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Uganda's Mineral Regulatory Regime

A fresh perspective

1. Introduction

In 2018, Uganda's cabinet approved a new mining and minerals policy that highlights measures building on earlier reforms that are aimed at creating a more vibrant mining sector and leads the way for the expected amendments to the Mining Act 2003 ("Mining Act").The protectionist policies that many developing countries adopted post-independence to the mid-1980s dried up foreign direct investment ("FDI") and this led to the deterioration of their mining sectors that were underfunded and mismanaged. The triumph of capitalism over socialism represented by among others the 1989 Washington consensus and the collapse of the Former Soviet Union saw many developing countries pursue sectoral and general business reforms as a means of attracting FDI.

Developing countries started liberalising their economies, eased foreign exchange controls and profit repatriation, secured private property ownership and investment protection, entered into several tax and investment treaties to create the most competitive environment for attracting the highly mobile foreign investment capital.

In 1988, Uganda established the National Mining Commission that undertook remedial steps to restore the productive capacity of some of the country's mines. The Investment Code Act was enacted in 1991 providing fiscal and related incentives for doing business in Uganda. A new Constitution was promulgated on 8th October 1995 and it among others cemented the right to private property ownership only allowing expropriation in national interest and subject to fair and prompt compensation. Tax laws were reviewed with the enactment of the Value Added Tax Act ("VATA") in 1996, the Income Tax Act ("ITA") in 1997 and the East Africa Community Customs Management Act in 2004. A new Mining Act was passed in 2003 and an aerial geo survey exercise undertaken in 2006 to map Uganda's mineral potential.

It is widely believed that the potential of Uganda's mining sector is yet to be fully harnessed and this explains the ongoing reforms to the regulatory regime heralded by the new mining and minerals policy. In this publication, we give an overview of Uganda's mineral regulatory regime focussing on the legal and fiscal framework.

2. A robust mining regulatory regime

Once the geology of a country has been ascertained as prospective, the preconditions for investment attractiveness are a stable and effective regulatory regime with strong mining institutions to administer and implement the sectoral agenda. Some elements of a robust mining regulatory regime include the following:

a) Security of tenure where the mineral rights holders have secure title to their concessions or licences, are able to transfer title to eligible third parties and can mortgage the right to raise finance or other purposes;
b) The law should be clear and transparent regarding the requirements and procedures for obtaining, maintaining and terminating mineral rights;
c) Investors should be assured of access to land for exploration and development activities under clearly defined conditions;
d) A modern mining cadastre which provides an accurate record of the geographical location of mining rights; their nature and time validity should be in place;;
e) Investment protection for capital committed to the sector against explicit and creeping expropriation;
f) A stable, equitable and predictable tax and fiscal regime.

3. Uganda's mineral legal regime

Uganda's mineral legal regime draws from several sources but our discussion in this publication will be limited to the provisions of the 1995 Constitution ("Constitution") and the Mining Act.

The Mining Act defines minerals to mean any substance, whether in solid, liquid or gaseous form occurring naturally in or on the earth, formed by or subject to a geological process but does not include petroleum, as defined in Petroleum (Exploration and Production) Act of 1985, water and building minerals though these technically constitute minerals. This is consistent with the definition for minerals provided under the Constitution.

a) Mining licenses

Uganda's mining licences derive from the concessionary system. As the term suggests, a concession allows for the private ownership of natural resources. The ownership of the minerals is vested in the mining companies at extraction subject to the payment of royalties, taxes and other fiscal impositions to the government. The Mining Act provides that no person may explore or prospect for, or retain or mine or dispose of any mineral in Uganda except under, and in accordance with, a licence issued under the Act. The various types of mining licences in Uganda are:

Type of license	Discussion
Prospecting licence	A prospecting licence gives the holder a non-exclusive right to carry on prospecting operations for any mineral. It is non-transferable and is for a duration of one year.
Exploration licence	An exploration licence gives the holder an exclusive right to carry on exploration operations in the specified area and for the mineral to which the licence relates. It is for a duration not exceeding three years but can be renewed for a further period not exceeding two years.
Retention licence	A retention licence is given to a holder of an exploration licence if a mineral deposit of potentially commercial significance has been identified but such deposit cannot be developed immediately by reason of adverse market conditions, economic factors and other factors beyond their control, which are of a temporary nature. It is for a duration not exceeding three years but can be renewed for a further period not exceeding two years.
Mining lease	A mining lease gives the holder an exclusive right to carry on exploration and mining operations in the specified mining area. It is for a duration not exceeding twenty years or the estimated life of the ore body. It can be renewed for a period not exceeding 15 years.
Location licence	A location licence gives the holder the exclusive right to prospect for and mine in a designated area. It is for a duration not exceeding two years and can be renewed for a further period not exceeding two years. A location licence can only be granted to Ugandan citizens and companies desirous of carrying on small scale prospecting and mining operations.
Mineral dealer licence	A mineral dealer's licence enables the holder to purchase and sell minerals in Uganda. It is for a duration of one year and renewable annually.
Goldsmith licence	A goldsmith licence enables the holder to manufacture articles from any precious mineral or any substance containing any precious minerals in Uganda. It is for a duration of one year and is renewable annually.

b) The acquisition of mining rights

Mining rights in Uganda are principally acquired by 3 main ways. These are the direct acquisition of rights and obligations under a mining licence also known as farm outs, farm downs or assignments, the direct or indirect acquisitions of the shares of an entity with a mining licence and first come first serve basis where an investor applies for a licence from government for any available mining area. Some countries like Kenya envision in their regulatory regime the use of competitive licensing rounds to give out mining rights. Licensing rounds are however largely used in the upstream oil and gas sector.

c) Transfer of mining licenses

The mining sector extensively uses farm down techniques which involve the assignment of part or all of the exploration or mineral licence interests to a third party. The third party, called the 'farmee', may reimburse the farmor (" party transferring the mining right ") all or part of their sunk exploration costs and also commit to fund certain costs associated with future exploration work as outlined in a work programme. Farm outs raise finance but also manage exploration and development risks in the sector. Countries that place onerous requirements on the assignment of mining interests can discourage FDI in the sector. Assignments provide the opportunity for big mining companies to collaborate with junior miners that could have already played a key role in de-risking the acreage in place but are constrained by resources and expertise to go it alone.

Junior mining companies play a key role in the development of countries' mining sectors because of their high appetite for risk that the big mining companies may not have. The booming mining sectors in Canada and Australia are largely attributed to the fiscal incentives provided to junior mining companies some of which have made discoveries and in partnership with the larger mining companies have also grown into big companies.

Unless provided otherwise, the Mining Act permits the transfer of mining rights but this is void and of no legal effect unless approved by the Commissioner for Geological Survey and Mines Department subject to the terms given.

d) Mining agreements

Mining agreements are also known as Mining Development Agreements ("MDA"). The Mining Act allows the Minister responsible for mineral development to enter into an MDA with any person holding an exploration license or mining lease. The terms included in the MDA include but are not limited to conditions relating to:

- Minimum exploration or mining operations to be carried out and the timelines of such operations;
- The minimum expenditure in respect of exploration or mining operations;
- The manner of carrying out the exploration or mining operations;
- The processing whether wholly or partly in Uganda of minerals found
- The basis on which the market value of any group found may be determined;
- The financial and insurance arrangements;
- The resolution of disputes through an international arbitration or a sole expert;
- Any other matter connected with the contemplated mining operations.

The Mining Act is silent on stabilisation clauses in mining agreements and is thus not very clear whether their inclusion can stand legal scrutiny.

e) Investment protection

One specific feature of the mining sector that heightens sovereign risk is that the exploration, development and production takes place where the minerals are. Once the investment has been sunk, host governments may renege on their earlier commitments and toughen the regulatory and fiscal environment. The recurring variations in mineral prices can also make an apparently profitable deal under an agreement previously negotiated look unattractive, and this can be a trigger point for government to revise fiscal terms, sometimes to the detriment of the mining companies.

For these reasons and prior to investing in developing countries, mining companies seek assurance that the risk of unilateral and arbitrary changes to the law and investment agreements which can dilute the value of their projects can be satisfactorily managed.

There are three legal techniques which investors seek to mitigate the above discussed political risk or at least limit the resulting economic loss, namely: legislative, contractual and treaty-based - all of which are embedded in Uganda's mineral legal regime.

- *Legislative protection*

Legislative support against unilateral revision of mineral fiscal terms is usually by substantive provisions in national legislation setting out guarantees for the protection of a category of investments. The Constitution, for instance, prohibits the government from arbitrarily depriving a person of property or interest over any property except in public interest in which case a prompt and fair compensation must be made. The basic criticism of law based protection measures, however, is that arliament can undo whatever it enacts.

- *Treaty-based protection*

Bilateral and multilateral investment treaties are also used to protect investors. Bilateral investment treaties (BITs) concluded between capital exporting and importing countries set out substantive principles on investment protection, as well as the procedures of investor state arbitration. The umbrella clause, the Fair and Equitable Treatment (FET) standard and the principle of utmost good faith embedded in BITs ensure the provision of additional protection.

The wording of an umbrella clause in a BIT is broad and can be interpreted as elevating every single contractual obligation entered into by a State to the status of a treaty obligation. Premising on the FET standard, it can be argued that if a stabilisation clause has been included in an agreement, there is the expectation that the law will not be changed or that if changed, a renegotiation will follow to rebalance the fiscal position.

Uganda presently has BITs with Denmark, France, Germany, Netherlands, Switzerland and the United Kingdom. More BITs have been signed with China, Belgium and Luxemburg, Eritrea, Nigeria, South Africa and Egypt but are not yet in force.

- *Stabilisation clauses*

Investors in the mining sector are keen to include stabilisation clauses in their MDAs. However, as noted in the earlier discussion, the Mining Act is silent on stabilisation clauses in mining agreements and is thus not very clear whether their inclusion can stand legal scrutiny. These clauses aim at ensuring that future changes in a country's legislation do not vary the terms of the mining agreements as originally concluded. Investment in the extractive sector is long-term, large-scale and upfront which raises concerns for investors to guard against unforeseen changes to project economics through the variation of the regulatory and fiscal framework. One safeguard often sought is the inclusion of stabilisation clauses in mining and related project agreements.

Stabilisation clauses aim at ensuring that the fiscal terms and related terms of the investment or mining agreements executed are not altered to the disadvantage of the investor during the duration of the project. While stabilisation clauses can seem attractive to the government in the short run as a cheap way of minimising investor risk, they may have costs in the long run through limiting government's ability to modify tax policy.

Stabilisation clauses have transformed over time and to date there are four types used in international investment contracts. These include: freezing, prohibition on unilateral change, balancing, and allocation of burden, highlighted below

Type of stabilization clause	Discussion
Prohibition on unilateral changes	They are also known as intangibility clauses. They ensure that the terms of the investment agreement are neither modified nor abrogated except with the contracting party's mutual consent.
Freezing clauses	The host state is precluded from changing its legislation in relation to the relevant project. Such clauses are criticized as encroaching on a country's sovereign legislative prerogative.
Allocation of burden	These clauses seek to allocate the fiscal and related burdens created by a unilateral change in the law usually to the National Mining Company or the State.
Balancing clauses	These are sometimes called economic stabilization clauses. They provide for automatic adjustments or negotiations to reinstate the initial economic balance of the investment should there be an amendment to legislation with a fiscal impact to the investment.

f) Government participation

There are strong sentiments in resource-rich countries that resource exploitation activities should not be entirely left in the hands of foreign companies. For this reason, governments usually co-invest alongside the private investors as a means of asserting greater operational control and direction in the exploitation of mineral resources. Excessive government participation is however not popular with mining companies for a variety of reasons including the potential of reducing entitlement to the resource-sharing and unwarranted government sway in technical and working committee meetings.

Kenya's mining regime gives the government participation via a 10% free carried interest in respect of large-scale mining projects. Uganda's current legal regime does not provide for this though the new Mining and Minerals Policy hints at plans for government participation.

g) Local content

Local content is the value add brought to the host state through the activities of the mining industry. This can be realised through work force development via employment and capacity building of local workforce, developing as well as procuring supplies and services locally.

Strategies devised by countries to achieve local content include simple contractual requirements providing for the preference of local goods and services, imposition of training obligations, and preferential regulation and taxation of local companies over foreign. Incentives may similarly be provided to foreign investors who re-invest their profits domestically as a strategy of anchoring local content.

The Mining Act requires licensees to give preference in the conduct of their operations to supplies produced in Uganda and services by agencies located in Uganda to the extent possible consistent with safety and commercial sense. The same applies to the employment of the local workforce.

4. Uganda's Mineral fiscal regime

Uganda's mineral fiscal regime combines both legal and contractual instruments setting out the framework for the allocation of the economic rent or wealth arising from the sector to the government and the investors. Economic rent is the difference between the revenues accrued from the production of minerals and the costs of production including the investor's 'reasonable' return on investment. Uganda's mineral fiscal regime is represented by some of the following fiscal tools discussed below.

a) Royalties

Royalties are impositions on the production of minerals and are broadly categorised into two types, namely: specific or ad valorem. Specific royalties are computed as a fixed value amount on the quantity of the resource extracted, while ad valorem are charged as a percentage of the monetary value of the resource. Royalties are favoured by governments because they are easy to administer, collect and also provide a first tranche of payment as soon as production commences.

Specific royalties are simple to administer, provide early revenues and are not affected by fluctuations in commodity prices. Government revenues, however, remain stagnant if resource prices increase and do not keep up with inflation. Ad valorem royalties address some of these concerns through valuation based on the prevailing commodity prices.

Royalties are however unpopular with mining companies and are criticised as being insensitive to costs, front-end loaded and with the potential to end production prematurely. Mining companies tolerate royalties linked to the profitability of the project. Governments are usually reluctant to forego royalties though it is suggested that abandoning these may create an impetus to attract mineral sector investment as investors prefer to be taxed on the ability to pay determined by profitability and not production.

The Mining Act allows the Minister responsible for Mineral Development to waive the payment of royalties with the approval of Cabinet if it is considered necessary to encourage mineral production. In 2017, the President of Uganda announced a waiver of royalties on gold mined or exported from Uganda though it is not clear whether there was a follow up legal instrument to effect this directive. Uganda's current royalty rates are:

Mineral	Type of royalty	Royalty rate
Precious metal	Ad-valorem	5% of the gross value
Precious stones	Ad-valorem	10% of the gross value
Base metals and ores	Ad-valorem	5% of the gross value
Coal including peat	Specific	UGX 5000 per tonne
Vermiculite	Specific	UGX 10,000 per tonne
Kaolin, limestone, chalk or gypsum	Specific	UGX 10,000 Per tonne
Marble, Granite, sandstone and other dimension stones	Specific	UGX5000 per tonne
Pozzolanic materials	Specific	UGX 1,000 per tonne

Mineral	Type of royalty	Royalty rate
Phosphate	Specific	UGX 10,000 per tone
Salt	Specific	UGX 5,000 per tonne

Royalties collected from the mining sector in Uganda are shared as follows: eighty percent to the Central Government, seventeen percent to the Local Government and 3% to the land owner.

b) Fiscal terms imposed under the ITA

Uganda's mineral income tax regime is based on the taxable profits of the mining company determined by adjusting accounting profits or losses with allowable or disallowable expenses. A company only has income tax to pay when it has a taxable profit. Some features of Uganda's mineral income tax system are:

Feature	Discussion
Rate of corporation tax	Until 2015, the ITA provided for a variable rate of income tax system for the mining companies. The rationale for this was to capture a competitive share of revenues for the government at different mine profitability levels while at the same time providing suitable tax relief for projects. A variable rate of income tax formulae was used to tax highly profitable mines which could rise up to 45% but also reducing to 25% if the mine was not so profitable in that year of income. The rate of income tax is for mining companies is now 30%.
Ring fencing	Ring-fencing requirements were introduced in 2015.Ring-fencing is an arrangement where the different mining areas held by an investor are considered separate with costs and revenues disaggregated when determining the taxable profits for each mining area.
Carry forward of tax losses	The ITA allows taxpayers to carry forward tax losses and deduct the same in determining the taxpayer's taxable profits in the following year of income. Effective 1st July 2018 taxpayers with carried forward tax losses for 7 consecutive years will pay income tax at the rate of 0.5 percent of the gross turnover for every year of income in which the loss continues after the seventh year.
Mineral exploration and extraction expenditure	The ITA permits mining companies to deduct any expenditure of a revenue or capital nature for their mining operations in accordance with the provisions of the Act.

c) Surface rentals

The following annual rents below are paid depending on the category of the mining right held other than a prospecting license.

Mineral	Rates
Holder of an exploration license for every square kilometer	UGX 50,000
Annual rent for the first renewal of an exploration license for every square kilometer	UGX 75,000
Annual rent for the second renewal of an exploration license for every square kilometer	UGX 100,000
Holder of a retention license for every square kilometer	UGX 100,000
Holder of a location license	UGX 1,000,000 per annum
Holder of a location license (Class VII Brine and salt)	UGX 20,000 per annum
Holder of a mining lease	UGX 100,000 per annum per hectare or part of hectare

d) Value Added Tax Act

Mining companies in Uganda may register for VAT at exploration and development stages even before they embark on production. Entitlement to VAT registration though laudable may not solve the issue of timely refund of VAT repayments which is a challenge in many developing countries.

Uganda additionally operates a deemed VAT paid regime providing that while inputs for mining operations are

charged VAT at the standard rate of 18%, the mining companies need not expend cash as the VAT charged is deemed to be paid under the law. The vendors to the mining companies similarly need not remit the VAT charged to the government but their ability to recover the input VAT they suffer in providing supplies to the mining companies is not affected.

e) Fiscal terms under the East African Community Customs Management Act, 2004

Uganda is part of the East African Community Customs Union and thus uses the same legislation applicable to all the East African countries, namely, Uganda, Kenya, Tanzania, Rwanda and Burundi with respect to customs matters. The East African Community Customs Management Act, 2004, exempts all machinery and inputs imported by licensed mining companies and their subcontractors for direct and exclusive use in mining exploration and development from import duty. This tax policy stance taken by Uganda is laudable and consistent with the position adopted by many other countries that exempt extractive projects from import duties.

The general import duty rates are otherwise 0% for raw materials and capital goods under Chapter 87 of the Common External Tariff, 10% for semi-processed goods, 25% for finished products and 35% to 100% for sensitive items.

f) Infrastructure Development Levy

The Finance Act 2015 introduced a levy known as the Infrastructure Development Levy paid on selected goods imported into Uganda. The levy is at the rate of 1.5% of the customs value of goods and is payable at the time goods are imported. Mining companies are not exempted from this levy which has the potential to adversely affect the economics of mining projects.

g) Local government levies

Depending on the area of operation, local government authorities may levy, charge and collect fees, taxes, rents and rates that are set out in the Local Government's Act. These levies are presently immaterial.

5. Proposed reforms under the New Mining Policy

The 2018 Mining and Minerals policy notes that the current regulatory framework is outdated and inadequate in view of the evolved national aspirations and experiences implementing the current Mining Act since 2003. The policy provides that there is need to strengthen the capacity of mining institutions, review the discretionary powers of the Commissioner in issuing and monitoring licence performance as well as creating other avenues of dispute resolution amongst others. The reforms envisioned under the new Mining Policy some of which shall be reduced into amendments to the Mining Act include:

- Expand the reach of the Mining Act in regulating the commercial exploitation of building minerals such as sand, stone, clay and murram currently excluded from the definition of minerals under the Constitution and the Mining Act;
- The current regulatory regime confers significant discretionary powers on the Commissioner with unclear guidelines for administering the sector which has resulted into sector speculation and unnecessary litigation;
- Continue developing and implementing a stable, transparent and predictable competitive fiscal regime;
- Enhance the transparent and efficient management of mineral concessions and allocation of rights by easing access to information mainly through the use of information technology and automating business processes including online business services and mineral rights applications;
- Mainstream and formalise artisanal and small scale mining operations by eliminating current barriers, supporting their capacity building and access to technology and appropriate equipment, establish a fund to support their access to credit, easing business processes to enable them acquire licences and get access to land;
- Strengthen the enforcement and monitoring of compliance with health, safety and environment standards by developing guidelines and regulations benchmarked against national and international standards of human rights, health, safety and environmental protection;
- Support the equitable participation of vulnerable groups such as women, youths, people with disabilities, communities in ownership and decision making along the mineral value chain;

- Support in-country local value addition by maintaining or helping in the establishment of modern internationally certified mineral analysis and beneficiation laboratories, provide appropriate incentives for the private sector to undertake value adding industrial processes locally and putting in place an appropriate framework and structure for the regulation of mineral processing and exportation;
- Bolster local participation through regulatory frameworks that mainstream local content in the sector and the use of other strategies for local content development including but not limited to training and research and development and enterprise development;
- Promote regional and international cooperation in the development and management of the minerals subsector through collaboration with regional and international governments as well as supporting good governance in the sector including adherence to international protocols;
- Strengthen the Directorate of Geological Survey and Mines by firming up the mineral exploration and licensing units and creating agencies like the Mineral Audit Agency and the Mining Tribunal to carry out specific tasks. The Mineral Exploration Department will undertake the detailed exploration and evaluation of mineral deposits, package mineral deposits into bankable feasibility projects, promote mineral value addition among others;
- The Mining Cadastre Unit will receive, evaluate and process applications for mineral rights and mineral processing licences as well as requests for renewal, extension, reduction, transfer, and abandonment and making recommendations to the Minister responsible for Mineral Development or any other authorized officer to grant application or request. It will also administer mineral rights and mineral processing licenses under the Mining Act and other applicable laws as well as managing the computerised cadastre and registry system among others;
- The Mineral Audit Agency will be established to provide audit functions in the subsector and will be charged with examining and monitoring the implementation of feasibility reports, mining programs and plans, annual mining performance reports, environmental management plans reports of mining companies, the assessment and collection of mineral taxes and royalties among others.
- The Mining Tribunal will arbitrate mineral and mining disputes.

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From 2004 to 2008, he worked in Russia where he led Deloitte's oil and gas industry group and established Deloitte's office in Sakhalin. He moved to East Africa in 2009 leading Deloitte's energy and resources industry group in Uganda, Kenya, Tanzania, Rwanda, Ethiopia and Mozambique. He was initially based in Kampala, Uganda later relocating to Dar es Salaam, Tanzania. Bill returned to the UK in 2014 supporting Deloitte UK teams working on outbound projects investing in Africa and was a key member of Deloitte UK's energy and resource practice until his retirement from the firm in September, 2018.

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At Deloitte, he lived and worked in Uganda, Kenya, Tanzania and the United Kingdom for over 6 years and subsequently became the firm's chief of staff for the Energy and Resources Industry Group seeing him play a lead advisory role in Uganda, Kenya, Tanzania, Mozambique, South Sudan, Somalia and Ethiopia.

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Dickens was instrumental in UNOC's formation and initial period of operation and also served as its head of Contracts, Negotiations and Advisory until May 2018. Prior to joining UNOC, Dickens was Legal Counsel at the Petroleum Directorate of the Ministry of Energy playing key legal advisory roles on the negotiation and implementation of PSAs, Joint venture and other oil and gas agreements. He was also part of the team that shepherded the process of enacting the current Ugandan oil and gas Legislations and Regulations including the local content requirements.

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