

# The DEMYSTIFICATION Of MINING Contracts In Tanzania

## Setting the Foundation: The Mineral Sector Policy

It is well-documented that Tanzania is endowed with a number of minerals, including diamonds and gold, and the unique gemstone, Tanzanite. The mining sector was recently prioritised by the Government of the United Republic of Tanzania ('GoT') due to its recognised potential in playing a huge part in the development and rapid economic growth of the country. To this end and within the context of broader economic and legislative reforms aimed at liberalising the economy (pursuant to the belief that a market-led economy will lead to sustainable development), in October 1997, the GoT, through the Ministry of Energy and Minerals ('MEM'), formally set out the Mineral Sector Policy ('MSP'). The MSP is intended to drive the development and exploitation of minerals in the country. The Mining Act, 1998 (as amended) became the principal and comprehensive law governing the sector and thereby repealing and replacing *inter alia* the Mining Act, 1979.<sup>1</sup> The Act came into force on July 1, 1999.<sup>2</sup>

In line with broader national objectives, the GoT's vision for the sector over the next two-three decades is:

"[to] have a strong, vibrant, well-organised private sector led, large and small-scale mining industry conducted in a safe and environmentally-sound manner; contributing in excess of 10% of the GDP; a well-developed gemstone cutting and jewellery industry making Tanzania the gemstone centre for Africa; and providing dependable employment to Tanzanians."<sup>3</sup>

Broadly speaking, and in order to realise this vision, the private sector is expected to drive the mining sector through direct investment. That is, the private sector is expected to lead in all mining activities, including exploration, development, and mineral beneficiation and marketing. The GoT is meant to perform a more supportive and regulatory function by *inter alia* creating a legislative, fiscal, and institutional framework

that will attract private investment, ensuring that social and environment guidelines and codes of conduct are established and adhered to, provide continuous support to artisanal and small-scale miners, foster the development of industrial infrastructure, strengthen the ability of the GoT to perform its regulatory and investment promotional activities, and conduct research.<sup>4</sup>

The MSP sets out multiple strategies which are to be employed at the macro-economic level (e.g. ensuring suitable monetary investment policies are in place) right through to the community-level (e.g. fostering the creation of key partnerships between mining companies and local communities) in order to fulfil these objectives. Moreover, the MSP identifies various groups as being necessary actors in the implementation and fulfilment of the MSP, including NGOs, local communities in which mines are located (particularly vulnerable groups therein such as women and children), and the financial services and capital markets industry.<sup>5</sup>

## Performance of the Mining Sector: Living up to Expectations?

On the surface, the rapid growth of the mining sector in Tanzania in the past decade proves that the sector does in fact have a significant role to play in the overall development of the country as envisioned by the GoT. It is widely acknowledged that following the enactment of the Mining Act, 1998 and within the context of the broader nation-wide financial and legislative reforms, there was a sharp increase in gold production. This in turn contributed significantly to the growth of the sector, as well as attracted the largest foreign direct investment (nearly 75% of total foreign direct investment).<sup>6</sup> Since 1998, Tanzania has not only become a player on the world gold market, but also Africa's third largest producer of gold after South Africa and Ghana.<sup>7</sup>

Whilst nearly half of Tanzania's exports are now attributed to the mining industry, it only accounts for 3.2% of the GDP and

1 The other laws which were repealed were the Mining (Controlled Areas) Ordinance, the Mining (Loans) Ordinance, The Gold Trading Ordinance, the Diamond Industry Protection Ordinance, and the Gemstone Industry (Development and Protection) Act, 1967. See the Fourth Schedule and Part I of the Fifth Schedule to the Mining Act, 1998 for the saving and transitional provisions. Whilst the Mining Act, 1998 is the governing sector legislation, the National Environmental Act, 2004 the Employment and Labour Relations Act, 2004 the Companies' Act, 2002, and a host of other laws are relevant to the business of mining in the country.

2 See Government Notice No. 171 of 1999

3 Ministry of Energy and Minerals, The United Republic of Tanzania. Mineral Policy of Tanzania. Tanzania: October, 2007, page vii.

4 Supra Note 3 at page 2-3.

5 Supra Note 3 at page 30.

6 Curtis, Mark and Tundu Lissu. A Golden Opportunity?: How Tanzania is Failing to Benefit from Gold Mining. Tanzania: Christian Council of Tanzania, National Council of Muslims in Tanzania, Tanzania Episcopal Conference, March, 2008, page 13; Macdonald, Catherine and Alan Roe. Tanzania Country Case Study. The challenge of mineral wealth: using resource endowments to foster sustainable development. International Council of on Mining & Metals, July 2007. Available at: <http://www.icmm.com/publications/1700RECCSTanzaniaFINAL.pdf>, accessed March 25, 2008, page 8.

7 Tanzania becomes Africa's third largest producer of gold; government wants larger share." Business. International Herald Tribune, October 26, 2006. Available at: [http://www.iht.com/articles/ap/2006/10/26/business/AF\\_FEA\\_FIN\\_Tanzania\\_Mining.php](http://www.iht.com/articles/ap/2006/10/26/business/AF_FEA_FIN_Tanzania_Mining.php), accessed March 25, 2008.

3.6% of the GoT's total tax revenues.<sup>8</sup> Critics have often questioned the extent to which the mining industry, an identified priority sector, has contributed to the development of Tanzania as a whole, and the local communities in which the mines exist in particular.<sup>9</sup> It has been argued that whilst the country appears to be an emerging champion of the regional mining industry, the GoT has not been able to translate this significant mineral wealth (a potential fortune of USD 39 BN at current gold prices) into concrete benefits for the majority of the country's citizens.<sup>10</sup>

The net result of the tensions between the significant financial success of the mining companies on the one hand and the questionable socio-economic impact of mining activities on the other, has made the sector unsurprisingly controversial. The fact that the mining contracts, or development agreements have been kept out of the public arena has only exacerbated matters. In recent years, the extractive industries have taken centre stage in public fora and in response to the latest round of mounting public pressure, the GoT has directed a commission headed by Justice Mark Bomani, (commonly referred to as 'the Bomani Commission'), to review the subsisting mining development agreements.

The findings of the Bomani Commission are expected to be released at the end of March 2008. The report shall come at a time when the MEM is itself conducting a comprehensive review of the MSP and governing legislation. One of the critical initial outcomes is that these agreements are not expressly confidential as they do not contain a confidentiality clause that would bar either party to the agreement—namely the company (or companies, as the case may be) or the GoT—from disclosing the contents of the agreement to third parties. Given this outcome, Policy Forum (PF) has taken the opportunity to review the subsisting mining agreements with a

8 Macdonald, Catherine and Alan Roe. Tanzania Country Case Study. The challenge of mineral wealth: using resource endowments to foster sustainable development. International Council of on Mining & Metals, July 2007. Available at: <http://www.icmm.com/publications/1700RECCSTanzaniaFINAL.pdf>, accessed March 25, 2008, page 8.

9 See in general Curtis, Mark and Tundu Lissu. A Golden Opportunity?: How Tanzania is Failing to Benefit from Gold Mining. Tanzania: Christian Council of Tanzania, National Council of Muslims in Tanzania, Tanzania Episcopal Conference, March, 2008.

10 Curtis, Mark and Tundu Lissu. A Golden Opportunity?: How Tanzania is Failing to Benefit from Gold Mining. Tanzania: Christian Council of Tanzania, National Council of Muslims in Tanzania, Tanzania Episcopal Conference, March, 2008, page 13.

view to de-mystifying what the companies and the GoT respectively have bargained for, and how this feeds into the ongoing debate regarding the socio-economic impact of the mining sector.

## The Mining Development Agreements: What do they Actually Say?

### Background

#### Subsisting Development Agreements

At the time of writing, the GoT had concluded seven mining development agreements with various companies to engage in large-scale mining. Of the seven, at least five were entered into before the Mining Act, 1998 came into force in July 1999 and three of these before the Mineral Sector Policy ('MSP') was set out in October 1997.<sup>11</sup> However, agreements that were entered into immediately prior to the enactment of the Mining Act, 1998 (in 1997, and 2 in June of 1999), ensure that the rights accrued by the companies would endure in the event that a new law would be enacted repealing the Mining Act, 1979.<sup>12</sup> Further, the Mining Act, 1998 ensures that agreements between mineral rights-holders and the GoT under the Mining Act, 1979, would remain effective.<sup>13</sup> Importantly, however, this means that a significant proportion of the current mining agreements were executed at a time when the GoT had not yet formally set out its development strategy for the sector and potentially therefore the concluded agreements do not take into account long-term development objectives as later identified by the GoT.<sup>14</sup> Furthermore, the downside of having customised contracts where the state lacks capacity to regulate/administer/monitor contracts effectively makes administration (as well as revenue collection) all the more tasking and complex.<sup>15</sup>

No	Year	Company(ies)	Mining Project
1	1992	Kagera Mining Company Limited	Exploration and Development of nickel, cobalt, lead, zinc, copper, and associated minerals (Kabanga nickel project)
2	1994	Kahama Mining Corporation Limited	Bulyanhulu gold mine
3	1997	Resolute Limited, Samax Resources Limited, Resolute Tanzania Limited & Mabangu Mining Limited	Golden Pride project
4	1999	Samax Resources Limited & Ashanti Goldfields (Tanzania) Limited	Geita gold Mine
5	1999	Afrika Mashariki Gold Mines Limited	North Mara gold mine
6 <sup>1</sup>	2003	Pangea Minerals Limited	Gold mine at Tulawaka, Biharamulo
7	2007	Pangea Minerals Limited (a subsidiary of Barrick Gold Corporation)	Gold mine at Buzwagi, Kahama

11 These statistics may be slightly skewed as one of the seven development agreements, specifically the copy of the development agreement for the development of the gold mine at Tulawaka, Biharamulo between the GoT and Pangea Minerals Limited, is neither signed nor dated.

12 Section H, mining development agreement among GoT, Resolute Limited, Samax Resources Limited, Resolute Tanzania Limited, and Mabangu Mining Limited, dated June 25, 1997; Section H, mining development agreement between the GoT and Afrika Mashariki Gold mines Limited, dated June 24, 1999; Article 15, gold mine development agreement between the GoT, Samax Resources Limited, and Ashanti Goldfields (Tanzania) Limited, dated June 24, 1999.

13 Paragraph 13, Schedule 4 to the Mining Act, 1998.

14 "Chapter VI: The Policy Challenge." World Investment Report 2007: Transnational Corporations, Extractive Industries and Development. United Nations Conference on Trade and Development. Available at: [http://www.unctad.org/en/docs/wir2007p2\\_en.pdf](http://www.unctad.org/en/docs/wir2007p2_en.pdf), accessed April 1, 2008, page 162.

15 Shemberg, Andrea. Stabilisation Clauses and Human Rights: A research project conducted for IFC and the United Nations Special Representative to the Secretary General on Business and Human Rights. John Ruggie, March 11, 2008. Available at: <http://www.reports-and-materials.org/Stabilization-Clauses-and-Human-Rights-11-Mar-2008.pdf>, accessed April 1, 2008, Footnote 59 at page 36.

## Current Owners/Operators

Whilst the above-listed companies appear as the original parties to the agreements, a number of the rights prescribed therein have since been assigned to other companies, through various corporate mergers and acquisitions. For instance, Barrick Gold Corporation ('Barrick') is the parent company for Pangea Minerals Limited resulting from its acquisition of Pangea Goldfields Inc in 2000.<sup>16</sup> Through Barrick's acquisition of 97% of Sutton Resources Ltd in mid-1999, it has taken over the latter's interests in the country through Kagera Mining Company Limited, and Kahama Mining Corporation Limited.<sup>17</sup> Afrika Mashariki Gold Mines Ltd was a wholly-owned subsidiary of the Australian-based company East Africa Gold Mines Limited. This company was then purchased by Placer Dome Inc. in 2003, and Barrick acquired Placer Dome in 2006. Hence, Barrick has directly or indirectly become one of the dominant private foreign companies in the sector operating three mines, developing its fourth (Buzwagi), and maintains an interest in a fifth mining project (the Kabanga nickel project) in the country. In a similar fashion, through the successful merger of the South African company, AngloGold Limited and Ashanti Goldfields Company Limited in 2004, AngloGold Ashanti ('AGA') has become the other principal foreign company in the sector, operating the Geita gold mine, the largest goldmine in Tanzania. Additionally, Ashanti Goldfields Company Limited's prior purchase of Samax Gold Inc in 1998 resulted in its acquisition of a 50% interest in the Golden Pride project.<sup>18</sup>

## What do the Companies Get?

### Scope

In determining what the companies and the GoT bargained for, we have narrowed the scope of our analysis to the two agreements involving Pangea Minerals Limited, as they are the most current, and the Geita Gold Mine agreement, as it is the largest goldmine in the country. As identified above, each of the seven agreements have been negotiated separately, and hence there is a certain degree of variance amongst the terms and conditions. The sample of contracts we have therefore chosen to review does not necessarily represent what all of the respective companies contracted for but are a good indication of the latest kind of terms and conditions that the GoT has negotiated for, as well as those terms which govern the largest mine in the country. Below is a description of the contractual rights and duties of the companies and the GoT respectively, followed by an analysis and concluding remarks.

16 "Profiles of Some Canadian Mining Companies Operating in Africa." Available at: [http://64.233.183.104/search?q=cache:xz6MXrmMgiwJ:www.miningwatch.ca/updir/Canadian\\_Cos\\_in\\_Africa\\_2001.pdf+kahama+mining+company+limited+barrick+pangea&hl=en&ct=clnk&cd=3&gl=uk](http://64.233.183.104/search?q=cache:xz6MXrmMgiwJ:www.miningwatch.ca/updir/Canadian_Cos_in_Africa_2001.pdf+kahama+mining+company+limited+barrick+pangea&hl=en&ct=clnk&cd=3&gl=uk), accessed March 26, 2008.

17 *ibid.*

18 *ibid.*

## I. Mineral Rights and GoT Guarantee against Expropriation

### Tulawaka and Buzwagi

One of the essential benefits received by companies is the exclusive right to conduct mining activities in a particular area for a stipulated period on agreed terms. For both the Buzwagi and Tulawaka goldmines, Pangea Minerals Limited was entitled to obtain, 60 days from executing each agreement, a special mining licence to conduct mining at both sites for an initial 25 year period, renewable at the option of the company, and subject to the Minister's reasonable satisfaction that such a renewal would be in the public's interest.<sup>19</sup>

Further, the company has the right to take outside of the country the proceeds of sale of the minerals and dispose of them as it deems appropriate throughout the subsistence of the agreements, provided that it continues to honour its obligations to make payment within Tanzania and subject to obtaining prior approval from the Bank of Tanzania ('BOT'). It is equally entitled to export and/or sell to foreign purchasers any minerals or associated products that are derived from the prescribed contract area.<sup>20</sup>

Finally, the GoT guarantees that it will not nationalise and/or forcefully acquire any part of the company's interest in the special mining licenses. Additionally, the GoT guarantees that it will not nationalise or forcefully acquire any title, interest, right of the company or its contractors and sub-contractors in any property that is used in the course of the mining operations or the special mining license. In the event that the GoT does in fact seize such property, it will be obliged to financially compensate the company and effect such payment in US dollars into a bank account identified by the company outside of Tanzania.<sup>21</sup>

### Geita

In similar fashion to Pangea, the companies (Ashanti Gold and Samax Resources) were jointly entitled to obtain, not later than 60 days after execution of the development agreement a mining licence for an initial period of 25 years with an option for the companies to renew the licence for a period of 15 years. However, in the event that the companies seek to renew the licence further, the GoT may agree to this further renewal for a period of time as determined by the GoT (through the MEM), provided that the GoT deems it to be within the public

19 Mining Development Agreement between Pangea Minerals Limited and the United Republic of Tanzania, Article 3 (Tulawaka and Buzwagi).

20 An Agreement for the Development of a Goldmine at Tulawaka, Biharamulo between the Government of the United Republic of Tanzania and Pangea Minerals Limited, 2003 ('Tulawaka'), Articles 5.1.1 and 5.1.8; An Agreement for the Development of a Goldmine at Buzwagi, Kahama between the Government of the United Republic of Tanzania and Pangea Minerals Limited (Subsidiary of Barrick Gold Corporation), dated February 17, 2007 ('Buzwagi'), Articles 5.1.1 and 5.1.8.

21 Tulawaka, Article 8; Buzwagi, Article 10.

interest.<sup>22</sup> Thus the companies are afforded an opportunity to extend the life of the goldmine for a much longer period than Pangea vis-à-vis both the Tulawaka and Buzwagi goldmine which both have a maximum life of 50 years. Like Pangea, the GoT provides a guarantee against expropriation and in the same manner, as well as secures the other rights to take the proceeds of minerals and associated products outside the country, and sell the minerals to foreign purchasers.<sup>23</sup>

## 2. Banking/'Financial Management' Rights

### Tulawaka and Buzwagi

Under both agreements, Pangea is allowed to source funding from outside Tanzania to finance its mining operations within Tanzania, as well as to retain outside of Tanzania the proceeds of any disbursements from such loans, subject to obtaining the approval of the BOT.<sup>24</sup> Moreover, the company has the right to grant any charge, lend, assign, create debentures, or mortgage over its licenses.<sup>25</sup>

It is entitled to operate bank accounts in both Tanzanian Shillings and foreign currency, provided that the said accounts hold funds related to, or derived from the mining operations. With respect to Tanzanian Shilling accounts however, Pangea has the additional benefit of disposing of those funds as they deem fit. Subject to prior approval with the BOT, Pangea is further entitled to operate foreign currency bank accounts outside of Tanzania and dispose of funds therein as it deems fit. However, the company may be required at mutually agreed intervals to provide the BOT with information on financial transactions relating to the mining operations in these foreign bank accounts in relation to the BOT's management of monetary policy, foreign exchange reserves, and balance of payments.<sup>26</sup> Finally, Pangea is entitled to maintain its accounts and records for tax and account purposes in US Dollars, as opposed to Tanzanian Shillings.<sup>27</sup>

### Geita

The companies have the same set of entitlements as Pangea.<sup>28</sup>

## 3. 'Labour' Rights

### Tulawaka and Buzwagi

Provided that Pangea, its contractors and sub-contractors, substantially comply with all applicable Tanzanian laws, including completing the application procedures and pay the

requisite fees, Pangea, its contractors and sub-contractors are free to employ, without restriction non-Tanzanians and the GoT will expeditiously grant such persons all necessary work permits, visas, and passes for this purpose.<sup>29</sup> Any such expatriate employees (and contractors and sub-contractors) involved in the mine development and mining operations are entitled to repatriate their salaries. Upon first arrival, they are permitted to import tax-free personal and household effects, including one vehicle. However, such items cannot be re-sold in Tanzania except in accordance with the Government regulations. At the termination of their employment, they are further entitled to repatriate their pension monies, balance of their salaries, as well as personal and household effects including those previously imported into Tanzania as well as purchased within Tanzania, provided that they have remitted their income taxes.<sup>30</sup>

### Geita

The companies have the same set of entitlements as Pangea.<sup>31</sup>

## 4. Rights relating to Plant and Machinery

### Tulawaka and Buzwagi

The agreements acknowledge that whilst Pangea is to utilise to the fullest extent possible locally-produced materials and supplies in the course of its mining activities, it is entitled to import without limit all such necessary supplies, including fuel, spare parts, and replacements to the spare parts inventory. For any such supplies, they are obliged to pay the customs duty applicable under the Customs Tariff Act, 1976 as at the date of the mining development agreement. Payment for the importation of fuel including road toll contribution is capped at an annual limit of USD 200,000. Any of these imported items not used by the company for its mining activities in Tanzania on the mining project specified in the mining development agreement can be freely exported tax free.<sup>32</sup> Additionally, Pangea is entitled to freely export such plant and machinery in order to have them repaired and/or refurbished, and re-imported tax free, where such plant machinery are to be permanently installed in the prescribed mining area or form part of the infrastructure.<sup>33</sup>

The Buzwagi development agreement goes further than the Tulawaka development agreement in terms of obliging Pangea to procure local goods and services where such services are competitive in terms of quality, service delivery, and price. The Buzwagi agreement further provides that Pangea in consultation with the GoT will set-up appropriate procurement process to

22 An Agreement for the Development of a Goldmine at Geita between the Government of the United Republic of Tanzania and Samax Resources Limited and Ashanti Goldfields (Tanzania) Limited, dated June 24, 1999 ('Geita'), Article 3.

23 Geita, Article 9, 5.1.1, 5.1.8.

24 Tulawaka, Article 5.1; Buzwagi, Article 5.1.

25 Tulawaka, Article 5.1.7; Buzwagi, Article 5.1.7.

26 Tulawaka, Articles 5.1.3 - 5.1.5; Buzwagi, Articles 5.1.3-5.1.5.

27 Tulawaka, Article 5.4; Buzwagi, Article 5.4.

28 Geita, Article 5.1.

29 Tulawaka, Article 6.3; Buzwagi, Article 8.3.

30 Tulawaka, Articles 6.3-6.5; Buzwagi, Articles 8.3-8.5.

31 Geita, Articles 6.3 - 6.5.

32 Tulawaka, Article 6.1; Buzwagi, Article 8.1.

33 Tulawaka, Article 6.2; Buzwagi, Article 8.2.

implement the company's obligation in this regard and taking into account the Tanzanian circumstances and to enable local suppliers to bid for the supply of such goods and services.<sup>34</sup>

## Geita

The companies have the same set of entitlements as Pangea in terms of the Tulawaka development agreement.<sup>35</sup>

## 5. Ancillary Rights relating to Land, Forestry and Water

### Tulawaka and Buzwagi

Pangea will have ancillary rights, such as land and water as necessary for the proper conduct of the mining activities. In the event that the company deems it necessary to use land lawfully owned and/or under the care of any third parties, upon the request of the company, the GoT is to assist the company in acquiring, renting, and/or otherwise being lawfully permitted to use such land.<sup>36</sup> With respect to the Tulawaka goldmine, in the event that the prescribed mining development area contains a forest reserve, the company shall have a right of entry thereto.<sup>37</sup>

## Geita

The companies have the same set of entitlements as Pangea in terms of their development agreements.<sup>38</sup>

## 6. Rights of Assignment

### Tulawaka and Buzwagi

In similar fashion to a company's statutory rights of assignment under the Mining Act, 1998, the agreements afford Pangea the right to assign any of its rights, privileges, duties, or obligations under the agreements to third parties subject to obtaining prior written consent from the GoT, such consent not to be unreasonably withheld. In the event of any such assignment, the assignee will be obliged to provide an unconditional undertaking that it will assume all of the company's duties under the agreement.

The GoT is not permitted to withhold its consent where the assignment is to an affiliate **and** the GoT is satisfied that the said assignment will not have a negative impact on the company's ability to perform its obligations under the development agreement. Even if the GoT consents to the assignment, the company will still remain liable to perform its obligations under the agreement. Further, the GoT has the right to approve an assignment of shares in the company to another that is not that company's affiliate. But, this will not prevent a shareholder from charging, transferring, or conditionally assigning its shares as security to finance the mining project.

34 Buzwagi, Article 7.

35 Geita, Articles 6.1, 6.2.

36 Tulawaka, Articles 7.1-7.2; Buzwagi, Articles 9.1-9.2.

37 Tulawaka, Article 7.3.

38 Geita, Article 8.

Moreover, any assignments made either to third parties, banks and financial institutions in the form of a security, or to affiliates will be made tax-free other than as specified under the Mining Act, 1998 and the regulations made thereunder.

However, the GoT maintains the right to refuse consent in the event that the assignment is to a company trading with or incorporated in a country which the GoT has restricted trade for policy reasons.<sup>39</sup>

## Geita

The companies must first obtain the consent of the GoT and ensure compliance with the Mining Act before assigning their respective interests in the mining licence, such consent not to be unreasonably withheld or delayed. In the event that the GoT gives its consent, the company assigning its interests in the mining licence (assignor), and the person being assigned that company's interest (assignee) must agree in writing that the assignee will become a party to the development agreement from the date of the assignment (and therefore subject to the rights and duties previously afforded to the assignor as per the terms of the development agreement) and that the assignor will no longer have any duties under the development agreement from the date of the assignment.<sup>40</sup>

As with Pangea, the development agreement provides that the GoT's consent will not be required where the assignment is to an affiliate.<sup>41</sup> Further, in the event that the prevailing legislation does not require it, either company may also assign its interests in the form of security to any financial institution which is providing financing in connection with the mining operations to be carried out in the Geita goldmine project.<sup>42</sup>

## 7. Fiscal Stability Guarantee

### Tulawaka and Buzwagi

Under both development agreements, Pangea receives a guarantee from the GoT that the GoT shall not for the life of the agreements effect any unilateral legislative changes which govern the company, the company's shareholders, rights and duties in respect of the following:

1. The term of the special mining license or the use of the land over the development mining area, or any other land outside of the said area used by the company for example for storage or transport of its products;
2. The rights of companies to employ expatriate staff, import plant, machinery, transport vehicles and any other such materials necessary for the proper conduct of the mining operations;
3. Tax exemptions;
4. Guarantee to transfer capital, profits, and dividends;

39 Tulawaka, Article 10; Buzwagi, Article 12.

40 Geita, Article 11.1.1-11.1.2.

41 Geita, Article 11.1.2.

42 Geita, Article 11.2.

5. Guarantee from GoT appropriation;
6. Pricing or export of gold;
7. Payment of royalty, income tax, and the methods of computation for each;
8. “any other matter which is fundamental to the economic position of the company”<sup>43</sup>

Further, in the event that fundamental changes do occur in the bases in the above matters concerning the company, its shareholders’ benefits, rights and duties, which place the company in a financially worse-off position than it was on the effective date (this date being defined as the last date of signature of the mining agreement), then the GoT is obliged and in consultation with Pangea to “take necessary steps to ensure that the Company’s rights or interests are not eroded or otherwise materially diminished.”<sup>44</sup>

## Geita

The companies have the same set of entitlements as Pangea.<sup>45</sup>

## What does the GoT Get?

### I. Taxes

#### Tulawaka and Buzwagi

The general set of taxes received by the GoT differs from contract to contract, even when the GoT is negotiating with the same company. For instance, the central GoT has agreed to receive stamp duty from Pangea Limited regarding the Tulawaka gold mine in accordance with the Stamp Duty Act, 1972 and as at effect on the date of the Agreement, but capped to a maximum rate of 0.35%. This maximum cap was absent from the later development agreement Pangea Limited entered into with the GoT regarding the Buzwagi goldmine.<sup>46</sup> Additionally, Pangea Limited is obliged to pay USD 125,000 by December 31 as a contribution to the Empowerment Fund in each year of production at the Buzwagi goldmine.<sup>47</sup> The Empowerment Fund has been recently established to empower small-scale and medium-sized enterprises.<sup>48</sup>

However, in respect of both agreements, the central government collects a 3% royalty on the net back value of all minerals produced in the development agreement area other than diamonds. In case diamonds are produced, the royalty is 5% of the net back value. Any other taxes, levies, and other such charges are payable in accordance with the prevailing Income Tax Act and Customs Tariff Act, 1976, as at the date of the agreement.<sup>49</sup> For the Tulawaka goldmine, the development agreement emphasises that it is the Customs Tariff Act, 1976 as

amended by the Financial Laws (Miscellaneous Amendments), 1997 and as at the date of the development agreement which is applicable.

Under both agreements, the local governments may receive payments by levying taxes and other such charges provided that the maximum aggregate of such charges in any calendar year does not exceed USD 200,000. Further, the method of calculating any such taxes **must not**:

1. be based on the profit, turnover, sales, output from the mining operations; **or**
2. value of the land used for the mine, the mining infrastructure, installations on the mine site; **or**
3. be any more than what is generally applicable in the country.<sup>50</sup>

With respect to the Tulawaka agreement, the company is obliged to withhold tax from payments it makes to third parties as at the date of the development agreement. However, the company will not withhold any amount relating to repayments of the principal or interest on due, accruing, or payable in foreign currency on loans sources from outside of Tanzania, including loans from company affiliates **OR** any amount more than 3% of the gross amount of payments for technical services the company has received or management fees. However, in the case of management fees where the gross payment is greater than 2% of the operating costs, then the amount withheld will be no more than 20%. Where the company has withheld such amounts (i.e. up to 3% in respect of technical fees or up to 20% in respect of management fees), the amount withheld will be deemed to satisfy those persons liability in terms of the income tax, insofar as they relate to the gross payments received.<sup>51</sup> Finally, purchasers of mineral products produced on the mining development area will not be obliged to withhold any amount from the purchase price.<sup>52</sup> However, in respect of the Buzwagi agreement, the withholding tax regime is slightly different. Pangea will only not be obliged to withhold tax where it is more than 5% of the gross amount of payments for technical services and management fees. Further, with respect to management fees, where the gross payment is more than 2% of the operating costs, the amount to be withheld has been reduced to 15%. However, as with the Tulawaka agreement, where Pangea has withheld the said amounts, the providers of the technical and/or management services will be deemed to have satisfied their income tax liabilities.<sup>53</sup>

Aside from the above, under both agreements, Pangea is not obliged to pay any other taxes in relation to its operations which are of a general application and minor in nature. A minor tax is

43 Tulawaka, Article 9.1; Buzwagi, Article 11.1.

44 Tulawaka, Article 9.2; Buzwagi, Article 11.2.

45 Geita, Article 10.

46 Compare Tulawaka, Article 4.1.2 versus Buzwagi, Article 4.1.2.

47 Buzwagi, Article 4.1.3.

48 Buzwagi, Article 1.

49 Tulawaka, Article 4.1-4.2; Buzwagi, Article 4.1-4.2.

50 Tulawaka, Article 4.3; Buzwagi, Article 4.3.

51 Tulawaka, Articles 4.5-4.6.

52 Tulawaka, Article 4.7.

53 Buzwagi, Article 4.5.2, 4.6.

one that which either alone or in combination with any other taxes, duties, fees, or other such charges which are not already provided for above, would not exceed USD 10,000 in any calendar year. Further, it is not obliged to pay any additional taxes that may result from an amendment to the Mining Act, 1998, which will result in the company paying in aggregate an additional USD 2000 per annum in any one calendar year. Similarly, it will not pay more than USD 200,000 per annum in respect of any increased amounts due under the Road Tolls Act, 1985. Finally, the company is not obliged to pay sales tax or VAT except as set by the Value Added Tax Act, 1997 and as at the date of the development agreement. In fact, to provide greater certainty for the company, it will be entitled to VAT relief in accordance with Schedule 3 of the Value Added Tax Act, 1997 as at the date of the development agreement.<sup>54</sup> In respect of the Buzwagi gold mine, Pangea receives an additional deduction of 80% of its capital expenditure is allowed in the year it is incurred. In the subsequent years, a deduction of 50% is allowed every year on the declining balance method, provided that the GoT will have enacted legislation to make this provision applicable under Tanzanian laws.<sup>55</sup>

## Geita

Given that the Geita Gold Mine is owned/operated by two companies, the development agreement provides that the companies' duties are joint and several except with respect to income tax, which is assessed separately.<sup>56</sup> For instance, the Govt will only receive one royalty payment which will be made jointly by the two companies, but the PAYE deductions on salaries will be separately due from each company.

The set of taxes payable by the companies is akin to those payable by Pangea regarding the Tulawaka goldmine. The sole difference is that the companies are not contractually exempt from paying VAT or any other such sales tax in respect of the Geita goldmine agreement, as is prescribed in the Tulawaka development agreement.<sup>57</sup>

## 2. Rights of Termination

### Tulawaka and Buzwagi

The GoT may terminate the development agreement in the event that an order is made to wind up the company, and this order is not part of a reconstruction or amalgamation exercise which the GoT has received prior notice thereof **OR** the company is in breach. However, these termination rights are subject to the duty of both parties to the agreement to satisfactorily comply with their legal duties owed to themselves, third parties, and particularly secured creditors. The GoT is further restricted from exercising its right of termination if there is a dispute as

to whether or not an order is made to wind up the company or that the company is in default. In such a case, the dispute must first be referred to arbitration, during which time the agreement will subsist until final determination thereof.<sup>58</sup>

Exercising its right of termination is a 3-part process. The GoT must first serve written notice on the company of its intention to terminate the development agreement on one of the two grounds. Further, the notice must specify the reasonable period of time within which the company may submit in writing to the GoT any matter which it would like the GoT to take into consideration and offer the GoT as adequate compensation in respect of the default. If the company has defaulted in terms of payments, a reasonable period of time must be at least 60 days, and 90 days if it is in relation to any other kind of default. Finally the GoT must take into account any steps the company has taken to remove the said ground or similar grounds or prevent its recurrence, as well as any matters and offers of adequate compensation made by the company.<sup>59</sup> In the event of early termination, the company is obliged to leave the producing mines in good working condition as far as is practicable.<sup>60</sup>

## Geita

The GoT has the same set of entitlements as in the Tulawaka and Buzwagi development agreements, save that the agreement provides that a failure of the GoT to perfect any consents, approvals, waivers, or exemptions as set out in the agreement will constitute an event of default. However, the agreement is silent on what rights the companies may exercise in the event that GoT has so defaulted.<sup>61</sup>

## 3. Rights of Information

Unlike under the Tulawaka Agreement, or even the Geita goldmine development agreement, Pangea is obliged under the Buzwagi development agreement to supply the GoT with copies of all agreements it has entered into relating to the refining, sale, marketing, and disposal of gold and other minerals produced in the licence area.<sup>62</sup>

## Challenges Presented in the Geita, Buzwagi, and Tulawaka Agreements

### Fiscal Terms and Stability Guarantee

Based on the agreements for the Tulawaka, Buzwagi, and Geita goldmines, it is clear that the mining contracts afford investors with a favourable tax regime which fulfils the mandate of the MSP to make large-scale mining sufficiently attractive to foreign investors in order to drive the mining sector. However,

<sup>54</sup> Tulawaka, Article 4.4; Buzwagi, Article 4.4.

<sup>55</sup> Buzwagi, Article 4.7.

<sup>56</sup> Geita, Article 7.

<sup>57</sup> Geita, Article 4.

<sup>58</sup> Tulawaka, Articles 13.2, 13.5 and 13.6; Buzwagi, Articles 15.2, 15.5, 15.6.

<sup>59</sup> Tulawaka, Articles 13.2, 13.3; Buzwagi, Articles 15.2, 15.3.

<sup>60</sup> Tulawaka, Article 13.4; Buzwagi, Article 15.4.

<sup>61</sup> Geita, Article 14.

<sup>62</sup> Buzwagi, Article 6.

the cumulative effect of such contractual fiscal terms, taken together with the additional statutory fiscal exemptions (such as 100% capital allowance, the indefinite carry forward of losses against future profits, or even the method of calculation and range of current taxes) is that the GoT has bargained to receive comparatively little from the mining industry, which in turn explains the sector's current contribution to the country's GDP and total tax revenue. The GoT also failed to provide for the review of fiscal terms in the event of change in economic circumstances, such as the mineral prices.<sup>63</sup> This is further compounded by the fiscal guarantee which locks the terms for the life of the mining projects.

Fiscal stability clauses such as the ones appearing in these contracts are commonly used in sub-Saharan Africa as a means to mitigate the perceived high investment risk of the host country.<sup>64</sup> However, such clauses neither make a distinction out of social/environmental laws, nor provide a fair manner of determining the amount of compensation to be given to companies in the event that unilateral changes are made by the state.<sup>65</sup> It also does not provide circumstances where it would be inappropriate to provide any such compensation (e.g. where new laws regarding national security are passed). Whilst it is arguable that such clauses are generally unenforceable under domestic and international law, on a *prima facie* basis they can be used by companies to justify non-compliance with new laws (regardless of the nature of the law). They may also serve as a negotiation tool for companies to both delay application and/or demand compensation for such application, if at all. This may lead to a net result of any new environmental and/or social laws enacted *after* the contracts have been signed having no concrete impact.<sup>66</sup> This is particularly significant as most of the subsisting contracts pre-date *inter alia*, the Environmental Management Act, 2004, the Income Tax Act, 2004, and the Employment and Labour Relations Act, 2004.

### **Absence of Environmental/Social Terms**

Section 10(c) of the Mining Act, 1998 clearly states that development agreements may contain binding provisions relating to, "environmental matters, including in respect of matters which are project specific and not covered by regulations of general application, provisions intended to define the scope, and as may be appropriate in any particular case, limit the extent of the obligations or liabilities of the holder of a special mining licence." Further, one of the MSP strategies is to strengthen community participation and involvement in mining, as experience has shown that where this has happened, mining projects became significantly more sustainable.<sup>67</sup> Given the above, it is notable that the GoT has not exploited the opportunity to incorporate into the Tulawaka, Buzwagi, and Geita Gold Mine development agreements such socio-

63 Supra Note 14 at page 166.

64 Supra Note 15 at page 33.

65 Supra Note 15 at pages 17-29.

66 Supra Note 15, at pages 35-7

67 Supra Note 3 at page 26.

environmental terms that could directly address *inter alia* the needs of the local communities in which the mines operate as well as protect the environment, which would be reinforced by the governing legislation. The strength of incorporating such terms into the contract would mean that failure of the companies to adhere to them would constitute a breach of contract, and possibly lead to termination thereof (and payment of damages).

Experience has shown that extractive industries **do not yield a significant positive impact unless there are concerted efforts to build up local industry capacity.**<sup>68</sup> And yet in this regard, the GoT has not contracted with the companies to implement and/or set up a capacity-building mechanism so that over time, the need to rely on the (currently unlimited) foreign expertise will diminish. In fact, the terms of the agreements regarding human resources do little to realise the MSP policy direction and strategy on human resource development.<sup>69</sup> There are a number of duties that may have been incorporated into the contracts, such as a requirement to train local staff with a view to transfer management to local experts, ensure that all bidding processes included local firms, or required investment in research and development projects to deepen local knowledge and enhance education so as to build the skills required to foster local industry.<sup>70</sup>

### **Proper Closure of Mines**

Another distinct absence in the three agreements is provision for mine closure procedures. Again, this would have been an opportunity for the GoT to ensure the safe closure of mines with the least possible negative impact on local communities.

### **Contractors and Sub-Contractors**

Whilst the GoT has increasingly more control where the companies seek to assign their interests in the licences to other parties (particularly in the Buzwagi development agreement vis-à-vis the two others), the GoT has no input in terms of identification, selection, monitoring, and/or otherwise of the contractors and sub-contractors which will be engaged to carry out mining activities on behalf of the mining companies. Further, there is no express provision that the mining companies will remain ultimately liable where any such contractors or sub-contractors have been appointed and commit faults. Indeed, it is only in the latest development agreement for the Buzwagi goldmine that Pangea is required to *at least* submit copies of all its contracts to the GoT.

### **Input from Stakeholders**

As stated above, the MSP clearly identifies certain groups whose input and participation is necessary to enhance the effective

68 Supra Note 14 at page 169.

69 Supra Note 3 at page 20.

70 Supra Note 14 at page 170.

implementation of the MSP. Based on what the parties have bargained for vis-à-vis the Buzwagi, Tulawaka, and Geita goldmines, it is unclear to what extent the GoT had sought input from these groups (or any of the others) prior to and during the contract negotiations—particularly NGOs active in the sector and the local communities in order to ensure best possible outcomes for all stakeholders.

### **Conclusion: Opportunity for Review?**

The combination of the stability clauses and the lack of a periodical review mechanism means that the contracts provide little scope for redress for the GoT *unless* the GoT and the respective companies mutually agree to amend and/or vary any of the terms. The contract terms may be explained in part by the GoT's relatively weak bargaining power due to a lack of specialised skills necessary to appreciate the fiscal options available as well as sufficient revenue collection processes.

Tanzania, with the support of the World Bank, re-shaped its mining legal regime at a time when metal prices were in decline and therefore countries competing in the sector found it comparatively difficult to attract FDI. The string of tax exemptions and other incentives were therefore legislated to attract FDI to the sector, which it successfully did.<sup>71</sup> The current higher mineral/metal prices have driven a number of host countries to seek a greater share from profits through revision of contracts and fiscal regimes. For example, Mongolia has a new windfall profit tax as of 2006 set at 68% on profits on key commodities after deduction of extraction costs and only if global prices exceed certain levels.<sup>72</sup> Although it is often stated that unilateral changes will scare off investors, experience shows that whether or not a host country may successfully make unilateral changes (regardless of fiscal stability clauses such as applied in Tanzania) is contingent upon its relative bargaining power. Countries with proven high-value minerals may have a better chance of capturing greater revenue-share and still retain

foreign investors even though they would be operating under less favourable terms.<sup>73</sup> Hence, it is arguable that Tanzania can successfully renegotiate existing contracts in order to address a number of the issues raised herein without reducing FDI.

Going forward, and in the event that the GoT continues to negotiate mining contracts separately, the GoT should build its capacity to negotiate effectively with companies.<sup>74</sup> Any such contracts should balance the important need to attract FDI, with the equally important need to ensure that revenue obtained from the mining sector can reasonably contribute to the development needs of the country, particularly if the sector is to contribute 10% to the GDP of the country by 2025 as the GoT aspires. Making such contracts publicly available is also important for citizens to help determine whether or not the GoT is meeting its human rights obligations and whether or not such contracts are deleterious in this respect.<sup>75</sup> Transparency also minimises wasteful use of resources, curbs corruption, and improves macroeconomic management.<sup>76</sup> It levels the playing field for both the GoT and companies as it contributes to a wealth of information on models, outcomes, and improves the public image of mining companies.<sup>77</sup> Importantly, however, companies will be encouraged to disclose contracts if all companies are obliged to do so, as there will be no comparative disadvantage in disclosure.<sup>78</sup> CSOs have a continued role to play in monitoring GoT and companies and identify best and worst industry practices. These steps may be further supported by international efforts such as the 2007 Big Table initiative of the United Nations Economic Commission for Africa and African Development Bank to foster “a constructive dialogue between senior African policy makers and their developed-country counterparts” with a view to meeting the continent’s challenges in effectively managing its natural resources to meet poverty reduction goals.<sup>79</sup>

71 Supra Note 14 at page 162. See also Fraser Institute Annual Survey of Mining Companies 2006/2007. Coordinated by Fred McMahon and Anas Melham. Available at: [http://www.fraserinstitute.org/COMMERCE.WEB/product\\_files/Mining06rv2.pdf](http://www.fraserinstitute.org/COMMERCE.WEB/product_files/Mining06rv2.pdf), accessed April 1, 2008.

72 Supra Note 14 at page 163.

73 Supra Note 14 at page 166.

74 Fatal Transactions/Conference 2007: Minding the mines: resource certification and revision of contracts in the mining industry in Africa. Available at: <http://www.fataltransactions.org/documents/conferenceprogram.pdf>, accessed April 1, 2008, page 8.

75 Supra Note 15 at page 41.

76 Supra Note 14 at page 178.

77 Supra Note 15 at page 43. See also Supra Note 14 at page 179.

78 Supra Note 14 at page 179.

79 Supra Note 14 at page 172.

# Bibliography

## Policy Document

Ministry of Energy and Minerals, The United Republic of Tanzania. Mineral Policy of Tanzania. Tanzania: October, 2007.

## Legislation

The Mining Act, 1998

The Mining Act, 1979

## Agreements

An Agreement for the Development of a Goldmine at Buzwagi, Kahama between the Government of the United Republic of Tanzania and Pangea Minerals Limited (Subsidiary of Barrick Gold Corporation), dated February 17, 2007.

An Agreement for the Development of a Goldmine at Tulawaka, Biharamulo between the Government of the United Republic of Tanzania and Pangea Minerals Limited, 2003.

An Agreement between the Government of the United Republic of Tanzania and Afrika Mashariki Gold Mines Limited, dated June 24, 1999.

An Agreement for the Development of a Goldmine at Geita between the Government of the United Republic of Tanzania and Samax Resources Limited and Ashanti Goldfields (Tanzania) Limited, dated June 24, 1999.

An Agreement between the Government of the United Republic of Tanzania, Resolute Limited, Samax Resources Limited, Resolute Tanzania Limited, and Mabangu Mining Limited, dated June 25, 1997.

An Agreement between the Government of the United Republic of Tanzania and Kahama Mining Corporation Limited, dated August 5, 1994.

An Exploration and Development Agreement for Nickel, Cobalt, Lead, Zinc, Copper, and Associated Minerals between the Government of the United Republic of Tanzania and Kagera Mining Company Limited, dated June 1, 1992.

## Articles and Reports

Anglogold Ashanti, Annual Report 2006. Available at: <http://www.anglogold.com/subwebs/InformationForInvestors/AnnualReport06/default.htm>, accessed on March 26, 2008.

"Rights to mine and title to properties." Anglogold Ashanti, Annual Report 2004. Available at: [http://www.anglogold.com/subwebs/InformationForInvestors/AnnualReport04/report/overview/rights\\_mine\\_title\\_properties.htm](http://www.anglogold.com/subwebs/InformationForInvestors/AnnualReport04/report/overview/rights_mine_title_properties.htm), accessed March 26, 2008.

"Chapter VI: The Policy Challenge." World Investment Report 2007: Transnational Corporations, Extractive Industries and Development. United Nations Conference on Trade and Development.

Available at: [http://www.unctad.org/en/docs/wir2007p2\\_en.pdf](http://www.unctad.org/en/docs/wir2007p2_en.pdf), accessed April 1, 2008.

Curtis, Mark and Tundu Lissu. A Golden Opportunity?: How Tanzania is Failing to Benefit from Gold Mining. Tanzania: Christian Council of Tanzania, National Council of Muslims in Tanzania, Tanzania Episcopal Conference, March, 2008.

Fatal Transactions/Conference 2007: Minding the mines: resource certification and revision of contracts in the mining industry in Africa. Available at: <http://www.fataltransactions.org/documents/conferenceprogram.pdf>, accessed April 1, 2008.

Fraser Institute Annual Survey of Mining Companies 2006/2007. Coordinated by Fred McMahon and Anas Melham. Available at: [http://www.fraserinstitute.org/COMMERCE.WEB/product\\_files/Mining06rv2.pdf](http://www.fraserinstitute.org/COMMERCE.WEB/product_files/Mining06rv2.pdf), accessed April 1, 2008.

Macdonald, Catherine and Alan Roe. Tanzania Country Case Study. The challenge of mineral wealth: using resource endowments to foster sustainable development. International Council of on Mining & Metals, July 2007. Available at: <http://www.icmm.com/publications/1700RECCSTanzaniaFINAL.pdf>, accessed March 25, 2008.

"Mining." Tanzania National Website:

<http://www.tanzania.go.tz/mining.html#Mineral%20Sector%20Policy>, accessed March 25, 2008

Ministry of Energy and Minerals, The United Republic of Tanzania official website: <http://www.mem.go.tz/mineral/index.php>, accessed March 26, 2008.

"Profiles of Some Canadian Mining Companies Operating in Africa." Available at: [http://64.233.183.104/search?q=cache:xz6MXrmMgjwJ:www.miningwatch.ca/updir/Canadian\\_Cos\\_in\\_Africa\\_2001.pdf+kahama+mining+company+limited+barrick+pangea&hl=en&ct=clnk&cd=3&gl=uk](http://64.233.183.104/search?q=cache:xz6MXrmMgjwJ:www.miningwatch.ca/updir/Canadian_Cos_in_Africa_2001.pdf+kahama+mining+company+limited+barrick+pangea&hl=en&ct=clnk&cd=3&gl=uk), accessed March 26, 2008.

Shemberg, Andrea. Stabilisation Clauses and Human Rights: A research project conducted for IFC and the United Nations Special Representative to the Secretary General on Business and Human Rights. John Ruggie, March 11, 2008. Available at:

<http://www.reports-and-materials.org/Stabilization-Clauses-and-Human-Rights-11-Mar-2008.pdf>, accessed April, 1, 2008.

"Tanzania becomes Africa's third largest producer of gold; government wants larger share." Business. International Herald Tribune, October 26, 2006. Available at: [http://www.iht.com/articles/ap/2006/10/26/business/AF\\_FEA\\_FIN\\_Tanzania\\_Mining.php](http://www.iht.com/articles/ap/2006/10/26/business/AF_FEA_FIN_Tanzania_Mining.php), accessed March 25, 2008.

## (Footnotes)

1 The copy of this Agreement PF obtained is neither signed nor dated and therefore the date given is what is stated in the Agreement as the apparent commencement year of the Agreement.



**Published by Policy Forum.**

**P.O. Box 38486, Dar es Salaam, TANZANIA Tel/Fax: (255 22) 2772611**

**Email: [info@policyforum.or.tz](mailto:info@policyforum.or.tz) Website: [www.policyforum.or.tz](http://www.policyforum.or.tz)**

**THE DEMYSTIFICATION  
OF MINING CONTRACTS  
IN TANZANIA**