

Research Article

Avoiding ‘Voidness’ Risk in the 16% Free Carried Interest Arrangements Between the State and Mining Companies: The Option for Tanzania

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Abstract

Many mineral resources-rich developing countries have adopted special measures leading to state participation in mining sector, Tanzania alike. The most common recent approach has been via free carried interest (FCI) where the state is assigned 16% equity interest in the capital of all mineral rights licensed to a mining company. While the mining laws and regulations requires the state not to pay any consideration for such shares, contractual laws, declares contracts without consideration void. This paper is an attempt to ascertain as to whether there is a risk of the 16% FCI being declared void. To answer this question, the paper adopted a qualitative desk review of both primary (legislation and cases) and secondary (books and journal articles etc) sources of data. Primarily the paper focuses in Tanzania, however, reference is made to other African countries with the view not to compare but to offer the basis for the arguments of the possible risks to be encountered. It is found that the legal framework upon which the FCI is premised, renders it vulnerable to court interpretations owing to absence of clear legal provision offering exception to the general rule that agreements without consideration are void. The paper offers two ways forward, firstly to review the laws to accommodate exceptional to the above noted general rule as a means to avoid potential risk of loss by the state, where Kenya saves an example. Secondly, to place reliance on common law practice of precedents on similar cases.

Keywords

State Participation, Tanzania, Mining Sector, Free Carried Interest, Risk, Void

1. Introduction

Of recent years, many mineral resources-rich African countries have revised their laws with the view to maximize potential benefits accruing from the sector. Although various legal and policy measures have been in place such as; setting aside a sub-sector to be explored by locals alone, increasing of the royalties and mandatory state participation, the discussion in this paper focuses on the Free Carried Interest (FCI). The choice of FCI is based on the fact that, firstly, it is a unique

form of state participation in the modern era unlike royalties and or Production and Sharing Agreements (PSAs) which are common in the extractive sector.

Secondly, although most mineral resources-rich developing countries seem to prefer the use of FCI, it is not always uniformly regulated. To exemplify this, while in Tanzania the FCI does not confer the state the rights to vote, in Kenya it does. Thirdly, while the FCI is based on the state participation

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in Kenya and Tanzania, in South Africa, it is the local communities instead.¹ Fourthly, FCI is premised on the legal position that it is granted to the government freely as the government is not mandated to reciprocate by investing any capital to receiving benefits conferred under it. Although all these elements pose different legal and policy implications and challenges, this paper focuses on the last unique element of the FCI.

In particular, the regulation states, ‘...no financial contribution shall be required from the government on account of its shares...’² Notably, according to the law contractual agreements falling short of considerations in Tanzania are regarded as void.³ Based on this legal view point, primarily this paper examines the legal status of the government and mining companies’ FCI agreements and suggest a way forward for Tanzania.

The paper is organized into four sections including this introduction. Section two provides for clarifications of key concepts that are relevant to the discussion. Section three examines the current legal and policy implication of FCI in Tanzania. It also draws inference from other common law countries such as; Kenya, South Africa and South Sudan. Section four present the way forward for Tanzania.

2. Conceptual Clarification

This section offers clarification of concepts that recur in this paper. It aims at helping the reader to navigate well in the paper by eliminating possible complexity of the legal meaning the concept may be linked to. Among concepts clarified are; state participation, FCI, consideration, void and capital.

To begin with state participation, refers to legal or policy framework which requires participants in mining sector to carry out mining activities jointly with the state at an agreeable (percentage or margin) set either under the law or as a product of negotiation. State participation in mineral sector arises out of the fact that, since early days of privatization states have been merely regulators of the sector but not active participant. However, sentiments related to mineral resources-rich states losing in the mineral benefits, revived the desire of many of them to review their laws providing for mandatory state participation in the sector through shareholding in all mineral rights that are granted to investors. Notably, there is no hard and fast rule on the percentage of state participation, however, experience from, South Africa, Kenya and Tanzania shows that it ranges from 5-16 percent or above.⁴ Notably, the FCI rules in South Africa are intended to benefit local communities and not the state as it is in Tanzania and Kenya.

FCI is yet another concept that is worth to be clarified. State participation can take various forms as already noted above. FCI is one form through which state participation may transpire. FCI is basically a form of state participation, where the state is given agreeable/negotiated or fixed rate or percentage of equity ownership in the company that is granted mineral

rights under either mining or special mining licenses. What makes this form of state participation unique is that, the shares are granted freely. What this means is, the ordinary rules regulating the shareholders and the company contractual relation on consideration are not applicable.

To understand better the free aspect of the FCI, it is worth to expound the concept of consideration. This is a legal principle that is vital in regulation of the relation between parties to contract. Although there are several other principles such as; consent and legality, consideration fits well into the FCI description noted above. Generally, consideration refers to a promise, an act or forbearance by one party to a contract in return of a performance by the other. The most common statement that tells the reciprocal nature of parties’ commitment in relation to consideration is that, something goes for something and nothing goes for nothing. What this means is, if you are parted with something that goes to the other party you are entitled for something from him, and where you are parted with nothing you are entitled nothing in return. This reciprocity aspect in the consideration makes it a vital principle in all agreements if at all they are to be regarded as contracts capable of being enforced. Basically, the law does not set the minimum or rather the margin of consideration, so it can transpire through unique environment such as out of love and affection. Nonetheless, the law does not intervene the parties’ choice given the fact that they freely consented to that value as a consideration in return.

Next, the term void refers to emptiness, value less and or lacking legal force. In relation to this paper, the preference is on the last meaning, that is lacking of legal force. Since this paper reviews the relation between state and mining company in particular to FCI, it is worth to examine what is the nature of relation? What is the intention of the parties? And whether that intention is real attained under the current legal position? Obviously, having in place both the Mining Act, and its regulations accompanied by schedules detailing the manner in which the contractual arrangements detailing rights and duties of the parties to the Joint Venture Company signals that the parties intend their relation to have legal force and not otherwise.⁵

Lastly, it is worthy to describe the term capital. According to the English dictionary the term capital is defined to mean, the initial large sum of money that is invested to initiate a business [1]. Notably, this definition seems to restrict it to money and hence exclude other possible assets that are valuable in initiating business. According to the law regulating investment in Tanzania the term is defined in threefold. Firstly, capital is defined to mean;

...all cash contribution, plant, machinery, equipment, buildings, spare parts, land, intellectual property and other business assets other than goodwill which are not consumed in the regular operations of the business...⁶

Secondly, the capital is defined in terms of monetary contribution that the investor has invested in Tanzania. The monetary aspects for example shows the capital thresholds

ranges between United State Dollars (USD) fifty thousand to three hundred million. Thirdly, capita is defined based on the investment output. What this means is, the investment is given performance standard to achieve such as; number of employment opportunities created, value and or volume of goods produced for export and or import substitute.

In this definition, not only is capital defined to include money but also it includes performance standards. The definition also seems to be open ended when it uses the term 'and other business assets'. A close review of the definition of the same term under a similar investment law in South Sudan is clear that raw materials are also part and parcel of capital.⁷ What this means to most mineral resources-rich African countries is that, they already have capital by naturally being endowed with plenty and variety of mineral resources that can offer a range of raw materials.

3. The Current Legal Position on FCI

The current legal position is that the state is required by the law to participate in all mineral rights that are granted under mining and special mining licenses. In particular, the law states that,

In any mining operations under a mining licence or a special mining licence the Government shall have not less than sixteen percent non-dilutable free carried interest shares in the capital of a mining company depending on the type of minerals and the level of investment.⁸

This legal position is replicated under the Regulations. What this means is that, for every mining or special license issued by the Mining Commission, to an investor, whether local or foreign, then the investor has to enter into joint venture (JV) with the government. The Government is granted 16% of the equity of the joint venture agreement between the investor and the state.

Notably, JV could operate as either a firm or a company. When JV operates as a firm, the parties there too, that is the state and the mining company become the partners in mining business and rules of partnership apply accordingly. However, when the JV operates as a company, which is the case preferred under the regulations, then a company is registered whose members are the government and the mining company. In this case, the Joint Venture Company (JVC) company is born and exists as a person separate from the state and the mining company. In both the JV as a firm and or JVC, the state holds 16% of the equity. Worth noting here is the fact that, nature of relation between the parties under the JV firm and or JVC is contractual based and hence the law regulating contract is applicable to them.

Nonetheless, the FCI as provided under the regulations confers a number of rights on the part of the state. Among the rights that are conferred are; right to appoint those who will manage the affairs of the company and those who will hold senior positions in the company, right to receive dividends and distribution of assets in case of winding up or otherwise.⁹

In particular, the nature of shares to be held under the FCI in Tanzania is that they are cumulative preference shares.¹⁰ What this means is that, the shares confer the state a right to a fixed rate dividend that is 16%, the payment of dividends to these shares offers the state priority over other shares in the company and that, in case the company will not make profit in a particular year, the right to dividends accumulates and become payable whenever the company makes profit. Arguably, these rights confer the state a preferential position in the company's venture over those of the investor as a means to maximize return and curb the possible complexities the investor may indulge into that may undermine the state benefits.

Notably, the regulations seem to have expounded the FCI provision by categorically stating that there shall be no consideration for the 16% shares granted to the state via the JVC. Contrary though under the law regulating contracts in Tanzania, agreements that lack consideration are regarded as having no legal force. The law states,

An agreement made without consideration is void unless-

- 1) it is expressed in writing in electronic form and registered under the law for the time being in force for the registration of documents, and is made on account of natural love and affection between parties standing in a near relation to each other;
- 2) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do; or
- 3) it is a promise, made in writing or electronic form and signed by the person to be charged therewith, or by his agent generally or specially authorised in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.¹¹

Worthy to note from the foregoing provisions is that, among the exceptional circumstances provided, non could be relied to fit into the FCI provisions in Tanzania. However, borrowing experience from Kenya, law regulating contracts has taken a unique approach, where it states,

"Save as may be provided by any written law for the time being in force, the common law of England relating to contract..."¹²

The implication of this legal position is that, all contractual principles, inclusive consideration that are recognized under English law apply in Kenya subject to other written laws. Consequently, the Kenyan Mining Act and its regulations overrides the English law on the aspect of consideration when issues of FCI comes to play.

Notably, it is worth to question whether it is true that the state did not contribute any value in return of the 16% FCI in the JVC. To recap, regulations in Tanzania states that, '...no financial contribution shall be required from the government on account of its shares...' ¹³ The same provision is also replicated under a similar regulation in Kenya, where it states that;

"free carried interest" means the grant of an equity interest by the holder to the State without any financial obligation, compensation or contribution to the holder of a mining licence by the State.¹⁴

Also, the position in South Africa seems the same where the Mining Charter states, '...percentage equivalent to the issued share capital of the mining right holder, at no cost to a trust or similar vehicle set up for the benefit of host-communities...' ¹⁵ What this means is that, there is a similarity of FCI rules, but when examined in the light of contractual laws, there is disparity in terms of regulation of contractual principle behind the FCI between Kenya and Tanzania.

Although the discussion above shows that capital is not only money but also include raw materials such as minerals, this seems to have escaped the mind of the drafters of both the regulations and the Mining Act. A similar lacuna is also noted under the law regulating mining in Kenya.¹⁶ Notably, drafters of legal instruments are cautioned on aspects related to defining terms as hereunder,

'provision for definitions on agreed terms, and such definitions should not defeat any provision of any applicable law; ...'¹⁷

As such the law does not define the term capital but uses it. To exemplify this, the Mining Act provides thresholds for the capital to be invested as a condition for application for mineral rights.¹⁸ Large-scale mining and small-scale mining which are expected to apply for special and mining licenses are expected to invest not less than USD one hundred million and five thousand million respectively. Notably, the manner in which capital is framed under this law signals that, it has to do more with the mining company and not the state. As such, the state is presumed as a mere regulator not the investor in the sector. Also, the capital is more in monetary terms than materials, leave alone natural resources.

Notably, the term capital is broadly defined under the investment law is capable to include natural resources or performance standards and hence signal state contribution into the 16% FCI. However, Tanzania Investment and Special Economic Zones Authority Act (Investment Act) is very clear that it does not apply to mineral sector.¹⁹ What a missed opportunity to save the state, JVC agreements from avoiding the risk of being rendered void.

In particular, the issue of conflicting legal position between the mining and the general law on contractual matters draws in statutory interpretation. As such, there is a constitutional principle that requires the judiciary not to be caught up into unnecessary technical matters that may obstruct its mandate in justice dispensation.²⁰ Similarly, Bhanri Juvekar shows that there are several principles that can be relied in interpreting statutes in Common law where there is a conflict between general and a specific law, old and newer law say for example [2] Shruti Sinha shows that while laws such as; penal code and criminal procedure code may be used to exemplify general laws, laws regulating cybercrimes may be used to exemplify

special laws [3]. The US Supreme Court once decided on this principle in the case of *Rodgers v US* as here under;

...where there are two statutes, the earlier special and the later general, the terms of the general - broad enough to include the matter provided for in the special - the fact that the one is special and the other is general creates presumption that the special is to be considered as remaining exception to the general...²¹

Consequently, the court is to be expected to apply the provisions of special law [Mining Act] as the exception to the general law [Law of Contract Act] on the aspect of consideration. This is so, despite the LCA does not contemplate such an exception under its provisions when compared with the same law in Kenya. Arguably, the court in Tanzania in the case of *Msafiri Pangara Ndabila v Bahati J Nkembo and 2 others*,²² parties were at issue (among others) with respect to application of the Law of Limitation Act or the Magistrate Court Act. While the Law of limitation Act sets general time limits to file various application to courts, other laws may also set specific time contrary to those provided under it. Specifically, the Law of limitation Act does not apply where there are other specific laws providing for a different time line to file applications to the court. Notably, however, the court in this case relied on technicalities and dismissed the application for wrongful citation of the law instead. Also, the Court of Appeal in Tanzania in the case of the *Commissioner General, Tanzania Revenue Authority vs Vodacom Tanzania Public Limited Company*²³ shows that there are various principles to be relied on statutes interpretation. Among such principles are; literal rule, golden rule, mischief rule, purposive rule and harmonious construction. Although this case could have been a good example on statute interpretation, the dispute was based on interpretation of sections of the same statute contrary to the case at hand, where the Mining Act conflicts with the LCA.

Notably, the Court of Appeal of Tanzania (CAT) established a principle that, words in statutes may not necessarily have a direct meaning even when they seem obvious. In particular, the court proceeds stating that words may be assigned different meaning where: there are express provision in a specific statute or if the words are to be applied would be contrary to the object of the written laws to name but a few.²⁴ As such, preference would be assigned to the specific law than a general law, in the case at hand Mining Act. However, CAT also seems to raise a caution that, even the specific law itself have to be well interpreted if it links with the general law in question. The CAT states that;

'...Cap 289 is in the circumstances a statute of specific application, whereas Cap 290 is a statute of general application as regard to rates. We however do not agree with Mr. Ngowi that despite Cap 289 being a statute of specific application Cap 290 would still apply in interpreting section 7 (1) (g) of Cap 289...' ²⁵

The above legal position of the court signals that, there must be linkages of what is being regulated under the specific

law and the general law. Supposedly, the subject of regulation is too far to be contemplated by the general law, as it was the case, the primacy of a specific law over general law is to be ignored. It is not surprising that Shruti, cautions that any mechanical reliance of court interpretation could lead into dissatisfaction or unjust judgements [3] This is based on the power the court has in interpreting the statute. It is argued that, ...the parliament merely provides raw material, in the form of a text, which the judges refashion according to their own value judgments in order to produce the law [4].

It is also further argued that, judges rarely are faced with such circumstances where the meaning of used words in statute are ambiguous or in cases of gaps, and that in doing so, they have to identify the real intention of the parliament. Consequently, since to date both the Mining Act and its regulations have not been tested in court, it is left to the court to give an interpretive view of the two contradictory legal position. Should the court adopt the less technical approach, the FCI provisions saves from the risk of being declared void, and vice versa is true. Such concerns are not farfetched and may not be ignored given the experience from South Africa where mining company challenged a move akin to FCI intended to benefit local blacks.²⁶

4. Way Forward

It is crystal clear above that, the regulations of FCI in Tanzania the state does not offer any consideration to the JVC in return of the issued 16% shares granted. The legal position as it stands now is also very clear that any agreement that lacks consideration is as good as it does not exist. To emolliate the situation, three alternative way forwards are proposed. Firstly, placing reliance over common law principles of statutory interpretation where the specific law overrides the general law. As such, principles of common law are applicable in Tanzania via the Judicature and Application of Laws Act.²⁷

Secondly, the regulations remain as they are, but the LCA is amended to provide exceptional grounds where contract may still lack considerations but yet valid. A good example could be where consideration is waived by the law. The Kenyan approach saves as an option here.

The third option offers two ways. On the first had, the Investment Act is amended to apply to mining sector on issues not provided for under the Mining Act. Here the broad definition of the term capital will be applicable to mining sector as well. On the second hand, the Mining Act is amended to provide for and define the term capital broadly to include

other assets such as natural resources. Notably, the second way forward where both Mining Act and Investment Act are to be revised, the regulations also need be revised to provide for state capital contribution in the FCI via natural resources subject to the license.

Abbreviations

CAT	Court of Appeal of Tanzania
FCI	Free Carried Interests
LCA	Law of Contract Act
JVC	Joint Venture Company
JV	Joint Venture
PSA	Production and Sharing Agreements
US	United States
USD	United State Dollars

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Conflicts of Interest

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¹ Republic of South Africa, 'Broad-Based Black Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry'. para 2.1.4.1.1.

² The Mining (State Participation) Regulations 2022. Regulation 7(5) (a).

³ Law of Contract Act 2019 345. s 25.

⁴ Republic of South Africa (n 1). para 2.1.4.1.1.; The Mining (State Participation) Regulations 2017.; The Mining (State Participation) Regulations.

⁵ Mining Act 2018 (CAP123).; The Mining (State Participation) Regulations.

⁶ Sheria ya Uwekezaji na Maeneo Malumu ya Kiuchumi 2025 s 3.

⁷ The Investment Promotion Act 2009. s 5.

⁸ Mining Act. s 10.

⁹ The Mining (State Participation) Regulations.

¹⁰ *ibid.*

¹¹ Law of Contract Act 345. s 25(1).

¹² The Law of Contract Act 2022. s 2(1).

¹³ The Mining (State Participation) Regulations. Regulation 7.

¹⁴ The Mining (State Participation) Regulations. Regulation 2.

¹⁵ Republic of South Africa (n 1).

¹⁶ Mining Act 2016.

¹⁷ United Republic of Tanzania, Attorney General Office, 'Contract Manual of 2024'. para 5.2 (a).

¹⁸ Mining Act. s 4(1).

¹⁹ Tanzania Investment and Special Economic Zones Authority Act 2025. s 2.

²⁰ United Republic of Tanzania Constitution 1977. Art. 107A.

²¹ *Rodgers v US* [1902] US Supreme Court 317, 185.

²² *Msafiri Pangara Ndabila v Bahati J Nkembo, Highland Auction Mart Co. Ltd and Registered Trustees of Brotherhood Church*, Miscellaneous Civil Application No. 34 of 2022

²³ *The Commissioner General, Tanzania Revenue Authority vs Vodacom Tanzania Public Limited Company*. p 8.

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