the relevant investor. That is the only feasible way to determine the profit made by the company. However, the implication of such a requirement, if introduced, is outside the scope of this article. The author's engagement with the Mining Commission has revealed that lack of types of minerals which would entitle the Government to 16% non-dilutable FCI shares or more has halted the companies' compliance with the FCI Regulations, particularly on the issuance of a 90 day notice to the Mining Commission.[64] This deserves a thorough consideration by the relevant authorities.

Another noteworthy challenge regarding the FCI requirement is requiring cement companies that hold MLs for extraction of

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[64] The engagements with the Mining Commission have occurred several times either physically in the Mining Commission's office in Dodoma or through phone calls with officials of the Mining Commission on enforcement of Mining (State Participation) Regulations, 2022.

limestone to also comply with the FCI Regulations**,** failure of which has adversely affected the renewal of some companies' licences.[65] In one of the discussions with two officials from two cement companies, cement companies' argument, to which the author subscribes, is that the extraction activity of cement producers is only incidental to their main activity, which is the production and sale of cement. Once extracted, the limestone is not sold but is used as a simple ingredient in a complex manufacturing process which is the core business of cement producers. This manufacturing activity is industrial, complex and costly as it requires heavy industrial investments which are always made in coordination with the authorities. As such, although they hold MLs, which would literally necessitate them to comply with the Mining Act and the FCI Regulations, requiring them to issue 16% FCI shares as it is for ordinary mining companies would be unfair and discriminative as quarrying of limestone forms a very small part of the mining activity as intimated under the Mining Act. It is not clear if the Mining Act and the FCI Regulations envisaged that cement companies should cede their shares to the Government. Based on these reasons, requiring cement companies to cede their shares in compliance with the FCI Regulations is unfair and, if maintained, stands to frustrate cement industry in the country.

4.2 Government's shares from converted tax incentives

Besides 16% FCI shares, the government can acquire up to 50% of the mining company's shares corresponding to the total value

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[65] Lyimo, H., "What cement stakeholders want in Finance Bill 2024: Cement stakeholders are asking to be exempted from Mining Act with Regulation". Available at <What cement stakeholders want in Finance Bill 2024 - Daily News> (accessed on 27 February 2025).

of tax expenditure, that is, the quantified value of tax incentives enjoyed by the company.[66] The law allows the government to enter into a stabilisation arrangement with an investor. In case such arrangement involves tax incentives enjoyed by the company, such a stabilisation arrangement should, first, provide for quantification of the value of such incentives; and secondly, provide how the company should recompense the government for the foregone revenues corresponding to such incentives in terms of section 100E(4) of the Mining Act. However, the government can opt to convert the quantified tax incentives into equity holdings in the company's capital. This implies that shares acquired by the government through tax incentives enjoyed by the company do not apply to all mining companies but only those enjoying tax incentives from the government.

This responds to public outcry over generous fiscal incentives in the form of taxes, royalties and other duties through which, as reported, Tanzania has lost revenues for decades.[67] The government's shares in this respect depend on the value of tax incentives, i.e. the higher the value of incentives, the higher the amount of government's shares.[68] However, as it is indicated above, the shares acquired by the government should not exceed 50% of the company's capital. It is not clear if this 50% cap is only restricted to shares out of tax incentives over and above 16% FCI shares or refers to all shares the government can acquire

It should be noted that through a stabilisation arrangement, the government may reduce taxes, royalties, or provide total

66 Mining Act, s 10(2) and (3); GN. No. 574, reg. 6(4)(c).
67 ISCEJIC, 2017.
68 Act No. 14 of 2010, s. 10(3).

exemptions to marginal mining companies for them to recoup from their marginal state. This is done on the agreement that once the company has recouped**,** the government may wish to restore its foregone revenue by converting the provided incentives into shares. This practice appears to create a conducive environment for investment in the country. Instead of closing its mining investment prematurely, the mining company is incentivised by the government to proceed with mining operations. The questions that arise relate to what happens if the company fails to recoup to the extent that it should close business or be wound up, and thus fails to recompense the Government, or it enjoys incentives whose quantified value entitles the government to more than 50% shareholding in the mining company's total capital. Having a progressive income tax and royalty system in which revenues flow to the government depending on the project's profitability, would work in the best interest of both the Government and investors.

Despite the above, the requirement for converting the enjoyed incentives to shareholding can be carved out by section 10(4) of the Mining Act. For clarity and avoidance of doubt, section 10 of the Mining Act reads:

> "10(1). In any mining operations under a mining licence or a special mining licence the Government shall have not less than sixteen percent non-dilutable free carried interest shares in the capital of a mining company depending on the type of minerals and the level of investment.
>
> (2) In addition to the free carried interest shares, the Government shall be entitled to acquire, in total, up to fifty percent of the shares of the mining company commensurate with the total tax expenditures incurred by the Government in favour of the mining company.

(3) Acquisition by the Government of shares in the Company shall be determined by the total value of the tax expenditures enjoyed by the mining company.

(4) Without prejudice to the provisions of subsection (1), the Government and a holder of a mining licence or special mining licence may, for the purposes of ensuring Government's effective participation in the mining operations as contemplated in this section, establish a special arrangement in a manner prescribed in the regulations".

A noteworthy aspect from the above provisions of section 10 is that subsection 1 is mandatory and cannot be carved out. Subsections 2 and 3 bring in the notion of the government's entitlement to 50% shares based on the total value of the tax incentives. However, subsection 4 provides a carve-out, whereby a company can enter into a special arrangement with the government for purposes of furthering the government's participation in the mining activities. This implies that such arrangement can reduce the 50% shareholding to a lower percentage, but which cannot fall below 16% or result into another arrangement which guarantees revenue for the government.

4.3 Government's shares from reversionary mineral rights

The government's equity in the mining venture can also comprise shares acquired by the government through contributing its reversionary mineral rights to the JV with the mining company, which should reflect the surrender value of such rights.[69] Reversionary mineral rights are mineral rights which revert to the government upon cessation by operation of law, that is, not cessation of operations as result of mine closure.[70] Such mineral

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69 GN. No. 574, reg. 6(4)b.

70 Id, reg. 4(1).

rights are converted into revisionary mineral rights and are reverted to the government issuable to the government shareholder of FCI shares, i.e., the Treasury Registrar.

Under the Mining Act, in the case where the Minister for Minerals considers that the public interests so dictate, he may, by notice published in the Gazette or in a local newspaper, designate any vacant area other than an area already forming part of a reserved area as an area for which applications for a prospecting licence, ML or SML by tender are invited.[71] The prospecting licence which is no longer renewable after the second renewal in terms of section 32, within four months from the date it expires, is deemed to have been designated as an area for which the Minister may invite applications by tender; declare such an area to be exclusively reserved for allocation to small scale miners or upon expiry of a four month period, the area should fall vacant.[72]

Besides, the Minister may cause any vacant area other than a reserved area to be reverted to the government. The area reverted to the government is held by the government shareholder of FCI shares in accordance with section 10 of the Mining Act, who should be issued with a certificate of reversionary mineral rights.[73] From this, we note that the Minister has three options regarding a licence that ceases to operate by operation of law. First, the area can be reverted to the Government as a revisionary mineral right; secondly, it can be declared vacant and remain as such; and thirdly, it can be designated as such for which the Minister may invite applications by tender.

71 Act. No. 14 of 2010, s. 15(1).
72 Id, s. 15(2).
73 Id, s. 15(4).

In a bid to convert mineral rights that cease to operate by operation of law into reversionary mineral rights, the surrender value of such revisionary rights is key. The surrender value is determined depending on mineral resource estimation as provided by the Geological Survey of Tanzania (GST) or any other company commissioned by the Government.[74] The Mining Commission considers the economic benefits and geological advice provided by the GST or the commissioned company to determine the mineral rights revertible to the government.[75] Subject to the determined surrender value, upon reversion of the mineral right to the government, the Mining Commission issues to the government Shareholder a reversionary certificate which replaces each of the reverted mineral right and vests unto the government rights over the respective mineral rights areas.[76]

Besides, where in the Mining Commission's opinion, the licence which ceases by operation of law is not economically worth reverting to the government, it is required to submit the findings in that regard to the Minister for Minerals.[77] However, irrespective of the Mining Commission's findings, the Minister may within 30 days of receipt of the findings direct that the mineral right be reverted to the Government and a reversionary certificate be issued accordingly.[78] In view of quantifying the Government's contribution to capital in the mining JV arrangement, each reversionary mineral right is assigned a surrender value which enables the Government to convert the reverted mineral right into an ML or SML, and thus, quantify its shareholding in the mining company.

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74 GN. No. 574, reg. 4(1) and 5(3).
75 Id, reg. 4(2).
76 Id, reg. 4(4).
77 Id, reg. 4(3).
78 Id, reg. 4(5).

These provisions on reversionary mineral rights reflect the spirit of the Mining Act on having land parcels for prospecting operations that come to an end to be remitted to the Government for other use. This is the reason the law enacts a requirement to relinquish part of land when applying for renewal of a prospecting licence. Despite what might be construed as a good intention of the Government or any benefits that the Government expects to garner from the reversionary mineral rights, there are issues worth noting and addressing. First, it defies logic that despite the finding that the licence is not economically worth reverting to the government, the Minister can still direct its reversion to the government and issuance of a reversionary certificate accordingly.

Secondly, the surrender value of each reversionary mineral right is established by the GST or any Government-commissioned company. It is this value that determines the Government's contribution to the JV arrangement. The investors whose shares will be acquired by the Government upon establishing the value of the rights reverted to the Government and now forming part of the joint venture arrangement are not involved in estimating and establishing the value of such rights. It is questionable if this creates a good investment environment, for the value is only established by the Government and not both parties to the JV arrangement. As such, the Government's capacity to strike a balance between its interests and those of investors remains questionable. Although the JV investors might not be present at the time of establishing the surrender value, there can still be a room for them to also carry out studies, with the Government's participation, to confirm the established value which is likely to affect their investment.

4.4 FCI-related rights and obligations

The mandatory state participation in the mining operations came with various rights and obligations on both the government as the freely carried shareholder and the investor on the other hand.

4.4.1 Participation in loan repayment

The government has a right to receive loan notes subject to certain rules.[79] Such rules are that any shareholder loan which does not bear interest can be made without any obligation to issue loan note to the government; any shareholder loan which bears interest is subject to an obligation to issue loan notes to the government representing a percentage of FCI shares therein; any shareholder loan raised from an external third party for purposes of on-lending the funds to the mining company is subject to the obligation to issue loan notes to the government representing a percentage of FCI shares therein; and any shareholder loan agreed by the parties which bears reasonable interest rate that is advantageous to the company is not subject to the obligation to issue loan notes to the government.

These rules imply that the government is entitled to receive a share of loan repayment for qualifying shareholder loans, which is proportionate to 16% FCI shareholding. It is, however, not defined in clear terms how this will be implemented. For example, a reasonable interest rate that is advantageous to the company needs clarity. There are also no determining factors of the loan which is advantageous to the company as the company would not be expected to seek loan that is disadvantageous to her business.

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[79] Id,reg.8.

Unless this requirement is clarified, it stands to impact the mining business in Tanzania.

4.4.2 Joint venture arrangements

As already noted, the government acquires FCI shares through a JV arrangement with mining companies.[80] Negotiations for the JV arrangement are triggered by ML and SML holders within 90 days from the date of publication of the FCI Regulations. However, types of minerals warranting acquisition of FCI shares are not published. Despite this, the Mining Commission has issued a notice requiring all ML and SML holders to notify the Commission to initiate the negotiations for a joint venture arrangement for purposes of the government's participation in mining operations.

The underlying principles for the envisaged JV arrangement include incorporation of a JV company (JVC) with the government shareholder; application of the equitable economic benefits sharing principle for the life of the mine; having a jointly agreed financial model to guide the management and operations of the JVC; jointly managing the JVC; agreeing on the fiscal assumptions underlying the economic benefits sharing principle; JVC to hold all proceeds from sale of mineral products in local and foreign currency bank accounts in Tanzania; issuing an ML or SML to the JVC; agreeing on modalities of in-country beneficiation of minerals; and preference of Tanzanians for appointment to management positions.[81] With the principle that an existing ML or SML is issued to the JVC, the fate of the current ML or SML owned by the exiting company remains undetermined. Some questions arise, for

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80 Id, reg. 6(1) and (2).

81 Id, reg. 11.

example, as to whether such licences will be transferred to the JVC; or will be revoked and re-issued to the JVC. It is noted, however, that cancellation or revocation of mineral rights is only triggered by the holder's default, which is not the case at hand.

4.4.3 Participation in the management of the joint venture company

By virtue of the FCI shares, the government shareholder is entitled to, first, appoint two suitable persons with pertinent qualifications as independent members to the JVC's Board of Directors; secondly, subject to the structure of the company and qualifications set out by the company, approve at least two suitable persons to the Top Executive Management of the company as agreed in the shareholders agreement, provided that any other management positions created by the company should be shared with the government shareholder on a 3:1 ratio; participate in assets distribution on winding up; and receive distributions made by the company, including loan notes in respect of qualifying shareholder loans.[82] It is noteworthy that no financial contribution is required from the government on account of its FCI shares.[83] This is in line with the available practice globally as discussed in this article that the government participates freely by virtue of owning the resources. Such FCI shares cannot also be diluted even when shareholders increase the company's capital.[84]

Despite the government's right to participate in the management of the JVC, including participating in statutory meetings and accessing the JVC's reports, these rights are subject to negotiations as per regulation 6(3) of the FCI Regulations. Besides, even with

82 Id, reg. 7(4)(a-d).
83 Id, reg. 7(5)(a).
84 Id, reg. 7(5)(b).

the government's representatives in the Board of Directors, the company's Boards of Directors work in the best interests of the company, which may mismatch the government's interests to ensure social welfare. In view of avoiding distribution of dividends to the government, which to the investors appears as an unfair advantage, ML and SML holders usually embark on measures that ensure the would-be distributable dividend is reinvested.[85] They also embark on other unprecedented practices by which the government does not receive dividends, thus weakening the state's legal and fiscal capacities.

As such, revenues as a result of the government's participation may hardly be generated, as it has been the case in Ghana and DRC.[86] Not only Ghana and DRC, even Tanzania before 2017 when the FCI was introduced as mandatory requirement, Tanzania had signed various MDAs under which the government had certain percentages of ownership in mining ventures including Bulyanhulu Gold Mines Ltd where the government held 15% shares, the amount received by the government is hard to obtain on records. The available records indicate that upon review of this agreement in 1999, the government accepted $5,000,000 in lieu of such shares.[87] These issues are in line with what has been advocated for by other authors that, if not well regulated, effective taxation may work better to the host country than its participation through FCI shares.

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85 Kaba, p. 1.

86 Ibrahim, 2018; Malden, A. and Osei, E., "Ghana's Gold Mining Revenues: An Analysis of Company Disclosures", 2018, at p. 13; Ross, A., "Congo's State Miner Seeks to dissolve Glencore Venture over Debts", available at <https://www.reuters.com/article/us-glencore-congo-katanga-mng/congos-gecamines-says-debts-require-dissolution-of-glencore-venture-idUSKBN1HV0ZR> (accessed 12 October 2023).

87 The United Republic of Tanzania, 2017, at pp. 34-38.

5. Conclusion

In view of asserting resource sovereignty and control to maximise mineral benefits, Tanzania introduced mandatory state participation in mining operations as opposed to previous practice where the state could participate in mining operations by acquiring shares on negotiated terms. This requirement is cemented by the FCI Regulations which provide more details as to how the requirement should be implemented. The government has described these reforms as resource nationalism geared towards addressing historical injustices in Tanzanian's extractive sector. The article has found legal and practical controversies which threaten Tanzania's capacity to translate the resources into development path while also creating investment-conducive environment as per the Mineral Policy. It has been noted that while ML and SML holders are required within 90 days from the date of publication of the Regulations to notify the Mining Commission regarding negotiations for the JV arrangement, the government's entitlement to acquire the 16% FCI shares or more depends on the types of minerals or level of investment made by ML or SML holders. Currently, there are no guidelines regarding types of minerals or clear guidance of application of the level of investment.

Regarding Tanzania's capacity to generate revenues from FCI shares, it has been argued that the Government's shareholding and regulatory roles at the same time raise conflicts of interest and there is no proof that state participation would work better than effective taxation. Given that this is a new requirement for existing mining companies, these rights are subject to negotiation in view of aligning the new requirement with the pre-existing MDAs in accordance with the Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act of

2017. Although the government may have strong position in renegotiation given the already invested capital (obsolescing bargain), there might be stern consequences in terms of compensation if mining companies resort to arbitration in accordance with existing MDAs, relocating investments or resulting in reputational risks.

In light of the above conclusion, some recommendations are made. It is recommended that the FCI Regulations be amended with a view to preferring clarity regarding implementation of the FCI requirement.

Specifically, the FCI Regulations should address such issues as: (i) the fate of the current MLs and SMLs owned by the current companies, i.e., whether such licences will be transferred to the JVC or will be revoked and re-issued to the JVC; (ii) if the JVC option cannot be avoided, then such a JVC should not be issued with an ML or SML, rather it should be incorporated for supervisory purposes only as a holding company; (iii) the type of minerals on which the Government is entitled to acquire the 16% non-dilutable FCI shares or more should be published; (iv) determining factors of the loan which is advantageous to the company and, therefore, does not to warrant issuance of loan notes to the government for purposes of sharing the repaid loan proportionately to the FCI shares held should be stipulated; (v) the mining company's participation in evaluation and estimation of the surrender value of the reversionary mineral rights should also be provided for; (vi) cement companies should be excluded from the FCI requirement; and (vii) the Mining Act should be aligned with the FCI Regulations whether FCI shares are acquired from equity capital or company's total capital.