An international perspective on the Tanzanian Natural Wealth and Resources Acts

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1. Introduction

The United Republic of Tanzania (Tanzania) is rich in natural resources. In the last decade, the country has attracted a range of foreign investors in its mining and energy sectors and has, until very recently, been regarded by such businesses as one of the safer investment destinations on the African continent. Tanzania did this in competition with other resource-rich countries, through the right combination of law and policy. However, the tide is now turning. On 5 July 2017, President Magufuli signed into law three bills designed to reform the way the extractive industries are regulated in the country. The new laws are the Natural Wealth and Resources (Permanent Sovereignty) Act 2017 (Permanent Sovereignty Act) and the Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act 2017 (Review Act). Also enacted was an omnibus bill, the Written Laws (Miscellaneous Amendments) Act 2017 (Amendments Act), which amends the Mining Act 2010 and, to a limited extent, the Petroleum Act 2015. Amongst other things, the Permanent Sovereignty Act and the Review Act prohibit the export of raw resources (and require the establishment of beneficiation facilities in Tanzania), mandate the National Assembly to initiate the unilateral review and renegotiation of any resources contract (including contracts signed before the new laws came into force) that is "prejudicial to the interests of the People and the United Republic" or which contains an "unconscionable" term, and purport to void any resources contract term that subjects the State of Tanzania to the jurisdiction of a foreign court or tribunal. Additionally, under the amended Mining Act, the Tanzanian Government will own at least a 16% stake in mining projects in the country and up to 50% in certain circumstances.

This paper is intended to offer an international perspective on these new laws. It begins with an overview of the Permanent Sovereignty Act and the Review Act. A short summary of the changes to the Mining Act is also provided. It then considers the impact of the new laws on contracts that the Tanzanian Government entered into with foreign resources companies before these new laws came into force, and the specific question of whether or not the arbitration clauses in these existing agreements will

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1 The writer is not a Tanzanian qualified lawyer. The analysis of Tanzanian legislation that is provided in this paper is based solely on general principles of statutory interpretation that prevail in common law countries, of which Tanzania is one. The views expressed in this paper should not be taken as legal advice.
still be enforceable notwithstanding the fact that they are deemed "unconscionable". The discussion then shifts to Bilateral Investment Treaties (BITs): what they are and how they work and some of the BIT claims that may arise out of the new Tanzanian laws. The aim is only to introduce this vast topic, not to cover it exhaustively.

2. The new laws

The new Tanzanian laws were promulgated in a fast-track legislative process. The three draft laws were tabled on Thursday 29 June 2017. They were then considered by parliamentarians in closed-door sessions the following day. The bills were passed by parliament on 3 and 4 July 2017 and signed into law on 5 July 2017.

(i) Natural Wealth and Resources (Permanent Sovereignty) Act 2017

The Permanent Sovereignty Act is organised into three parts, each of which is discussed below. The preamble to the Permanent Sovereignty Act recites various articles of the Constitution of Tanzania, including those that concern the Government's duty to protect natural resources for the benefit of the people\(^2\) and use the country's natural resources for the common good of the people\(^3\).

Significantly, the preamble also refers to certain resolutions of the United Nations (UN) General Assembly, namely:

- Resolution 1803 (XVIII) of 14 December 1962, also known as the "Resolution on Permanent Sovereignty over Natural Resources" (RPSNR); and
- Resolution 3281 (XXIX) of 12 December 1974, also known as the "Charter of Economic Rights and Duties of States" (Charter).

Both of these UN General Assembly Resolutions are included as schedules to the Permanent Sovereignty Act.\(^4\) Their contexts and contents are important to the present discussion, so it is useful to briefly digress.

After the Second World War, a then-growing group of newly independent developing countries – many of them Soviet clients with corresponding socialist views on property rights – conceived a strategy of using the UN General Assembly (where they had a majority) to advocate for "economic decolonisation".\(^5\) As part of this, the proponent countries sought to drive changes to customary international law rules governing foreign investment, particularly as they concern the obligation to pay fair compensation to foreign investors when their property is nationalised (which some countries argued worked as a bridle on their economic development).

\(^2\) Constitution of the United Republic of Tanzania, Article 27.

\(^3\) Constitution of the United Republic of Tanzania, Article 9.

\(^4\) The RPSNR is included in the First Schedule to the Permanent Sovereignty Act; the Charter is included as the Second Schedule.

\(^5\) For a useful overview of the RPSNR and the Charter of Economic Rights and Duties of States, see Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law (Oxford University Press, 2008), pp. 14-16.
The first of the two resolutions referred to in the Tanzanian legislation – the RPSNR – was focused on reinforcing the sovereignty of developing countries and securing for their peoples the benefits of natural resource exploitation within their territories. Critically, the RPSNR recognised the right of a host State to nationalise and expropriate the property of foreign investors, provided that "the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law".\(^6\) This part of the RPSNR was passed against the opposition of the Soviet Union, whose representatives proposed an amendment by which the question of compensation was to be answered solely by reference to the law of the nationalising State\(^7\) (as Tanzania now asserts in Section 10 of the Permanent Sovereignty Act).

While the RPNSR essentially adopted the viewpoint of the resource-rich developing countries, it was not entirely devoid of protections for the foreign owners of natural resource projects in these countries. The reference to expropriation "in accordance with international law" is one example of how the RPSNR sought to maintain basic protection for foreign investors. Indeed, in many respects, the RPNSR prefigured – and paved the way for – the system of investment protection based on international investment agreements (BITs or otherwise) that has become the backbone of today's international investment law regime.\(^8\) Article 8 of the RPNSR concluded, in relevant part, that: "[f]oreign investment agreements freely entered into by or between sovereign States shall be observed in good faith."\(^9\) This provision is particularly noteworthy given that the RPSNR was drafted and adopted roughly at the same time as the BIT between Germany and Pakistan entered into force, which is widely considered to be the first modern BIT.\(^10\)

The second of the two UN General Assembly resolutions – the Charter of Economic Rights and Duties of States – was part of a wider push by developing countries, including oil-rich countries buoyed by their embargo of 1973, to establish a new paradigm for economic relations between developed and developing countries, what was then referred to as the "New International Economic Order". The Charter drew on the RPSNR, reinforcing the fundamental principle of permanent sovereignty over natural resources. However, the Charter marked a dramatic escalation in the proponent countries' attack on the customary international law of foreign investment. Where the RPSNR expressly required that an expropriated alien be paid compensation ("shall be paid"), the Charter lowered this to an exhortation, providing that "appropriate compensation should be paid [by the expropriating State], taking into account its relevant laws and regulations and all circumstances that the State

\(^6\) RPSNR, para 4.
\(^8\) Harry Burnett and Louis-Alexis Bret, Arbitration of International Mining Disputes (Oxford University Press, 2008), p. 34.
\(^9\) RPSNR, Art 8.
In even sharper distinction to the RPSNR, the Charter also reflected the amendment that the Soviets sought the decade before in the RPSNR, in that it purported to remove the question of compensation from international law and reserve it to the jurisdiction of the expropriating State. 12 This attempt to extinguish a State's international law obligations toward foreign investors was ultimately rejected by the international community, for reasons explained below.

Returning to present day Tanzania, as its title suggests, the Permanent Sovereignty Act draws heavily on the RPSNR and the Charter. In Part II, the Act declares that "[t]he People of the United Republic shall have permanent sovereignty over all natural wealth and resources", 13 and that "[t]he ownership and control over natural wealth and resources shall be exercised by, and through the Government on behalf of the People and the United Republic". 14 The Act also proclaims that "[t]he natural wealth and resources shall be held in trust by the President on behalf of the People of the United Republic." 15

The operative provisions of the Act are contained in Part III. At Section 5(3), the Permanent Sovereignty Act provides that "activities and undertakings relating to exploration of natural wealth and resources shall be conducted by the Government on behalf of the People of the United Republic". 16 Section 5(4) creates a limited exception to this, allowing the Government to authorise any person to perform exploration work where the Government considers that is necessary. In Section 6(1), the Act states that "it shall be unlawful to make any arrangement or agreement for the extraction, exploitation or acquisition and use of natural wealth and resources except where the interests of the People and the United Republic are fully secured". Under Section 7, "[i]n any arrangement or agreement for extraction, exploitation or acquisition and use of natural wealth and resources, there shall be guaranteed returns into the Tanzanian economy from the earnings accrued or derived from such extraction, exploitation or acquisition and use". Under Section 8, in "any authorization granted for the extraction, exploitation or acquisition and use of natural wealth and resources, arrangements shall be made or given to ensure that the Government obtains an equitable stake in the venture and the People of the United Republic may acquire stakes in the venture."

Notably, Section 9(1) establishes a value-adding regime, providing that "no raw resources are exported for beneficiation outside the United Republic" 17 and requiring

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11 Charter of Economic Rights and Duties of States, Article 2(2)(c).
12 According to Article 2(2)(c) of the Charter of Economic Rights and Duties of States, "[i]n any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means."
13 Permanent Sovereignty Act, Section 4(1).
14 Permanent Sovereignty Act, Section 4(2).
15 Permanent Sovereignty Act, Section 5(2).
16 Permanent Sovereignty Act, Section 5(3).
17 Permanent Sovereignty Act, Section 9(1).
that, in any agreement for the extraction, exploitation or acquisition and use of natural wealth and resources, "there shall be commitment to establish beneficiation facilities within the United Republic". In Section 10(1), earnings from disposal or dealings in natural resources must be "retained in the banks and financial institutions established in the United Republic"; Section 10(2) makes it unlawful to keep such earnings in banks or financial institutions outside Tanzania except where distributed profits are repatriated in accordance with the laws of Tanzania. In a catch-all provision designed to complement the Review Act, Section 12 provides that "[a]ll arrangements or agreements entailing extraction, exploitation or acquisition and use of natural wealth and resources may be reviewed by the National Assembly" – language that covers contracts entered into both before and after the Permanent Sovereignty Act came into force.

Section 11 purports to void the jurisdiction of foreign courts and tribunals in disputes concerning Tanzania's natural resources. Under Section 11(1), "permanent sovereignty over natural wealth and resources shall not be a subject of proceedings in any foreign court or tribunal"; according to Section 11(2) "disputes relating arising from extraction, exploitation or acquisition and use of natural wealth and resources shall be adjudicated by judicial bodies or other organs established in the United Republic and accordance with laws of Tanzania".

Finally, Section 13(1) gives the Minister of Constitutional Affairs the power to make regulations for the carrying out of the Permanent Sovereignty Act.

Before moving on to discuss the Review Act, it is appropriate to make some observations on these provisions of the Permanent Sovereignty Act:

- First, the new laws stand out for their references to the RPSNR and the Charter – UN General Assembly resolutions that are essentially relics of the Cold War. The references to these UN resolutions give the new laws a revolutionary (even Marxist) character that, it must be said, is unlikely to play well with the investment community. In particular, the reference to the Charter may be taken by some investors as an indication that Tanzania does not intend to pay compensation at the level required under international law (but rather compensation in accordance with its own law, which could be lower).

- Second, the mandate given to the National Assembly in Section 12 – being to review "[a]ll arrangements or agreements entailing extraction, exploitation or acquisition and use of natural wealth and resources" – has already sent shockwaves through the Tanzanian mining sector. One of the main causes of concern amongst investors is the fact that the unilateral review power extends to contracts entered into before the Permanent Sovereignty Act came into force. As we shall see, there is a similar retrospective dimension to the Review Act. Investor confidence is a fragile thing at the best of times and, unfortunately, this provision has done some damage to Tanzania's profile as a destination for foreign investment in natural resources. We will return to Section 12 in our discussion of the Review Act.

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18 Permanent Sovereignty Act, Section 9(2).
• Third, the implementation of the value-adding regime in Section 9 may prove challenging. Governments around the world have introduced laws and policies designed to capture more of the resources value chain. There are often good social and economic justifications for such measures, including job creation. However, experience shows that the sudden introduction of value-adding rules can adversely impact the economics of natural resources projects and lead to counter-productive results. For example, Indonesia introduced value-adding (onshore processing) requirements for its mining sector in 2013. Those requirements gave rise to international claims by some of the affected mining companies.19 Local beneficiation requirements have given rise to investment treaty claims against other countries, such as Pakistan.20 Whether or not Tanzania faces similar claims will depend on how it executes its plan to build a local mineral processing industry, including how much time the companies subject to the new value-adding requirements are given to comply.

• Fourth, the Tanzanian Government may need to explain to industry why it is introducing a requirement that earnings from natural resources be "retained in the banks and financial institutions established in the United Republic".21 The rationale may well be familiar. Many emerging market countries have encountered difficulties in building and maintaining foreign exchange holdings. In the stage of development where natural resources are being exported, if the country is not able to require some measure of return of foreign currency into its banking system in order to ensure liquidity, the country may struggle to procure the necessary foreign exchange to develop. While many investors will understand this, in the absence of a clear explanation some investors may conclude that the only reason the Tanzanian Government requires earnings to be kept in its territory is so that it can seize, garnish or otherwise attach the funds at its convenience. Investors who form this view will draw little comfort from the Section 10(2) exception for distributed profits that have been "repatriated in accordance with the laws of Tanzania" (as Tanzania controls the scope of that exception). However, such investors should take comfort in the fact that, like many countries, Tanzania has made certain commitments in this area. In particular, a number of BITs signed by Tanzania contain capital repatriation guarantees (these BIT provisions are discussed further below).

• Fifth, it is likely that a good deal of attention will be given to Section 11(1) of the Permanent Sovereignty Act, which declares that "permanent sovereignty over natural wealth and resources shall not be a subject of proceedings in any foreign court or tribunal". It is understandable why, in the context of these ambitious reforms, the Government of Tanzania would seek to limit its


20 See, for example, Tethyan Copper Company Pty Limited v Republic of Pakistan (ICSID Case No ARB/12/11), Decision of Liability, 20 March 2017.

21 Permanent Sovereignty Act, Section 10(1).
exposure to offshore proceedings. However, like most developing countries (and numerous developed countries) with active natural resources sectors, Tanzania is party to many agreements that call for disputes to be resolved by international arbitration. These clauses have become entrenched in the cross-border natural resources business because they give foreign investors greater confidence that their contract with the host government will be respected. The legal issues surrounding the effect and enforceability of Section 11(1), and its sister provision in the Review Act (Section 6(2)(i)), are discussed in detail below. For now, the point can be made in simple terms: where the contract calls for arbitration outside Tanzania, it is not just the law of Tanzania that determines whether or not the promise to arbitrate lives or dies.

- Finally, while there are certainly some provisions of the Permanent Sovereignty Act that could be seen by foreign investors as ominous, it is clear that much will depend on the regulations that are promulgated to implement the Permanent Sovereignty Act. At the time of writing, no such regulations have been issued.

To conclude this discussion of the Permanent Sovereignty Act, we may take the benefit of hindsight. The "Permanent Sovereignty over Natural Resources" movement essentially failed. The main outcome of the Charter, and the New International Economic Order it espoused, was uncertainty. Resource nationalism lost much of its appeal during the ensuing decades as many States experienced considerable difficulties developing and operating their natural resource industries. Without the confidence that their customary international law rights would be respected, foreign investors retreated from many of the countries concerned, thereby depriving those countries of necessary capital and technology. The welfare of their people was not advanced. When the Soviet Union collapsed in 1991, most of the countries that were part of the voting bloc that pushed the RPSNR and the Charter needed to re-align quickly. A mass *volte face* occurred: developing countries that had been hostile to the role of international law in the regulation of their relations with foreign investors rapidly switched to a position whereby they offered protection beyond that which was afforded to foreign investors under customary principles. Encouraged by the International Monetary Fund and the World Bank, developing countries came to see free trade and foreign direct investment as a critical path towards social and economic development, and thus adopted various laws and incentive packages in order to attract much-needed foreign investments to rebuild their resources sectors.22 Those States also signed BITs directly with capital-exporting countries, in which the signatory States undertook (reciprocally) to promote and protect foreign investments by their respective nationals. This was part of what became known as the "Washington Consensus". Critically, most of these investment promotion and protection treaties allowed for covered investors to refer disputes with their host State to international arbitration. Thousands of such treaties were signed between 1980 and 2000, in what is sometimes referred to as the "BIT boom". We will return to the topic of BITs below.

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We turn now to the Review Act. This is, in essence, the statute that provides the framework for the review mandate given to the National Assembly under Section 12 of the Permanent Sovereignty Act.

Before turning to the statute itself, it should be noted that many countries around the world have systems whereby agreements for the development of natural resources require parliamentary approval of some form. In many countries, such agreements require ratifying acts of parliament. These requirements reflect the basic desire of every good government to make sure that agreements for the exploitation of natural resources in its territory are negotiated fairly and contain terms that make sense for the country. There are more than a few people inside and outside Tanzania who believe that some of the agreements the Government has signed with foreign mining companies fail this test. A further point to note is that, in some countries, parliamentary oversight also plays an important role in the fight against corruption – a universal wrong whose pernicious effects are well documented. It is in the context of this wider body of government practice that the Review Act must be considered.

Like the Permanent Sovereignty Act, the preamble to the Review Act refers expressly to the RPSNR. Interestingly, unlike the Permanent Sovereignty Act, the Review Act does not refer to the Charter of Economic Rights and Duties of States of 1974. This distinction may be taken as a positive sign, given that the Charter is the more aggressive of the two UN resolutions (from the perspective of foreign investors). Some investors may also take comfort from the fact that the preamble states that "the Government has resolved to fairly and equitably undertake protracted measures intended to ensure that the natural wealth and resources of the United Republic are used for the greatest benefit and welfare of the People […]". A requirement of "fair and equitable treatment" is also contained in Section 4 of the Review Act. There is, however, another way these references to "fair and equitable treatment" can be interpreted, as discussed below.

a) Part I

The Review Act is organised into three parts. As this is a statute where definitions are important, it is worth considering Part I in some detail. In this preliminary section, a number of key terms are defined. The two most important definitions are "natural wealth and resources" and "unconscionable term".

Dealing first with "natural wealth and resources", this expression is defined as follows:

"all materials or substances occurring in nature such as soil, subsoil, gaseous and water resources, and flora, fauna, genetic resources, aquatic resources, microorganisms, air space, rivers, lakes and maritime space, including the [sic] Tanzania's territorial sea and the continental shelf, living and non-living resources in the Exclusive Economic Zone [sic] any other natural wealth and resources as the Minister may by notice in the Gazette prescribe which can be
extracted, exploited or acquired and used for economic gain, whether processed or not."

This wording is broad enough to cover all forms of natural resources. This means that, on its face, the Review Act applies (or may in future be applied) not just to the mining industry but also to the hydrocarbons sector. The reference to the Exclusive Economic Zone certainly suggests the law may be applied to offshore oil and gas projects. The last four words of the definition ("whether processed or not") also warrant close attention. These words convey that the legislation is not just concerned with what is in the ground, but also with what has already been extracted. As we shall see, this is consistent with the changes that have been made to the Mining Act (discussed below).

Turning to "unconscionable term", the definition is as follows:

"any term in the arrangement or agreement on natural wealth and resources which is contrary to good conscience and the enforceability of which jeopardises or is likely to jeopardise the interests of the People and the United Republic."

This definition is clearly problematic. The touchstone for classification as "unconscionable" is whether or not the term jeopardises the interests of the people and the State. But those interests are not specific or confined in any way. As a result, investors do not have certainty as to whether any particular term of their contract (beyond those terms expressly deemed "unconscionable" under Section 6(2)) is "unconscionable" or not. We return to this issue below.

b) Part II

It is in Part II of the Review Act that we see the powers of the National Assembly to review contracts. The mandating provision is Section 4(1), under which the National Assembly "may review any arrangements or agreement made by the Government relating to natural wealth and resources". Sub-sections (2) and (3) then state as follows:

"(2) In asserting the principle of permanent sovereignty over natural wealth and resources, there shall be implied in every arrangement or agreement that the negotiations are concluded in good faith and fairly and, at all times, observe the interests of the People and the United Republic.

(3) The principle of permanent sovereignty over natural wealth and resources shall afford fair and equitable treatment to the parties."
Implying a general condition of good faith should bring balance to any renegotiation between an investor and the Tanzanian Government. So should the requirement of fairness. However, a statutory right is only as good as the body that enforces it. Just as it expresses these sentiments, the Review Act purports to outlaw provisions of contracts that provide for referral of disputes to international arbitration (or foreign courts). This means that, if an investor feels that the Government has not conducted the renegotiation fairly and in good faith, the Review Act says that the aggrieved investor can go to the Tanzanian courts (or whatever other tribunal the Government may establish under Section 11(3) of the Permanent Sovereignty Act). Foreign investors are unlikely to have the same confidence in the Tanzanian courts that they would have in an arbitral tribunal sitting outside Tanzania, comprised of neutral nationals acting under the supervision of disinterested courts. Indeed, some investors will conclude that the negotiating principles set out in Section 4 of the Review Act are simply unenforceable. These same people are likely to conclude that the reference to "fair and equitable treatment" in Section 4(3) is there more to protect the State from BIT claims than to guard the interests of foreign investors. Whether or not these more cynical views prove to be correct will depend on how the Government conducts the negotiations mandated by the new law.

Section 5 of the Review Act sets out the way contract reviews and renegotiations will be initiated. Under Section 5(1), the Government must report any natural resources agreement into which it enters within six sitting days of the National Assembly following the making of the relevant agreement. If the National Assembly considers that the agreement contains one or more unconscionable terms, the National Assembly may advise the Government by resolution to initiate re-negotiation of the agreement with a view to rectifying the terms. The obvious concern here is timing: it is only after the contract is signed that it becomes subject to review. This issue is discussed below.

It is also important to note that Section 5 has a retroactive dimension in that it applies equally to agreements made "before coming into force of this Act". If the National Assembly considers that certain terms of any such agreement "or the entire arrangement or agreement" are "prejudicial to the interests of the People and the United Republic", the National Assembly may direct the Government to initiate renegotiation of the agreement "with a view to rectifying the terms". If the National Assembly issues such a direction, the review procedure is the same as for agreements made after the coming into force of the Review Act (i.e. the Government has 30 days to serve a renegotiation notice and the Government and the other party to the agreement then have a further 90 days to complete the renegotiations, unless the parties agree to extend).

c) Part III

25 Review Act, Section 5(2).
26 Review Act, Section 5(3).
27 Review Act, Section 6(1).
28 Review Act, Section 6(4).
Part III is where the renegotiation procedure is set out. Importantly, under Section 6(2), certain terms of a natural wealth and resources agreement are "deemed to be unconscionable" if they contain any provision or requirement that:

- aims at restricting the right of the State to exercise full permanent sovereignty over its wealth, natural resources and economic activity;\(^{29}\)
- restricts the right of the State to exercise authority over foreign investment within the country and in accordance with the laws of Tanzania;\(^{30}\)
- is inequitable and onerous to the State;\(^{31}\)
- restricts periodic review of arrangement or agreement which purports to last for the life time of the mine;\(^{32}\)
- secures preferential treatment designed to create a separate legal regime to be applied discriminatorily for the benefit of a particular investor;\(^{33}\)
- restricts the right of the State to regulate activities of transnational corporations within the country and to take measures to ensure that such activities comply with the laws of the land;\(^{34}\)
- deprives the people of Tanzania of the economic benefits derived from subjecting natural wealth and resources to beneficiation in the country;\(^{35}\)
- by nature empowers transnational corporations to intervene in the internal affairs of Tanzania;\(^{36}\)
- subject the State to the jurisdiction of foreign laws and forum;\(^{37}\)
- expressly or implicitly undermining the effectiveness of State measures to protect the environment or the use of environment friendly technology;\(^{38}\) or

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\(^{29}\) Review Act, Section 6(2)(a).
\(^{30}\) Review Act, Section 6(2)(b).
\(^{31}\) Review Act, Section 6(2)(c).
\(^{32}\) Review Act, Section 6(2)(d).
\(^{33}\) Review Act, Section 6(2)(e).
\(^{34}\) Review Act, Section 6(2)(f).
\(^{35}\) Review Act, Section 6(2)(g).
\(^{36}\) Review Act, Section 6(2)(h).
\(^{37}\) Review Act, Section 6(2)(i).
\(^{38}\) Review Act, Section 6(2)(j).
• aim at doing any other act the effect of which undermines or is injurious to welfare of the people of Tanzania or economic prosperity of Tanzania.  

If the agreement contains any one of these "unconscionable" terms, the Tanzanian Government may issue a notice of intention to renegotiate the unconscionable term or terms.  The notice must "state the nature of the unconscionable terms and the [Government's] intention to expunge the terms from the arrangement or agreement if the re-negotiation is not concluded within a specified period". The period for renegotiation is limited to 90 days (from the date of the notice), but can be extended by the mutual agreement of the parties. Critically, if the non-government party fails to agree to renegotiate the unconscionable terms or no agreement is reached with regard to the unconscionable terms, Section 7(1) of the Review Act declares that such terms shall "cease to have effect" and shall be "treated as having been expunged" to the extent they are "unconscionable" within the meaning of the Act. Section 7(1) therefore has the potential to operate as a savings clause, i.e. it says that only the unconscionable part of the term is "expunged". However, in cases where the impugned term is on the Section 6(2) list of deemed "unconscionable" terms, presumably it will be expunged in full. In other cases, where the National Assembly makes a finding that a contract term is "unconscionable", some of that term may survive (at least in principle).

Section 8(2) gives the Minister of Constitutional Affairs the power to make regulations for the carrying out of the Review Act. These regulations may include a "code of conduct for members of Government negotiation team".

At this point, the following observations may be made regarding the Review Act:

• First, in most countries, legislation with retrospective effect is not common and is usually only seen in narrow circumstances. The retrospective dimension of the Review Act – namely its allowance (in Section 5(3)) for the Government to initiate renegotiations of agreements made before the Act came into force – is likely to alarm many investors.

• Second, the expansive definition of "natural wealth and resources" covers essentially any natural resource that exists within the territory of Tanzania and which can be "extracted, exploited or acquired and used for economic gain, whether processed or not." The final words – "whether processed or not" – warrant special attention. If all resources are State property (or are open to being declared as such) – wherever they are and whatever physical state they are in – then it is no longer certain that parties to resource extraction

39 Review Act, Section 6(2)(k).
40 Review Act, Section 6(1).
41 Review Act, Section 6(3).
42 Review Act, Section 6(4).
43 Review Act, Section 8(2)(b).
44 Review Act, Section 3.
agreements actually have clear title to the resources they have extracted. This may cause problems further down the value chain. Apparently, the Government's intention is for miners to be given a licence to sell ore once it has been extracted. While that approach may prove viable over time, it is likely to add a significant administrative burden to all parties concerned.

- Third, regarding the expression "unconscionable term", as we have seen this is defined in a way that creates significant uncertainty for investors and effectively gives the State a free hand to strike down any contractual term that the State considers is against its interests. The risk to investors is obvious and is compounded by Section 6(2) of the Review Act, which deems a broad range of contractual terms to be unconscionable, many of which are common (in some cases standard) in the contracts that are used for major natural resources projects.

- Fourth, there are two ways to interpret the references to "fair and equitable treatment" in the preamble and Section 4 of the Review Act. On one view, they may be taken as signs that the Government is committed to acting reasonably. On another view, this language may be taken as a sign that Tanzania is seeking to insulate itself against potential BIT claims by affected companies. As discussed below, most BITs contain a Fair and Equitable Treatment (FET) standard and there have been many cases brought under BITs where FET violations have led to large damages awards in favour of the aggrieved foreign investor. To an extent, this (more cynical) view is supported by the fact that it is unusual for a national law to contain an FET provision (unless the law is specifically concerned with foreign investment promotion and protection).

- Fifth, many investors will be concerned by the prohibition against any forms of "preferential treatment designed to create a separate legal regime to be applied discriminatorily for the benefit of a particular investor." It is uncontroversial that every mining project presents discrete technical and commercial challenges, many of which can only be overcome through proactive negotiations with the host government and the implementation of a highly-specific set of rights and commitments designed to make the project viable. These ad hoc provisions often create a specific legal regime for the project or the investor in question. If all such arrangements are deemed "unconscionable" by the operation of Section 6(2)(e) of the Review Act, a number of mining projects in Tanzania will be jeopardised.

- Sixth, Section 6(2)(d) of the Review Act – which deems "unconscionable" any term that "restricts periodic review of arrangement or agreement which purports to last for life time" – may undermine the validity and efficacy of the stabilisation provisions that are often included in long-term agreements for mining and energy projects. Stabilisation clauses seek to protect foreign investment from the vagaries of future political events.

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45 See, for example, Article 2(2) of the UK-Tanzania BIT.

46 Review Act, Section 6(2)(e).
investors from governmental action that would adversely affect the value of the investment contract (generally in the form of taxation or an increase in the host government's take). Stabilisation is particularly important to mining projects, which involve very large up-front investments that can be recovered only over a long period of time. As a general rule, stabilisation clauses are presumed to be valid. Many arbitral tribunals have held that an attempt by a State to escape a stabilisation commitment by invoking sovereign prerogatives will fail. The Tanzanian Government might therefore find it difficult to challenge these terms in practice.

- Seventh, Section 5 of the Review Act has the potential to create significant uncertainty amongst investors in the resources sector. This is because, for new agreements, it is only after the Government makes the agreement that the review process can be initiated. A better approach would be to require that the agreement be submitted for review once it is agreed in draft. It may be that such a practice emerges once regulations are enacted, but only time will tell. The Section 5(3) regime for the review of existing agreements is obviously problematic, both because it has retrospective effect and because it suggests that "the entire agreement" can be renegotiated (and, by extension, "expunged" in full under Section 7 if no new agreement is reached).

- Finally, the renegotiation procedure is likely to lead to disputes – including disputes under Tanzania's BITs. The period for renegotiation is very short (90 days). Those experienced in negotiating with governments will know that this time-frame is unrealistic. True, the window may be extended if the investor and the Tanzanian Government agree. But it is not clear why the Government would have any reason to extend. If no agreement is reached with regards to the unconscionable term, Section 7(1) of the Review Act says that the relevant term "cease[s] to have effect" and is to be "treated as having been expunged". It is hard to see how a negotiation could be fair and equitable if it is conducted within such a one-sided framework. Some balance may be restored if the Minister includes a proper and transparent code of conduct for negotiations in the regulations for the Review Act, but we are yet to see any indication of what those regulations will contain.

While some of the issues identified above may be resolved through a combination of balanced regulations and constructive Government practice, as it stands the Review Act is a problematic statute. Disputes seem likely. The probability of disputes brings

47 See, for a general discussion of stabilisation mechanisms in international mining agreements, Harry Burnett and Louis-Alexis Bret, Arbitration of International Mining Disputes (Oxford University Press, 2008), 259-266.

48 See, for example, Lena Goldfields Limited v USSR, Award (1929-1930) 5 ADIL 3 (Case No. 1); Libyan American Oil Co (LIAMCO) v Libya, Award on Jurisdiction, Merits and Damages, 20 ILM (1981) 1, 62 ILR 140, 12 April 1977; Saudi Arabia v Saudi Arabian Oil Co (Aramco) (1958) 27 ILP 117; Sapphire International Petroleum Co v National Iranian Oil Co, 35 ILR 136 (1967); Kuwait v American Independent Oil Co (AMINOIL), Award, 21 ILM 976 (1982), 24 March 1982; Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador, ICSID Case No. ARB/06/11, Award, 5 October 2012.
into focus the question of forum and, more specifically, whether or not the Government's attempts to escape international arbitration will work. For many investors, this is one of the most pressing questions raised by the new laws. Before we consider that important issue, we will briefly look at the changes that have been made to the Mining Act (through the Amendments Act), as these changes inform the subsequent analysis of contractual impact and treaty obligations.

(iii) Written Laws (Miscellaneous Amendments) Act 2017

To reflect the Permanent Sovereignty Act, significant changes to the Mining Act have also been made. These changes were implemented through passage of the Amendments Act. The key changes to the Mining Act are as follows:

- The amendments provided that "[i]n any mining operations under a mining licence or a special mining licence, the Tanzanian Government shall have not less than sixteen percent non-dilutable free-carried interest shares in the capital of the mining company depending on the type of minerals and the level of investment". In addition to this free-carried interest, the Government shall be entitled to acquire up to 50% of the shares of the mining company ("commensurate with the total tax expenditures incurred by the Government in favour of the mining company")

- The Tanzanian Government will have a lien over all mineral concentrates produced in Tanzania, and through the establishment of the Mining Commission is empowered to assert control over the storage and valuation of raw minerals. The Mining Commission is required to operate mineral warehouses which will be the central custodian of all minerals and gemstones won by mineral rights holders in Tanzania. Raw Minerals may not be stored at any mine site for more than 5 days and must be removed under the direct supervision of Government officials for storage in the Government mineral warehouses.

- Mineral right holders are required to submit to the newly-established Geological Survey of Tanzania the following "accurate mineral data":

`49 Amendments Act, Section 9 (by amending Section 10 of the Mining Act).
50 Amendments Act, Section 9 (by amending Section 10 of the Mining Act).
51 Amendments Act, Section 25 (by deleting Section 94 of the Mining Act and adding Section 100D(1)).
52 Amendments Act, Section 25 (by deleting Section 94 of the Mining Act and adding Section 100A(4)).
53 Amendments Act, Section 25 (by deleting Section 94 of the Mining Act and adding Section 100B(1) and (3)).
54 Amendments Act, Section 25 (by deleting Section 94 of the Mining Act and adding Section 100C(1)).
55 Amendments Act, Section 25 (by deleting Section 94 of the Mining Act and adding Section 100A(3)).`
and interpreted data or maps, technical reports, core samples, the mineral right holder's "exploration database" and "any other information as may be required". All of this information is to be given to the Geological Survey of Tanzania "free of charge" – although the Geological Survey of Tanzania may permit the right holder to market the use of its (own) data "on terms to be agreed".

- The royalties paid to Tanzanian Government for exports of gold, silver, copper and platinum have been increased from 4% to 6%, and must now be made by payment of one third of such royalties as deposits of refined materials in the newly established National Gold and Gemstone Reserve.

- Further amendments have been introduced including strict regulations relating to the local content, corporate social responsibility and environmental obligations of mining companies.

Beyond increasing the Government's participation in the mining sector, these changes foreshadow a dramatic increase in the level of Government control of mining operations in Tanzania. To that end, a number of new bodies are being created and granted broad powers, the exercise of which has significant potential to lead to disputes with affected mining companies. While some of the changes may be defensible in terms of their economic and social objectives (royalty increases being one such example), others seem harder to justify. For example, the new mining regime paves the way for the Government, through the Geological Survey of Tanzania, to compulsorily acquire all geological data collected in its territory, on essentially any terms it likes. Many mining companies, particularly those focused on exploration, will be reluctant to give up their databases for free. And, as we shall see, if they are forced to do so they may have a claim for unlawful expropriation of intellectual property (IP), which is generally accepted to be a form of protected investment under international law (and therefore an asset class covered by Tanzania's BITs).

The changes introduced by the Amendments Act are also likely to collide with undertakings that Tanzania has made in some of its contracts with foreign mining companies, including undertakings concerning stabilisation. We have seen that Section 6(2) of the Review Act deems such provisions "unconscionable" and therefore of no effect. But, as discussed further below, that does not necessarily mean that mining companies that have stabilisation clauses in their agreements with the Tanzanian Government will be left without a remedy. Depending on the terms of the contract, particularly as they concern governing law and dispute resolution, such companies may still have rights and a means of enforcing them.

56 Amendments Act, Section 12 (by adding Section 27F(3) to the Mining Act).
57 Amendments Act, Section 12 (by adding Section 27F(4) to the Mining Act).
58 Amendments Act, Section 12 (by adding Section 27F(5) to the Mining Act).
59 Amendments Act, Section 23 (by amending Section 87 of the Mining Act).
60 Amendments Act, Section 24 (by adding Section 88(2) to the Mining Act).
3. Impact of the Permanent Sovereignty Act and the Review Act on existing contracts with the Tanzanian Government

This takes us to the broader question of how the new laws will impact on contracts that the Tanzanian Government signed with foreign investors in its natural resources sector before these new laws came into force (we will refer to these as "existing contracts"). For the purposes of this part of the discussion, it is necessary to use an extreme example. Let us assume that a foreign mining company has a Mining Development Agreement (MDA) with the Tanzanian Government and that, following the Government's initiation of a renegotiation of "the entire agreement" under Section 5(3) of the Review Act, all operative terms of the MDA are "expunged" (due to a failure to agree a new contract in the time permitted). That would mean that, from a Tanzanian law perspective, those expunged terms no longer exist and the MDA is effectively void. Thus, if the investor has any contractual right to claim damages under the expunged clauses, that right too will be lost as a matter of local law. The question is whether international law provides the investor with a remedy in this situation. The answer is complicated but affirmative.

Under international law, there is a doctrine of acquired rights. This doctrine holds that the property rights of aliens are created under national law of their host State but, where the host State injures those rights through the exercise of its sovereign prerogatives (such as by passing legislation), the host State may have an international law duty to pay reparations to the injured alien. As Professor Pierre Lalive observed in 1965, at the height of the debate around permanent sovereignty over natural resources:

"[u]nder the doctrine of acquired rights, [the right of property] is not immune from the jurisdiction of the territorial state. Contrary to what some supporters of absolute sovereignty have contended, the doctrine does not mean that private property is or should be sacred, intangible or superior to the sovereignty of the state. It means that arbitrary measures, i.e., contrary to the laws of the territorial state itself, are forbidden. It also means the prohibition of abuse of right, of abuse of state competence. It means that a certain standard of justice must be respected with regard to the private rights of aliens."

The doctrine of acquired rights does not prevent the State from legislating. What international law does is make the exercise of that sovereign right subject to compensation. In the words of Charles De Visscher, "[n]on-intervention but indemnification; this is the present equation balancing the freedom of the State to organise as it will and the security of international relations."

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There are many examples of cases where the doctrine of acquired rights has been applied to concessions and other forms of investor-State agreement. In the well-known case of the arbitration between Saudi Arabia and the Arabian American Oil Company (Aramco) in 1958, the tribunal found that the rights of the concessionaire (Aramco) "[a]re in the nature of acquired rights and cannot be modified by the granting State [Saudi Arabia] without the Company's consent". Significantly, the Aramco tribunal found that the "concession has the nature of a constitution which has the effect of conferring acquired rights on the contracting Parties". In other cases, the host State's unilateral modifications have been held lawful, on the condition that the State compensates the counter-party investor. For example, in the Oliva Case, the umpire of the Italian-Venezuelan Mixed Claims Commission held that "[a] nation, like an individual, is bound by its contract, and although it may possess the power to break it, is obliged to pay the damages resultant upon its action".

Accordingly, international law provides the investor with at least an argument – if not a good claim – that it is entitled to compensation for the effective annulment of its MDA with the Tanzanian Government. The issue for the investor will be where this claim can be brought. More specifically, for investors that have contracts that contain arbitration clauses, the question will be whether the right to arbitrate has been "expunged" by the Review Act.

4. Impact of the Permanent Sovereignty Act and the Review Act on arbitration clauses in existing contracts with the Tanzanian Government

Recall that Section 11(1) of the Permanent Sovereignty Act declares that "permanent sovereignty over natural wealth and resources shall not be a subject of proceedings in any foreign court or tribunal". As we have seen, this prohibition is complemented by Section 6(2)(i) of the Review Act, which includes clauses "subjecting the State to the jurisdiction of foreign laws and forum" in its list of deemed unconscionable provisions. To determine the effect of these statutory provisions, it is first necessary to classify the clauses in question.

For present purposes, there are three main species of arbitration clause to be considered:

(i) arbitration clauses in contracts governed by Tanzanian law, where the clause requires arbitration inside Tanzania (what we will call "local seat clauses");

(ii) arbitration clauses in contracts governed by Tanzanian law, where the clause requires arbitration outside Tanzania (what we will call "foreign seat clauses"); and

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66 As an example of such a clause, Article 28 of the 2013 Tanzanian Model Production Sharing Agreement provides for disputes to be resolved by arbitration under the ICC Rules. Sub-article (e) specifies that the seat of the arbitration shall be Dar es Salaam.
(iii) arbitration clauses in contracts governed by a combination of Tanzanian law and international law (what we will call "mixed clauses").

The taxonomy above reflects one fundamental point: a change in Tanzanian law can only effect a contract clause (including an arbitration clause) if that clause is subject to Tanzanian law. Thus, in the order set out above, the species of arbitration clause are ordered in terms of impact, with the clauses *prima facie* most exposed to the measures (local seat clauses) at the top and the clauses least exposed (mixed clauses) at the bottom.67

Before considering the impact on each species, it is appropriate to make some brief remarks concerning arbitration clauses generally. While an arbitration clause is a contractual term like any other, most legal systems acknowledge that arbitration clauses have certain special characteristics. The most important of these characteristics is separability. The principle (or doctrine) of separability holds that an arbitration is autonomous and can be invoked and considered entirely separately from the contract in which it is contained. Put another way, an allegation that the underlying contract is unenforceable will not necessarily render the arbitration clause within it unenforceable. Rather, where the existence or validity of an arbitration clause is challenged, it will normally be for the arbitral tribunal to decide that challenge for itself. This "jurisdiction to decide jurisdiction" is known as *kompetenz-kompetenz*. The doctrine of separability is well recognised, and has been acknowledged and applied by the High Court of Tanzania.68

We now turn to the various species of arbitration clause listed above. In the discussion that follows, we will use the following fact pattern:

- a foreign investor is party to an MDA with the Tanzanian Government, signed *before* the Review Act and the Permanent Sovereignty Act came into force;
- the MDA contains an arbitration clause;
- the National Assembly has directed the Government to initiate renegotiation of the MDA;
- the investor has been served with a renegotiation notice under Section 6(1) of the Review Act, and the notice includes the arbitration clause in its list of "unconscionable" terms to be renegotiated;
- the subsequent negotiations did not produce a new arbitration clause within the time specified (90 days); and

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67 There are of course further sub-sets of each species: for example, Tanzania may have signed agreements with foreign resources companies that are entirely foreign in terms of their governing law and their dispute resolution system. Such contracts are at the "least exposed" end of the scale. But for the purposes of this paper we will focus on the three classes identified above.

68 *GK Hotels and Resorts (Pty) v Board of Trustees of the Local authorities Provident Fund*, Misc. Civil Cause No. 1 of 2008, High Court of Tanzania (Commercial Division), 7 August 2008.
• as a result, the arbitration clause in the MDA has been "expunged" as per Section 7(1) of the Review Act.

(i) Local seat clauses

If the MDA is governed by Tanzanian law, and the arbitration clause calls for arbitration in Tanzania, the investor is most exposed. This is because the Permanent Sovereignty Act and the Review Act are creatures of the same legal order as that from which the arbitration clause derives its legal existence and validity (i.e. Tanzanian law).

While a clause calling for arbitration in Tanzania may not be per se "unconscionable" under Section 6(2)(i) of the Review Act (i.e. because it does not call for arbitration in a foreign forum), the clause may still be deemed "unconscionable" on other grounds – for example, because the clause empowers the arbitral tribunal in a way that restricts the right of the State to exercise its authority 69 or because the arbitral procedure it specifies is "inequitable or onerous" 70 to the State. Alternatively, the arbitration clause may simply be "unconscionable" in the view of the National Assembly (under Section 5(3)) because it "jeopardise[s] the interests of the People and the United Republic". In any case, once the renegotiation process is completed, the clause would be "expunged" and would cease to be of effect (as per Section 7(1) of the Review Act).

However, in this situation, the investor should not assume that it has lost its right to arbitration. As noted above, the doctrine of separability is part of Tanzanian arbitration law. So it will be for the arbitrators, sitting in Tanzania and operating pursuant to Tanzanian law, to determine whether or not the arbitration clause in the agreement is invalidated by the Permanent Sovereignty Act and the Review Act. In the scenario where the clause has been declared "unconscionable" under Section 7(1) of the Review Act, or is deemed so under Section 6(2), the arbitrators may well conclude that there is no arbitration agreement and that, as a result, they have no jurisdiction over the dispute. But, strictly speaking, this outcome will only be available if the Section 6 re-negotiation process has been completed at the time the arbitral tribunal makes its decision. As the tribunal is not a foreign court, and is not applying foreign law, a local seat clause is not struck down by Section 11(1) of Permanent Sovereignty Act. What this means is that, in the situation where the foreign investor has a local seat clause, there may be an incentive to launch arbitration sooner rather than later. The longer the investor waits, the more exposed their arbitration clause is to being "expunged" and invalidated by operation of the Review Act. That said, even where the investor issues its notice of arbitration before any renegotiation procedure is commenced under the Review Act, there is strictly nothing to stop the Tanzanian Government from issuing a renegotiation notice after the arbitration process has begun. In this scenario, the duly constituted arbitral tribunal will only have 90 days (as per operation of sections 6(4) and 7(1) of the Review Act) before the arbitration clause from which it derives its power is "expunged".

69 Review Act, Section 6(2)(b).
70 Review Act, Section 6(2)(c).
(ii) Foreign seat clauses

These are arbitration clauses that call for disputes to be resolved by arbitration outside Tanzania and which are, either implicitly (by virtue of their selection of a foreign seat) or expressly (by virtue of a special choice of governing law for the arbitration agreement), controlled by a legal order other than Tanzanian law. What separates this species of clause from local seat clauses is that they do not derive their legal existence and validity from the legal system from which the invalidating order emanates (i.e. Tanzanian law).

Let us assume that the MDA in our example is governed by Tanzanian law but contains a dispute resolution clause that calls for disputes with the Tanzanian Government to be resolved by international arbitration in London. In this example, the governing law of the contract (the *lex contractus*) is Tanzanian law but the procedural law of the arbitration (the *lex arbitri*) is English law – specifically the *Arbitration Act 1996* and its attendant common law.⁷¹ In circumstances where the Government purports to "expunge" the arbitration clause from such a contract, it would be open to the investor to argue that the Tanzanian Government remains bound by its agreement to arbitrate in London. The investor's two key contentions would be:

- First, by selecting London as the seat of arbitration, the parties implicitly chose English law as the law that would govern the existence, validity and performance of their agreement to arbitrate. Alternatively, the same conclusion may be reached on the basis that, because England is the country of the seat, English law is most closely connected to the arbitration agreement and should therefore govern it.⁷²

- Second, as the Permanent Sovereignty Act and the Review Act are Tanzanian statutes, they cannot have extra-territorial effect and they cannot therefore alter the validity and enforceability of the arbitration clause as a matter of English law.

Of course, even if the investor prevailed in these arguments – thereby saving the arbitration clause – that would not necessarily save the body of the MDA, which is (in

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⁷¹ For completeness, it is to be noted that the arbitration clauses in some contracts contain express governing law provisions, whereby the arbitration clause is explicitly stated to be subject to a particular body of national law (which will usually be different to the national law that applies to the balance of the contract). In a situation where Tanzania is party to such a contract, and the arbitration clause states that it is governed by foreign law, the result will be the same as for a Foreign Seat Clause, i.e. the arbitration clause will remain binding and operable even if it is expunged by the Review Act.

⁷² *Sulamérica Cia Nacional De Seguros S.A. and others v Enesa Engenharia S.A* [2012] EWCA Civ 638. Following *Sulamérica*, if the parties have agreed London-seated arbitration in a Tanzanian law-governed contract, it could also be argued that the application of English law is justified on the basis that English law must be applied otherwise arbitration will not be available (i.e. the application of Tanzanian law would void the arbitration agreement). England is not alone in this approach to the issue of what law governs an arbitration clause. In Singapore, there is case law that arguably goes further by presuming that the law of the seat should be the governing law of the arbitration agreement, rather than the law that the parties chose to govern their agreement generally: *FirstLink Investments Corp Ltd v GT Payment Pte Ltd and others* [2014] SGHCR 12.
this example) governed by Tanzanian law: any terms that are "expunged" through the Review Act procedure may be held to be of no legal affect by the arbitrators sitting in London. But some important terms may still operate. For example, if the MDA contains a stabilisation clause under which the Tanzanian Government undertakes not to change any laws applicable to the project for a given period of time, it may be possible for the investor to acknowledge the effect of the Review Act but claim damages for breach of the Tanzanian Government's stabilisation undertaking. A similar argument may be available in the local seat clause example given above (if the contract contains a stabilisation clause). The difference is that, in a situation where the contract contains a foreign seat clause, the mechanics for the enforcement of the stabilisation regime may remain intact and outside the influence of the Tanzanian Government.

(iii) Mixed clauses

These are arbitration clauses embedded in contracts that are governed by a combination of Tanzanian law and international law. This combination will normally be set out in the governing law clause of the contract (rather than the arbitration clause itself). For some readers, this combination may seem novel and instinctively rare. But such clauses are common in the oil industry, where the international oil company (IOC) will often contract directly with the host State or its national oil company (NOC). An example can be found in the AIPN Model Form International Operating Agreement (2002), Article 18.1 of which reads as follows:

"[t]he laws of [the host State], to the extent consistent with international law, shall govern this Agreement for all purposes, including the resolution of all Disputes between or among Parties. To the extent the laws of [the host State] are not consistent with international law, then international law shall prevail."

This language ensures that, if there is a dispute, the host State cannot use its own laws to excuse its breaches of the contract. Essentially, what happens is that, by changing its own law to void its promise to arbitrate, the host State puts its own law in conflict with international law – namely the principle that promises must be kept (pacta sunt servanda) – with the result that international law overrides local law and the host State is held to its arbitration agreement with the foreign investor. This language provides for a form of contract stabilisation (by limiting the host State's ability to enact legislation contrary to international law) and, as such, was often included in long-term natural resources agreements in the second half of the 20th century.

The seminal illustration of how a mixed clause such as this operates is the 1977 case of Texaco Overseas Petroleum (TOPCO) v Libya. In 1955, the Libyan Petroleum Commission awarded concession agreements to 17 international oil companies. In 1969, Muammar Kaddafi overthrew the Libyan monarchy and commenced socialist reform of Libya. Part of Kaddafi's reform agenda involved the nationalisation of the oil industry, the State's main source of revenue. By 1971, most of the IOCs engaged in Libya had been subject to the host government's revision of terms of their respective agreements. In 1973, the Libyan Government announced the

73 Texaco Overseas Petroleum Company v Libya (1977) 53 ILR 389.
nationalisation of 51% of the interests of nine IOCs. In February 1974, the remaining interests of three of these foreign companies (TOPCO, California Asiatic Oil (Calasiatic) and the Libyan American Oil (LIAMCO)) were nationalised, such that their investments were expropriated in full. The affected IOCs had arbitration clauses in their concessions, and so they were able to bring claims directly against Libya, without the need to rely on the remedy of diplomatic protection. The arbitrations that followed, known collectively as the "Libyan Nationalisation Cases", played a key role in shaping modern international investment law – a role that modern practitioners continue to acknowledge to this day. In the LIAMCO arbitration, Libya was ordered to pay USD 80 million in damages. In the TOPCO/Calasiatic arbitration, the Libyan Government challenged the claims and refused to acknowledge that there was a dispute requiring resolution. Although it did participate initially, once the arbitrator was appointed, Libya did not file any further pleadings or appear in the arbitration. The award handed down by the sole arbitrator, Professor Rene-Jean Dupuy, became a seminal decision in the "construction of the modern international law of foreign investment." This was due mainly to Professor Dupuy's decision that the concession agreements on which TOPCO and Calasiatic relied were "within the domain of international law", and that international law was part of the legal order that governed them.

Prior to this, contracts between foreign private parties and sovereign states were understood as being linked to (and generally governed by) the domestic law of the State party, rather than international law. However, TOPCO/Calasiatic had three clauses in their concession contracts that changed the equation:

- first, the governing law clauses of the concessions called for the application of both Libyan law and "principles of international law";
- second, the contracts contained stabilisation clauses (in which Libya effectively undertook not to nationalise for a certain period); and

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76 Ibid.
77 Ibid.
78 Libyan American Oil Company (LIAMCO) v Libya (1977) 62 ILR 140.
83 These principles were set out by the Permanent Court of International Justice (the predecessor to the ICJ) in Serbian Loans (France v Serbia) (1928) PCIJ Ser A No 20 and Brazilian Loans (France v Brazil) (1929) PCIJ Ser A No 21.
• third, the contracts contained international arbitration clauses.\textsuperscript{84}

Professor Dupuy deduced from these clauses that the concession contracts were linked to the \textit{international} legal order – in this matrix, Libyan law applied unless it was inconsistent with international law. In substance, applying this body of rules, the arbitrator found that the nationalisation of TOPCO and Calasiatic's assets was an expropriation that violated one key principle of international law: \textit{pacta sunt servanda} (the sanctity of contracts).\textsuperscript{85} Professor Dupuy held that although a host state has the right to nationalise foreign-owned property in the exercise of its sovereign prerogatives, this right must be exercised in a manner that conforms to any contractual obligations that the host state may owe to the relevant foreign owners at the time (the relevant obligation being, in this case, Libya's undertaking not to nationalise, expressed in the stabilisation clauses of the concession contracts), as the contract was held to be subject to international law.\textsuperscript{86} Professor Dupuy ordered Libya to specifically perform its contractual obligations under the concession agreements.\textsuperscript{87} Eight months after Professor Dupuy's decision, the Libyan Government, TOPCO and Calasiatic reached a settlement, under which Libya agreed to provide the companies with compensation in the form of oil valued at USD 152 million.\textsuperscript{88}

Thus, returning to our example, if the investor's MDA contains a mixed governing law clause, there will be a damages claim to be made. Indeed, even without a mixed governing law clause, there may still be arguments based on the international connecting factors identified in \textit{TOPCO}.

5. \textbf{Potential BIT claims arising out of the new laws}

Given the international law themes that emerge from the above discussion, it is appropriate to conclude with a brief summary of the ways in which the new laws may give rise to claims against Tanzania under the many BITs that the country has signed.

It bears noting at the outset that the new Tanzanian legislation has no effect on the international arbitration rights that are granted to covered foreign investors under Tanzania's BITs. Purely as a matter of local law, treaties are not within the definition of "arrangement or agreement"\textsuperscript{89} so BITs are not subject to the Review Act – at least not its unilateral renegotiation regime.

The application of the Permanent Sovereignty Act is more complicated. Recall that Section 11 of the Permanent Sovereignty Act states that "[p]ursuant to Article 27(1)

\begin{itemize}
  \item \textsuperscript{84} Robert von Mehren and P Nicholas Kourides, ‘The Libyan Nationalizations: \textit{TOPCO/CALASIATIC v Libya Arbitration}’ (1979) 12(2) \textit{Natural Resources Lawyer} 419, 426.
  \item \textsuperscript{85} Ibid, 425.
  \item \textsuperscript{87} Robert von Mehren and P Nicholas Kourides, ‘The Libyan Nationalizations: \textit{TOPCO/CALASIATIC v Libya Arbitration}’ (1979) 12(2) \textit{Natural Resources Lawyer} 419, 433.
  \item \textsuperscript{88} Ibid.
  \item \textsuperscript{89} Review Act, Section 6(1).
\end{itemize}
of the Constitution, permanent sovereignty over natural wealth and resources shall not be a subject of proceedings in any foreign court or tribunal." Many of the Tanzania's BITs do provide for disputes to be resolved by international arbitration, and so, faced with a BIT claim, Tanzania might well argue that the investor's referral of the dispute to international arbitration is unlawful under the Permanent Sovereignty Act. However, it is an established principle of international law that no State can rely on its own legislation to limit the scope of its international obligations.\(^90\) Thus, any such argument by Tanzania will fail if made before an international tribunal constituted under an applicable BIT.

**I BIT protection: what it is and how it works**

In order to understand how BIT claims may arise out of the implementation of the new Tanzanian laws, it is necessary to first provide a brief explanation of what BITs are and how they work. BITs are agreements between two States in which each contracting State agrees to promote and protect investments made in its territory by investors of the other contracting State.

Tanzania has a fairly extensive BIT program. The country has BITs with Canada (in force since 9 December 2013), China (in force since 17 April 2014), Denmark (in force since 21 October 2005), Finland (in force since 30 October 2002), Germany (in force since 12 July 1968), Italy (in force since 25 April 2003), Mauritius (in force since 2 March 2013), the Netherlands (in force since 1 April 2004), Sweden (in force since 1 March 2002), Switzerland (in force since 6 April 2006) and the United Kingdom (in force since 2 August 1996).\(^91\)

Although their terms vary, BITs tend to have a relatively uniform scheme. They are usually short (between seven and twelve pages) and comprised of a series of provisions that establish some or all of the following rules:

- Neither contracting State will expropriate, nationalise or otherwise take over investments made by nationals of the other contracting State in its territory, unless it does so in accordance with due process of law, for a public purpose and with the payment of prompt and adequate compensation. The expropriation provisions of most BITs recognise that expropriation may be direct or indirect (indirect expropriation coverage is usually signalled by the words "measures having effect equivalent to nationalisation or expropriation",\(^92\) or other such language). Generally speaking, a direct expropriation occurs where the State seizes or confiscates property, and/or transfers title to private property to itself or a State-mandated third party. Indirect expropriation occurs where a government measure or series of measures (which is not an outright seizure or title cancellation) results in the effective deprivation of the foreign investor's property or its benefits.

\(^90\) *Case Concerning The Factory At Chorzow* (1928) PCIJ Ser. A, No. 17, p.33.


\(^92\) See, for example, Article 5(1) of the UK-Tanzania BIT.
• Each contracting State will treat investors and investments from the other contracting State just as it would treat its own nationals and their investments (the so-called "national treatment" standard).

• Each contracting State will extend to investors from the other contracting State any greater benefit that it grants to an investor from a third country (the "Most Favoured Nation" rule). So, where country A signs a BIT with country B, and later signs a BIT with country C that gives investors from country C more favourable treatment than country A gave investors from country B, investors from country B are entitled to the same treatment as investors from country C. In practice, Most Favoured Nation clauses can be used to import more favourable provisions from other investment treaties that the host State has entered into.

• Each contracting State will accord investors/investments from the other contracting State "fair and equitable treatment" and "full protection and security" (FPS), the latter standard being concerned mostly, though not exclusively, with physical protection. As explained below in more detail, the purpose of FET is to ensure that host States do not unreasonably hamper the normal conduct of business by law-abiding foreign investors in relation to their investments. FET includes principles such as transparency, due process, freedom from coercion and harassment, and the protection of an investor's legitimate expectations. It is probably the most important standard in contemporary investor-State arbitration.

• In the event of a dispute between an investor and either contracting State, or a dispute between the two contracting States, the relevant parties may submit the dispute to binding arbitration in accordance with an agreed set of rules (the options often including arbitration in accordance with the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (the ICSID Convention), which established the International Centre for Settlement of Investment Disputes (ICSID)). ICSID is the leading venue for investor-State arbitration and Tanzania has been a contracting state to the ICSID Convention since 17 June 1992. Another common option is arbitration under the rules of the United Nations Commission on International Trade Law (UNCITRAL), administered by the Permanent Court of Arbitration at The Hague.

It is the last of the provisions listed above – the investor-State arbitration clause – that makes the substantive standards and protections of the BIT effective. Investor-State arbitration provisions are critical because they allow the investor to enforce its treaty rights directly against the relevant host State, in a neutral forum that the State does not

93 Continental Casualty Company v Argentina, ICSID Case No. ARB/03/9, Award, 5 September 2008, para 254.

94 Christoph Schreuer, "Fair and Equitable Treatment in Arbitral Practice" (2005) 6 The Journal of World Investment & Trade 357-386.

control (and without the need for any assistance from the investor's home State). In other words, the investor-State arbitration clause gives the BIT "teeth".

It is beyond the scope of this paper to provide a full explanation of the investor-State arbitration process. For present purposes, it suffices to note that investor-State arbitration process works – hence why the Tanzanian Government is ostensibly seeking to limit its exposure to the process in this new legislation. The awards of investor-State tribunals are enforceable as national court judgments under one of two widely subscribed multilateral treaties: the ICSID Convention (where the award is made under the auspices of ICSID) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention), where the award is made by an ad hoc tribunal or a tribunal constituted under the rules of an institution other than ICSID, such as UNCITRAL or the International Chamber of Commerce in Paris. Critically, these two enforcement treaties allow an award-creditor to enforce against the State debtor in any New York Convention or ICSID Convention country in which that debtor State has assets, subject to the ability of the award-creditor to overcome any defence of sovereign immunity that the debtor State may have (under the law of the country in which enforcement is sought).\(^96\) So if investors bring BIT claims against Tanzania and win, they are not restricted to enforcing those awards in the Tanzanian courts. But investors should not assume they will need to resort to these formal enforcement procedures. States often comply voluntarily with awards made against them by tribunals constituted under trade and investment treaties.\(^97\)

(ii) **Qualification criteria: "investor" and "investment"**

Before an investor will be entitled to invoke and enforce the provisions of a BIT, two "gateway criteria" will normally need to be satisfied. First, the person or company will need to qualify as a "National" (or "Investor") of the other State party to the BIT. Most BITs allow both nationals of, and companies incorporated in, a contracting State to claim the benefit of the treaty. This means that nationals of third countries will often be able to structure their investments so that they acquire the protection of an investment treaty. A number of companies have done this in Tanzania, using English and Mauritian holding companies to own their interests in the country, such that they are covered by Tanzania's treaties with those countries. Generally speaking, so long as

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96 This strategy of pursuing enforcement against host State assets in other countries is sometimes referred to as “Hot Oil Litigation”, an expression that comes from the satellite actions brought following the Libyan nationalisation cases discussed above.

97 Even where the State is not inclined to adhere to its international obligations, there will be economic consequences if it does not meet its pecuniary obligations under the award. In particular, the World Bank Operational Policy provides that non-payment of an ICSID award can be taken into account to limit that State's access to World Bank funding (see OP 7.40 – Disputes over Defaults on External Debt, Expropriation, and Breach of Contract). Additionally, in a non-ICSID context, failure to comply with the award of an international tribunal may impact on the State's sovereign risk rating and this will eventually pass-through to increase its borrowing costs.
this structure was not set up after a dispute arose with the host State (or is imminent), it will be acceptable. 98

Second, the person or company must own an "investment" in the host State. The term "investment" is critical to the operation of the BIT: it is only if an asset or interest qualifies as an "investment" under the BIT that the relevant asset or interest will be covered by the protections and standards of treatment provided by the BIT. Similarly, it is only if there is a dispute in relation to an "investment" that the foreign investor can commence international arbitration against Tanzania under the BIT. Under most BITs, "investment" is defined on an inclusive basis, usually by reference to a list of example assets and interests. The definition below is taken from the UK-Tanzania BIT:

"(a) 'investment' means every kind of asset admitted in accordance with the legislation and regulations in force in the territory of the Contracting Party in which the investment is made and, in particular, though not exclusively, includes:

(i) movable and immovable property and any other property rights such as mortgages, liens or pledges;

(ii) shares in and stock and debentures of a company and any other form of participation in a company;

(iii) claims to money or to any performance under contract having a financial value;

(iv) intellectual property rights, goodwill, technical processes and know-how;

(v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources."

This definition of "investment" is broad enough to encompass most of the rights, assets and interests that comprise a natural resources project. Importantly for present purposes, it includes contracts and natural resource concessions. Protected investments are not limited to the rights or assets of the project owner. In practice, the broad definition of "investment" included in most BITs, means that, in certain cases, lenders, bondholders, royalty-owners, or even – in some circumstances – off-takers and contractors, will be considered to have a protected investment (and hence to be protected investors if they satisfy the other relevant conditions).

However, if an investor tries to restructure its investments to place those investments under the protection of a BIT after a dispute has arisen with the host State, that investor risks having any subsequent claim it makes under that BIT struck out on the basis that restructuring to obtain BIT protection after a dispute has arisen is an abuse of process.
(iii) Possible BIT claims arising out of the new laws

These new laws could be taken as foreshadowing a potentially wide-ranging nationalisation programme in the Tanzanian natural resources sector. Tanzania is likely to face BIT claims for unlawful expropriation if it proceeds along this path. Investment treaty tribunals have found States responsible for indirect expropriations in a wide array of circumstances, including annulment and cancellation of property rights, contractual rights, debts or licences.

Because most BITs include contracts and contractual rights in their definition of "investment", these contracts may form the basis of an expropriation claim. In the example of the British company that is party to an MDA with the Tanzanian Government signed before the new laws came into force, if the Government uses the Review Act to expunge one or more key commercial terms of that contract, the British investor may be able to bring a claim for unlawful expropriation of contractual rights. If the MDA is outright terminated by the State, then that too could form the basis of an expropriation claim under the BIT.

Additionally, most BITs also define "investment" in a way that includes IP rights. This means that these rights too may form the subject matter of an expropriation claim. As we have seen, the changes to the Mining Act give the Geological Survey of Tanzania (an agency for which the United Republic of Tanzania is responsible as a matter of international law) the power to require mineral right holders to transfer all of their geological data free of charge. Either by virtue of its own authorship, or because it has commissioned others to collect and collate the data, the mineral right holder is likely to hold certain IP rights (such as copyright) over geological maps and plans, technical reports and exploration databases. If these materials are acquired by Tanzania without fair compensation, the mineral right holder may have grounds for claiming that its IP investments have been unlawfully expropriated.

The next head of likely claim is FET. Almost every BIT claim today entails a claim under the FET standard. In most BITs, the FET standard is drafted in simple terms. Often, it is paired with other standards, such as FPS and "non-impairment". The text below is from Article 2 of the UK-Tanzania BIT:

"(2) Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party."

The first sentence of this article is what is known as a "generic" FET clause. Generic FET clauses have been held to oblige the host State to respect the "basic expectations
that were taken into account by the foreign investor to make the investment". Continuing with the example of the British company and its existing (pre-Review Act) MDA with the Tanzanian Government, the MDA records the promises made by the Government to the British investor which (presumably) informed the British investor's decision to invest in Tanzania. If, through the implementation of the new legislation, the Tanzanian Government unilaterally amends the MDA in a way that destroys the viability of the British investor's business in Tanzania, then the British investor will have an FET claim. Specifically, the investor will be able to contend that it had a legitimate expectation that the terms of its MDA would be respected by the Tanzanian Government, and would not be modified without mutual agreement of the parties. Additionally, if one or more terms of the MDA are declared unconscionable (and expunged) under the Review Act, the investor may claim FET violation on the basis that the invalidation of those terms was arbitrary because the Government simply "deemed" them to be unconscionable without taking into account the effects of that decision on its counter-party investor.

The British company may also have a claim for breach of the non-impairment undertaking that Tanzania has made in Article 2(2) of the UK-Tanzania BIT. The claim would be that, by taking action to expunge contractual terms under the Review Act, the Tanzanian Government has adopted unreasonable or discriminatory measures that have impaired the management, maintenance, use, enjoyment or disposal of the British company's investments. A well-known example of a non-impairment claim succeeding is *Eureko v Poland*, where the tribunal found that Poland had breached the FET/non-impairment provision of the applicable treaty by "act[ing] not for cause but for purely arbitrary reasons linked to the interplay of Polish politics and nationalistic reasons of a discriminatory character". In *Saluka v Czech Republic*, the tribunal interpreted "impairment" to mean "any negative impact or effect" caused by measures taken by the host State, which the tribunal held could be in the nature of both acts and omissions.

Further, some BITs also contain what are known as "umbrella clauses", which oblige the host State to observe any obligation it may have entered into with regard to investments of nationals or companies of the other State. The final sentence of Article 2(2) of the UK-Tanzania BIT (extracted above) is an example of such a clause. There is ongoing debate as to the effect of an umbrella clause, but in a number of cases umbrella clauses have been held to mean that, if the State breaches a contract it has entered into directly with a BIT covered investor, the breach of that contract is a breach of the BIT. So, if the Tanzanian Government purports to "expunge" the stabilisation clause of a contract it signed with a British investor before the Review

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99 *Técnicas Medioambientales Tecmed SA v The United Mexican States* (ICSID Case No. ARB (AF)/00/2), Mexico-Spain BIT, Award, 29 May 2003, para 154.

100 *Eureko BV v Republic of Poland*, Partial Award of 19 August 2005, para 233.

Act came into force, that investor may have a claim under the umbrella clause of the UK-Tanzania BIT.

A number of other standard BIT provisions may also be activated by the Tanzanian measures. For example, as noted in the discussion of Section 10 of the Permanent Sovereignty Act, many BITs signed by Tanzania contain capital repatriation guarantees. Article 6 of the UK-Tanzania BIT provides that each State "shall guarantee to nationals or companies of the other Contracting Party the unrestricted transfer of their investments and returns". If, in the implementation of Section 10 of the Permanent Sovereignty Act, Tanzania takes action to prevent repatriation of returns by British investors, it will violate Article 6 of the UK-Tanzania BIT and be liable to pay damages in an amount equal to the investor's stranded funds (plus interest).

Of course, if Tanzania faces any BIT claims, the country will by no means be defenceless. Tanzania may have defences based on express exceptions and carve-outs in particular BITs and, potentially, certain principles and doctrines under customary international law. However, the strength of these defences will depend in large part on how the Government exercises the powers conferred upon it by these new laws.

6. Conclusion

Through these new laws, Tanzania is embarking on a wide-ranging reform of its natural resources sector. Some changes are more controversial than others. For example, many countries in similar stages of economic development to Tanzania have increased royalties for resources projects and introduced value-adding requirements. While these changes have the potential to lead to disputes with foreign investors, experience shows that major investors will often find a way of living with such rules provided their host government takes a realistic and sufficiently flexible approach to their implementation. Other changes are, however, more obviously problematic. As we have seen, the new regime for the review of resources agreements has significant potential to lead to disputes between the Tanzanian Government and foreign participants in the country's extractive industries. This is especially so given that the Review Act is retrospective in effect, applying not just to future agreements but also agreements made before the law came into force.

It is in this context that we have considered the provisions of the new laws that purport to bar referral of disputes concerning natural resources to foreign courts and tribunals and preclude the application of foreign law. We have traced the pedigree of these provisions back to the "permanent sovereignty" movement of the 1960s and seen how the effect of these parts of the new Tanzanian laws will depend on a number of factors, including whether the contract in question provides for arbitration outside Tanzania and the extent to which international law is part of its governing law. We have also seen that, despite what these new laws proclaim, investors may retain acquired rights under international law and Tanzania will remain bound by the offers of international arbitration it has made to investors from certain countries through BITs and other treaties. As we have seen, there is reason to infer from certain provisions of the new laws that the Tanzanian Government was conscious of its treaty obligations when it drafted this legislation. The FET provision of the Review Act is
probably the best indicator in this regard. To an extent, this bodes well for foreign investors. However, it will only be possible to estimate the risk that these new laws present once the manner of their implementation becomes clear (and the necessary regulations are enacted). Tanzania has enjoyed great success promoting itself as a stable destination for investment by natural resources companies. No doubt these same companies and the resources sector more generally will be closely observing the implementation of these new laws.