



THE MINING (STATE PARTICIPATION) REGULATIONS 2022 GN. NO. 574 PUBLISHED ON 23 SEPTEMBER 2022

The Minister for mining promulgated the Mining (State Participation) Regulation 2022 (**"the Regulations"**), vide Government Notice No. 574 of 2022 published on 23 September 2022. The Regulations repealed the Mining (State Participation) Regulation, 2020. The Mining Act, [CAP 123 R.E 2019] (**"the Act"**), provides for state participation in mining activities under section 10 and the Regulations are made pursuant to the said section 10 and section 129.

Key elements of the new Regulations include:

- Introduction of a new category of mineral rights called Reversionary Mineral Rights described under the Regulations as *"mineral rights which revert to the Government upon cessation by operation of law and includes Prospecting Licence, Retention Licence, Mining Licence or Special Mining Licence"*.
- Reversionary Mineral Rights shall have surrender value for the purpose of quantification of Government contribution to equity capital in any mining joint venture arrangement.
- Government shall also participate through direct equity interests in mineral beneficiation.
- Introduction model Framework Agreement, Shareholders Agreement, Memorandum and Articles of Association of a Joint Venture Company and Form of extract of Joint Financial Model that will be used for the purposes of onboarding the Government's 16% equity participation.

Ninety (90) Days to Issue Notice of Intention to Negotiate a Joint Venture:

Mining companies have up to 22nd December 2022 to issue notice to the Mining Commission of intention to initiate negotiations for the joint venture arrangement to enable the Government to receive its 16 percent free carried interest or any additional interest as stipulated under the Act and the Regulations. It may be assumed that those already in a joint venture will not be required to issue such notice, but there is need for clarification from the Mining Commission.

Underlining Principles to Govern Mining Joint Venture Arrangements:

The regulations stipulated principles that shall govern mining joint venture arrangements with the Government;

Should you require any assistance please contact our Partner, Daudi Ramadhani, via email: d.ramadhani@rexattorneys.co.tz web: www.rexattorneys.co.tz

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Dar es Salaam

Rex House,
344 Ghuba Road | Toure Drive,
Oysterbay, Dar es Salaam, Tanzania.
+255 22 221 1180-8
info@rexattorneys.co.tz

Zanzibar

Mbweni,
Zanzibar, Tanzania.
+255 22 221 1180-8
info@rexattorneys.co.tz

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- a) **incorporation of a joint venture company with the Government Shareholder.**
(This assumes that existing local subsidiaries will have to incorporate new joint venture entities. It would have sufficed to have existing companies simply amend their respective Memorandum and Articles of Association and take the necessary corporate actions to issue to the Government the statutory 16% free carried interest or any additional equity. The Regulations have not considered the fact that with a new entity license held by existing mining companies as well as other assets will have to be transferred to the new joint venture entity with the attendant tax and other legal implications).
- b) agreeing on the fiscal assumptions underlying the economic benefits sharing principle;
- c) issuing a Mining Licence or Special Mining Licence to the joint venture company.
(This implies that licenses will be re-issued to the joint venture company and not to be transferred. Which also means the licences will have to be surrendered?); and
- d) agreeing on modalities of in-country beneficiation of minerals.

Government May Acquire Additional Shares:

In addition to the 16% free carried interest the Government is also entitled to: *"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"* This requirement is also stipulated in the principal legislation. It is unclear if this will apply retrospectively to those companies that enjoyed tax exemptions in the past? Or maybe it is intended to discourage tax exemptions in the sector altogether? Government equity shall not exceed 50%.

Government Entitled to Issuance of Loan Notes:

The Government right to receive a proportion from any payment of a loan or third-party loan has been repealed and now, the Government shareholder is entitled to receive loan notes representing a percentage of the 16% free carried interest in respect of shareholder loans that bear interest or shareholder loans raised from external third party for on lending the funds to the mining company.

Certain Loans not Subject to Issuance of Loan Notes:

An investor borrowing and on lending to the joint venture mining company if the shareholders agree that the loan bears reasonable interest rate that is advantageous to the company. In such a case, the borrowing shall not be subject to the obligation to issue loan notes.

Preferential Dividend Payment to Government:

The Government free carried interest shares shall be undeletable and shall enjoy preference in relation to dividend payment as they will be entitled to preferred dividend immediately a distributable profit is recognized by the company. Distributable profit is defined as *"the profit for the year less prior losses and withdrawals for constitution of legal reserves, payment of corporate income tax and increased by retained earnings"*. It may be too early to raise this issue, but this may limit the joint venture company's appetite to retain profits as it is always a good business decision to retain funds for capital expenditure for growth. As it reads now, the Government may be paid a dividend, even where the company decides to retain funds for capital expenditure.

Application:

The Regulations apply to mining companies holding Mining Licence or Special Mining Licence. This means that holders of Prospecting Licenses will not be impacted except at the time of applying for a Mining Licence or a Special Mining Licence.

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