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The complexities of tackling illicit financial flows in practice THE EXAMPLE OF TANZANIA

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The issue of illicit financial flows (IFFs) in the mineral sector of African countries has been the recent focus of African regional and national policy discussions. Research and analysis by institutions like the African Union (AU) and United Nations Economic Commission for Africa (UNECA), aimed at building an understanding of IFFs, is still ongoing. The shocking preliminary results of this analysis have led many resource-rich African countries to blame IFFs for the low tax revenue from the resource sector, citing elements of tax evasion and tax avoidance. One such country is Tanzania, one of Africa's most productive gold mining countries.

This paper highlights the influence that the continental IFF agenda has had on Tanzania. The country has made headlines over the past four years for the president's zeal in dealing with mining companies and their IFF practices. These companies have been named and shamed, and some have even had to pay substantial amounts of assessed tax bills as a result of legal action and lengthy negotiations. This might be a positive indication of the kind of vigour that needs to be employed in transforming the sector. Conversely, such vigour should not result in driving out much needed foreign direct investment (FDI). In practice, balancing these needs is complicated.

The paper shows that Tanzania has started to implement the High-Level Panel on Illicit Financial Flows from Africa's recommendations. However, further analysis is needed. It also shows that consideration of the effects on employment and investment flows is vital to prevent an adverse impact on the country's economy. The paper specifies where exactly IFF takes place within the mining value chain, emphasising that some policies, if aptly targeted at specific stages, might be more effective and better meet revenue collection objectives. Finally, the paper provides evidence-based 'takeaways' that could improve the policy and institutional environment.

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Acronyms

AfDB	African Development Bank
AMV	African Mining Vision
ASM	Artisanal small-scale mining
AU	African Union
AUC	African Union Commission
BEPS	Base erosion and profit shifting
CMV	Country mining vision
DOTS	Direction of trade statistics
CoDA	Coalition for Dialogue on Africa
DRC	Democratic Republic of Congo
DRM	Domestic revenue mobilisation
DSE	Dar Es Salaam Stock Exchange
DTA	Double taxation agreement
EAC	East African Community
ECA	Economic Commission for Africa
ECDPM	European Centre for Development Policy Management
EI	Extractive industry
EPZ	Export processing zone
FDI	Foreign direct investment
FIU	Financial Intelligence Unit
GDP	Gross domestic product
GFI	Global Financial Integrity
HDI	Human development index
HLP	High-level panel
IFF	Illicit financial flow
IMF	International Monetary Fund
ISDS	Investor–state dispute settlement
MAB	Mining Advisory Board
MDA	Mining development agreement
MNE	Multinational enterprise
NGO	Non-governmental organisation
ODA	Official development assistance
OECD	Organisation for Economic Co-operation and Development
SAP	Structural adjustment program
SDG	Sustainable Development Goal
SML	Special mining license
TCME	Tanzanian Chamber of Minerals and Energy
TM	Trade mis-invoicing
TMAA	Tanzania Minerals Audit Agency
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNECA	United Nations Economic Commission for Africa
VAT	Value-added tax
WB	World Bank
WCO	World Customs Organisation
WIR	World Investment Report

1. Introduction

As much as the concept of Illicit Financial Flows (IFFs) has gained prominence in global discourse over the past three decades, a coherent international understanding of IFFs does not exist. The practical implications are that global agreements on how to deal with IFFs are reduced to mere political and policy statements, with very little or no action being taken at country levels to curb them. International focus on IFFs has accelerated in discussions around the challenges of financing the ambitious Sustainable Development Goals (SDGs), aimed at ending poverty, protecting the planet and ensuring shared peace and prosperity. IFFs are included under target 16.4 of the SDGs that calls to, “[b]y 2030, significantly reduce illicit financial flows and arms flow, strengthen the recovery and return of stolen assets and combat all forms of organised crime.”¹ The Addis Agenda,² which provides a global framework for financing the SDGs, makes explicit reference to the need to redouble global efforts towards reducing IFFs in order to eliminate them by 2030. The SDGs provide a clear opportunity to consolidate international, regional and national efforts to curb IFFs.

In Africa, strengthening domestic revenue mobilisation (DRM) is central to financing the SDGs. However, efforts to mobilise public resources are severely undermined by IFFs, which are estimated to total more than US\$ 50 billion a year.³ This figure exceeds the amount of official development assistance (ODA) given to the continent.⁴ The majority of these illicit flows take place in the natural resource sector, particularly in mining. While there are debates among various academic, intergovernmental and industry experts working on tax policy on the accuracy of these figures, there is a general agreement that the concerns that arise as a result of IFFs are real and should coherently be addressed.

While various international organisations have slightly different definitions of IFFs,⁵ for purposes of clarity, this paper uses the definition adopted in the ‘Report of the High-Level Panel (HLP) on Illicit Financial Flows from Africa, 2015’⁶: “*Money that is illegally earned, transferred or utilised. These funds typically originate from three sources: commercial tax evasion, trade misinvoicing and abusive transfer pricing; criminal activities, including the drug trade, human trafficking, illegal arms dealing, and smuggling of contraband; and bribery and theft by corrupt government officials*”. Following the release of the HLP report, some African countries have taken steps towards developing national policies to combat IFFs.⁷ However, there is a persistent lack of information and clarity on what exactly is included in these policy documents, how these measures are being implemented, the political incentives to act on IFFs and an understanding of the real impact on curbing IFFs at national levels.

This paper focuses on Tanzania to look at how the country has evolved in its practices, incentives and policies on IFFs – what changes (if any) have been made and what is their significance? This discussion paper also identifies the enablers that facilitate, and the bottlenecks that block, the country in strengthening its institutions and policies on IFFs. This country focus is further useful to distil some conclusions about the most efficient use of policy targeting and formulation, at a national level, on IFFs in the mining sector. The choice to focus the paper on Tanzania was guided by the fact that the country is said to have lost millions of dollars

¹ Expert meeting on statistical methodologies for measuring illicit financial flows. [Concept note](#).

² United Nations (2015a), ‘[The Addis Ababa Action Agenda of the Third International Conference on Financing for Development](#)’, 7 July 2015.

³ UNECA (2014), ‘[Illicit Financial Flows from Africa](#)’. Report commissioned by the AU/ECA Conference of Ministers of Finance.

⁴ OECD (2018), ‘[Illicit Financial Flows: The Economy of Illicit Trade in West Africa](#)’, p. 13. Although the figures on IFFs are heavily disputed, current analyses agree that IFFs exceed the amount of ODA provided to Africa.

⁵ For various papers discussing the definition of IFFs, see Miyandazi and Martin Ronceray (2018), ‘Understanding illicit financial flows and efforts to combat them in Europe and Africa’, pp. 3–5; Forstater (2018), ‘[Pinning Down Illicit Financial Flows: Why Definitions Matter](#)’. Chowla and Falcao (2016), ‘[Illicit Financial Flows: Concepts and Scope](#)’.

⁶ UNECA (2014).

⁷ Miyandazi and Ronceray (2018), pp. 29–30.

through IFFs⁸ in its mining operations – the country's most important foreign exchange earner,⁹ with gold accounting for 90% of the value of Tanzania's mineral exports.

The research, analysis and evaluation presented in this paper synthesise the findings from secondary desk reviews. Reviewed literature includes various government policies, laws and reports relevant to extractives in general; company business and financial reports; media articles; and institutional reports. It aims to give an overview of the key policy issues and articulate the impact of these on curbing IFFs. It achieves this by presenting the available information specific to understanding the problem, thereby allowing the reader to critically evaluate the mechanisms in existence and the complexities these present towards efforts in curbing IFFs in Tanzania.

The discussion is structured as follows. Section 2 looks at the emergence of IFFs as a policy-relevant concept in Africa. Specifically, it cites the work of the High-Level Panel (HLP) on Illicit Financial Flows from Africa, which positioned IFFs in Africa's 'financing for development' agenda. The section highlights how operations within the extractives industry and natural resource sector are areas of high risk for the occurrence of IFFs in Africa. The section also notes other continental instruments like the African Mining Vision (AMV) document and its contribution to the IFF debate. Section 3 then provides an overview of the gold mining industry in Tanzania. It tracks various historical moments up to current issues of natural resource governance, ownership and policies. The section ends by highlighting the current trends in IFFs in Tanzania that have been identified through various reports. Section 4 unpacks the current debates in the country on the activities of mining companies and the impact this has on foreign direct investment (FDI). Section 5 looks at the mining process and specific stages where IFFs are at the highest risk of occurrence. Section 6 then briefly summarises some of the policy takeaways from the situation in Tanzania and section 7 concludes. Overall, it is shown that there is a deepening debate on IFFs in Tanzania but a colossal lack of shared understanding on the subject of illicit flows. Moreover, it is understanding that is crucial – to ensure better governance, capacities to detect IFFs, regulatory and control systems that are well understood by all stakeholders within the sector, and better oversight of the mining sector.

2. The development of IFFs in Africa

IFFs have emerged as a key area of engagement for the African Union (AU), which now convenes all African states.¹⁰ Triggers to look more keenly into the issue include the need to increase DRM to tackle developmental challenges, such as fighting poverty; the need to find alternative sources of financing for the union and reduce the dependency on official development assistance (ODA); concerns around terrorism financing; rampant corruption; and depleting natural resources, among others. In 2011, a high-level panel (HLP) to examine IFFs originating on the continent was proposed and subsequently formed in February 2012,¹¹ led by the former president of South Africa, Thabo Mbeki. The panel was mandated to analyse the level and complexities of IFFs, create awareness on relevant aspects and propose policies and mobilise support for practices that would reverse the trend in outflows. Prior to this, work on IFFs in Africa was predominantly carried out by non-governmental organisations (NGOs) (for example Global Financial

⁸ Financial Secrecy Index (2018), 'IFFs Challenge at The Doorstep Of African Countries (Part 1)'.

⁹ Tanzania Extractive Industries Transparency Initiative Overview.

¹⁰ Today, the African Union counts 55 African member states. The last country to join the union was Morocco, which in January 2017 was readmitted after more than 30 years. See more at ECDPM (2016), '[The African Union: What role in tackling Africa's challenges?](#)'

¹¹ Established under [Resolution 896 \(XLIV\)](#) of the fourth Joint Annual Meetings of the Economic Commission for Africa Conference of African Ministers of Finance, Planning and Economic Development and the African Union Conference of Ministers of Economy and Finance.

Integrity, ActionAid, Trust Africa, Oxfam and Tax Justice Network-Africa), and some academics such as Léonce Ndikumana and James Boyce.¹²

For three years, the panel focused on research around Africa and used seven countries – Zambia, Nigeria, Kenya, Tunisia, Liberia, Mauritius (as a small island example) and South Africa (for its experience in dealing with IFFs) for specific case studies and visits. In 2015, the panel released its report titled *Track it, Stop it, Get it: Report of the High-Level Panel on Illicit Financial Flows from Africa*, which was adopted by African heads of state, during the Twenty-Fourth Ordinary Session of the AU Assembly in Addis Ababa, Ethiopia, in January 2015. The HLP report concluded that the continent was annually losing an estimated US\$50 billion through IFFs. This was predominantly through tax evasion and mispricing of trade by multinational companies. These estimates did not include elements such as trade in services and intangibles, proceeds of bribery and trafficking in drugs, people and firearms.¹³ This report has since become the main reference document on the subject in Africa. It identifies three main sources of IFFs: (1) commercial, including trade misinvoicing,¹⁴ abusive transfer pricing,¹⁵ and base erosion and profit shifting;¹⁶ (2) criminal activities, including the drug trade, human trafficking, illegal arms dealing, and smuggling of contraband; and (3) bribery and theft by corrupt government officials.

While the HLP report acknowledges the need for political intervention to curb IFFs, to increase transparency, and to address the vulnerability of African countries dependent on natural resources, concerns about the abuse of power, money laundering, weak national and regional capacities, and financial secrecy jurisdictions were also pointed out. Additionally, in its recommendations, the HLP report noted that African countries needed to prioritise dealing with the commercial activities found to be the most significant contributor of IFFs. This should be followed by prioritising dealing with organised crime (poaching; drugs, arms and human trafficking; oil and mineral theft; and other forms of crime that generate money contributing to IFFs), then public sector activities, especially corrupt practices that facilitate IFFs. It is important to note that some of the activities identified in the report as contributing to IFFs are not necessarily illegal.¹⁷ For instance, base erosion and profit shifting (BEPS)¹⁸ by multinationals that exploit gaps in national and international tax systems to reduce their tax liability exemplify the rather blurred line between illegal tax evasion and tax avoidance.¹⁹ BEPS can be detrimental to national systems since it undermines the integrity of the tax system, discourages tax morality and encourages a perception of unfairness in the tax system. It also undermines competition, since global multinational enterprises (MNEs) have a competitive advantage over enterprises that operate at a domestic level (especially small- and medium-sized enterprises).²⁰

¹² See Hearson and Brooks (2010), '[Calling Time: Why SABMiller should stop dodging taxes in Africa](#)'. Also various publications available at www.taxjusticeafrica.net/en/resources/downloads/topical-reports/?lang=en. In 2011, a book by Léonce Ndikumana and James K. Boyce analysing capital flight from Sub-Saharan Africa found that between 1970 and 2008 more than \$700 billion left the continent in the form of capital flight. See Ndikumana and Boyce (2011), 'Africa's Odious Debts: How Foreign Loans and Capital Flight Bled a Continent'. Zed Books.

¹³ Corruption Watch (2015), '[Mbeki: illicit financial flows crippling the continent](#)', The estimate of US\$50 billion was based on data obtained from the International Monetary Fund (IMF) Direction of Trade Statistics (DOTS), which has a database that provides data on countries' exports and imports.

¹⁴ The act of misrepresenting the price or quantity of imports or exports in order to hide or accumulate money in other jurisdictions. See UNECA (2014), p.10.

¹⁵ Transfer pricing, refers to the setting of prices for transactions between associated enterprises involving the transfer of property or services.

¹⁶ Refers to tax avoidance strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations. See: www.oecd.org/tax/beps/.

¹⁷ See Picciotto (2018), '[Why tax avoidance is illicit for more on this debate](#)'.

¹⁸ Refers to tax avoidance strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low- or no-tax locations (OECD definition).

¹⁹ Oguttu (2016), 'Tax Base Erosion and Profit Shifting in Africa – Part 1: Africa's Response to the OECD BEPS Action Plan'. ICTD working paper 54.

²⁰ Ibid.

Operations within extractive industries and the natural resources sector were found to be the primary source of IFFs from Africa. Around 56% of all IFFs leaving Africa between 2000 and 2010 came out of the oil, metals, ores and precious minerals sectors.²¹ Despite being rich in natural resources and having a long history of mining, Africa has not attracted a share of global mining investment commensurate with its share of global resources.²² Rich endowment in natural resources is often associated with lower socio-economic development: the so-called resource curse.²³ This is due to the existence of high-level discretionary political control, management of resource rents in an opaque way with no accountability, limited competition and lack of specialised expertise, and corruption.²⁴ Policy gaps and lack of compliance in regulatory regimes create loopholes for IFFs by allowing vested foreign and domestic interests to profit from tax evasion and weak state institutions.²⁵

Nonetheless, there has been momentum for action to tackle the scourge of IFFs in Africa, with various policy campaigns and advocacy activities. For example, the HLP members visited several European countries, the United States and many African countries for sensitisation and follow-ups. The ‘Stop the Bleeding’ campaign is driven by African civil society organisations to promote one Africa-wide movement against IFFs. The AU has also declared a renewed commitment to halve IFFs by 2023 within the first 10-year implementation plan of agenda 2063 (2014–2023).²⁶ A dedicated office at the AU headquarters works on an ‘Anti-IFF Project’, including policies, partnerships and research.²⁷ While these examples have increased awareness of the issue, at the national level enforcement of the recommendations of the HLP report remains unclear. For instance, no individual African country has commissioned a country-specific study on IFFs. Some countries, including Burkina Faso, Kenya, Liberia, Mauritius, Niger, Senegal and Sierra Leone, are said to have developed national action plans on policies to combat IFFs.²⁸ However, these national plans have not been made public yet. There is the apparent need to wholly implement the HLP’s recommendations nationally, regionally and globally. This merits further analysis.

Further, since 2009 the AU has had in place the Africa Mining Vision (AMV), which has been adopted by heads of state. The AMV seeks to foster a “transparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socio-economic development.”²⁹ It also establishes a progressive fiscal regime that can curb the haemorrhaging of the continent’s resources through tax evasion and avoidance and illicit financial flows from the mineral sector.³⁰ It does this by making sure that nations can negotiate contracts with mining multinationals that generate fair resource rents and stipulate local inputs for operations. Based on the guidelines provided within the AMV, Tanzania is one of the countries that is pursuing a country mining vision (CMV) to implement the AMV at the national level. This

²¹ Oxfam (2017), ‘From Aspiration to Reality. Unpacking the Africa Mining Vision’, pp. 15–20.

²² McKinsey & Company (2010). ‘[Africa’s path to growth: Sector by sector](#)’, online, accessed 2 February 2019.

²³ A theoretical paradox often referred to by economists and social scientists that can be traced back to the 1970s, where countries with an abundance of various types of natural resources experience less economic growth, democratic growth, and worse development outcomes than countries with fewer natural resources. Sachs and Warner (1995a), ‘Natural Resource Abundance and Economic Growth’. Harvard Institute for International Development. Discussion paper 517a.

²⁴ Le Billon (2011), ‘Extractive sectors and illicit financial flows: What role for revenue governance initiatives?’ U4 Issue.

²⁵ Akong et al. (2017), ‘The Impact of Illicit Financial Outflows from the Mineral Sector in Africa’.

²⁶ African Union Commission (AUC) (2015), ‘[Agenda 2063 – The Africa We Want](#)’. First ten-year implementation plan 2014–2023.

²⁷ The office for the Coalition for Dialogue on Africa (CoDA) was launched in January 2018, at the AU headquarters. It exists as a special initiative of its three convening organisations: African Union Commission, United Nations Economic Commission for Africa (UNECA or ECA) and African Development Bank Group (AfDB).

²⁸ These national action plans are said to have been developed as part of the United States–African Partnership on Illicit Finance. See UNECA (2018), ‘[A Study on the Global Governance Architecture for Combating Illicit Financial Flows](#)’, p. 47.

²⁹ African Union (2009), ‘Africa Mining Vision. Addis Ababa: African Union Commission and United Nations Economic Commission for Africa’. Introduction page.

³⁰ Oxfam (2017), ‘From Aspiration to Reality. Unpacking the Africa Mining Vision’, p. 2.

implementation has already begun and involves a review of existing legal, institutional, policy and regulatory frameworks; integrating mining into national development plans, poverty reduction strategies and visions for development; and capacity building and provision of technical support to create an ongoing space for dialogue on extractives.³¹

Key points:

- IFFs have been part of African financing policy discourse and actions for the past decade and especially since the 2015 release and adoption by African heads of state, of the report of the High-Level Panel on Illicit Financial Flows from Africa.
- Operations within extractive industries and the natural resources sector were found to be the primary source of IFFs from Africa. This is mainly as a result of political, policy and regulatory gaps within the sector.
- There is an obvious need to wholly implement the HLP's recommendations nationally, regionally and globally. However, what is being done at the national level is unclear due to lack of information on this.
- Other continental instruments such as the Africa Mining Vision (AMV) provide specific guidelines on how African countries can improve the mining sector for broad-based sustainable growth and socio-economic development.

3. The Tanzania context: Focus on the mining sector

In November 2018, during a visit to follow up on how Tanzania was performing in curbing IFFs since the release of the HLP report, the former chair of the HLP, H.E. Thabo Mbeki commended efforts being made by Tanzania's president, John Magufuli (fifth President) and his government. Mbeki said that the country was an example that other African countries should emulate, especially in combating money laundering and dealing with corruption in various sectors, including the mineral sector. At the same meeting, Tanzania's president singled out for criticism investors who report incurring losses and took money out of Africa.

The next section focuses on the situation in Tanzania's mining sector, beginning with the historical context that underpins the governance of Tanzania's mining sector. This background is necessary to understand where the country is coming from, the current push by the Tanzanian government to regulate the mining sector and where we may expect the country to be going with its policies towards reducing outflows of tax revenue.

3.1. Pre-independence

Tanzania is one of the top mineral-rich countries in Africa, after South Africa, the Democratic Republic of Congo and Nigeria.³² Diverse natural resources are extracted in Tanzania including metals such as gold, iron ore, copper, cobalt and silver; gemstones such as diamond, tanzanite, sapphire, topaz, ruby and emerald; as well as hydropower, tin, phosphates, coal, natural gas, gas and oil along the coast, and nickel among others. During the pre-colonial era, the Arab and Portuguese traders along the coastal regions dominated mining. Later, in the 1890s, the German colonial administration conducted the earliest organised prospecting and mining operations.

³¹ Oxfam (2017), 'From Aspiration to Reality. Unpacking the Africa Mining', p. 19.

³² Kirungi (2009), 'The Extractive Resource Industry in Tanzania: Status and Challenges of the Mining Sector'. Nairobi: Society for International Development.

The German colonial administration gave itself imperial power over land in Tanganyika (as Tanzania was formerly called) through various decrees. They had exclusive control over land endowed with natural resources. German private companies such as Kirondata and Sekenke Gold Mines dominated the sector and were given concessions and exclusive mining rights to large areas with mining potential.³³ Other mining ordinances were geared towards small reef-gold-miners rather than large-scale ventures, and generally, there were hardly any incentives to warrant large-scale mining.³⁴ In the same period, British and South African mining operations also opened. Tanganyika became a trust territory under British colonial administration from 1916 until December 9, 1961, when the country gained independence. Prospecting for gold was, however, banned during the Second World War, mainly because of the 'war economy' supply priorities.³⁵

The general law in Tanganyika was that resources, whether above or beneath the ground, were the property of the colonial government.³⁶ As a British protectorate, the laws and practices of the local communities with regard to land and natural resources were to be acknowledged. Nevertheless, in 1920, the order-in-council, Article 8. (3) placed all mines and minerals, in, under or on any public lands in the control of the governor (the highest British mandated ruler over the territory) and the colonial government. In 1929, the 1920 ordinance was amended, allowing the right to explore and prospect minerals by private mining companies in association with the government. Thus began the growth and establishment of many British state-owned mining companies, such as the South Nyanza Development Company (Britain)³⁷ in the gold and diamond sectors. Section 28 of the ordinance was repealed in 1931 to allow more foreigners, especially those coming from neighbouring countries' colonies, to come and settle in Tanganyika and prospect and dig for gold. The 1929 ordinance on mining required that prospecting by private companies was to be done in association with the government.³⁸

The overall 1929 ordinance remained valid up to 1969 when a Mining Ordinance (Amendment) Bill was introduced to give the minister full control over prospecting licenses,³⁹ whether it was in the public interest or not. The decision on what constituted 'public interest' was vested in the minister and was discretionary.⁴⁰ The 1929 Mining Ordinance gave all those who could afford 10 shillings and could fill out an application form the possibility to apply for a prospecting licence.⁴¹ Thus, from the 1930s, African miners started to access prospecting rights themselves.⁴² From this time, the sector started to attract both local and foreign investors. Still, the mandatory capital requirement and the need to have the capacity to operate a mine favoured foreign miners and most African-dominated artisanal, and small-scale mining was discouraged and extremely limited. Other enacted laws like the Land Ordinance Cap 113 of 1923 and Land Acquisition Ordinance Cap 118 of 1926 further facilitated the acquisition of native lands and considerably changed the way mineral

³³ Lemelle (1986), 'Capital, state and labor: A history of the gold mining industry in colonial Tanganyika 1890- 1942'. Ph.D thesis, the University of California at Los Angeles.

³⁴ Lissu (2001), '[In Gold We Trust: The Political Economy of Law, Human Rights and the Environment in Tanzania's Mining Industry](#)', online, accessed 3 February 2019.

³⁵ SID (2009), '[The Extractive Resource Industry in Tanzania: Status and Challenges of the Mining Sector](#)'.

³⁶ Ibid.

³⁷ Kelsal and Gibbon (ed.) (1996), '[Liberalised Development in Tanzania: Studies on Accumulation Processes and Local Institutions](#)'.

³⁸ Lange (2008), 'Land Tenure and Mining in Tanzania'. Bergen: Chr. Michelsen Institute (CMI Report R 2008: 2) p. 34.

³⁹ Ibid.

⁴⁰ Kelsal and Gibbon (ed.) (1996).

⁴¹ Bryceson et al. (2012), '[Unearthing treasure and trouble: Mining as an impetus to urbanisation in Tanzania](#)'.

⁴² Lemelle (1986).

expropriation was handled, leaving behind permanent marks on later practice.⁴³ By 1950, minerals contributed a record 3% of GDP and around 15% of total exports by value.⁴⁴

In summary, the mining rights in Tanzania were owned almost exclusively by the two colonial governments at different times, changing hands only to include private companies associated with the colonial powers. Involvement of African miners was limited. Earnings from the mining sector were seen as beneficial only to the colonial powers and British and German companies invested their money in their home countries. Consequently, during the post-independence period, ensuring ownership of mining rights and land to Tanzanians and the independent government became a key vision of the then-president, as will be discussed below.

3.2. Post-independence

At the time of independence in 1961, the approach of Tanzania's founding father, Julius Kambarage Nyerere (who is often referred to as *Mwalimu*, meaning a teacher in Swahili), was to introduce various socialist policies, commonly known as *Ujamaa*, or African Socialism. Some of the characteristics of this era were the legal transformation of the government into a one-party state with democratic parliamentary elections and the introduction of the Arusha Declaration of 1967 to promote economic and social self-reliance. Immediately after the Declaration was promulgated, Act No. 5, passed on February 15, 1967, allowed the Minister of Industries, Natural Resources and Power to expropriate up to 60% of several large companies, including mining companies.⁴⁵

The mining sector in Tanzania was nationalised in 1967, and in 1972 the State Mining Corporation (STAMICO) was established to operate the sector.⁴⁶ During this period, international gold prices stagnated, with a massive decline in mining between 1964 and 1976.⁴⁷ There was an increasing centralisation of economic authority and urgency in the implementation of programmes,⁴⁸ including a greater emphasis on the promotion of agriculture for development. A lot of artisanal mining took place between the 1960s and 1970s, with much smuggling of gold and gemstones and the discovery of tanzanite in 1967.⁴⁹ There was also a Mining Act introduced in 1979, the first comprehensive post-independence law that governed all mining activities except in hydrocarbons up until the government passed the Mining Policy 1997 and a mining law in 1998. Nyerere was regarded as a nationalist who advocated for local communities to fully benefit from their natural resource base and was once quoted as saying that: "*We will leave our mineral wealth in the ground until we manage to develop our own geologists and mining engineers*"⁵⁰ in relation to resources governance and the involvement of foreign multinational companies in the resource sector.

By 1980, artisanal mining operations in the country had significantly grown due to government allocation of large parcels of land rich with natural resources to the locals. The government did not interfere with

⁴³ Ndjovu (2015), 'Compulsory land acquisitions in Tanganyika: Revisiting the British colonial expropriation principles and practices'. *International Journal of Scientific and Technology Research*, 4(12), 10–19.

⁴⁴ Lissu (2001), '[In Gold We Trust: The Political Economy of Law, Human Rights and the Environment in Tanzania's Mining Industry](#)', online, accessed 3 February 2019.

⁴⁵ Edwards (2014), 'Is Tanzania a Success Story? A Long-Term Analysis' in *African Successes, Volume I: Government and Institutions*, pp. 357–432. The National Bureau of Economic Research.

⁴⁶ Lange (2011), 'Gold and Governance: Legal Injustices and Lost Opportunities in Tanzania'. *African Affairs*, 110 (439), 233–252.

⁴⁷ Kinyondo (2018), '[Resource nationalism in Tanzania: Implications for artisanal and small-scale mining](#)'.

⁴⁸ Van Arkadie (1995), 'Economic Strategy and Structural Adjustment in Tanzania' report. The World Bank.

⁴⁹ Jönsson et al. (2014), 'Mining and Social Transformation in Africa: Tracing Mineralizing and Democratizing Trends in Artisanal Production'.

⁵⁰ Chachage (2010), 'Mwalimu in our popular imagination: The relevance of Nyerere today'.

regulations on mining operations within the country and also formally recognised it as an important economic activity.⁵¹ Even though there was little engagement in industrial mining, this was a period of sustained growth.

3.3. The financial crisis and a fall in commodity prices

However, from 1978 onwards, this progress in the mining sector was interrupted, eventually reaching an all-time low as a result of the financial crisis of the 1980s and a reduction in commodity prices that affected the national economy deeply. The government had to rely on grants, loans and special facilities arranged with the assistance of the International Monetary Fund (IMF) and the World Bank (WB) for economic stability. By the mid-1980s during the presidency of H.E. Ali Hassan Mwinyi, Tanzania was the world's second poorest country based on GDP per capita.⁵² Additionally, the IMF and WB imposed certain conditions on the country. For example, Tanzania adopted the WB-sponsored structural adjustment programmes (SAPs), which saw the beginning of cautious liberalisation, allowing privatisation of public sector industries and started to allow greater private sector engagement in economic activity. SAPs involved changes in the legal and regulatory framework with a view to attracting more foreign direct investment (FDI).

The 1990s brought with it an increasing awareness of the economic potential of Tanzania's mining industry, and it was during this time that the country began liberalising and privatising its minerals sector.⁵³ In this context and under a new president (H.E. President Benjamin Mkapa), the government passed into law a new Mineral Code in 1998. This new law repealed and replaced *inter alia* the 1979 Mining Act,⁵⁴ which gave the state and the minister of mines more control over the mining sector. The new law further offered an array of incentives to prospective investors in the sector that were not there before. These incentives included:⁵⁵ 3% royalty rates on minerals (5% on diamonds); 30% income tax and no additional profits tax; indefinite carrying forward of losses; no import duty or Value Added Tax (VAT) on mining equipment; 10% withholding tax on dividends and 3% tax on expatriate salaries; mining rights were transferable and mortgageable; and titling was administered on a first-come, first served basis. The country attracted US\$ 58 million in mining exploration in 1998, more than any other African country, but the ministry of finance and the Tanzania Revenue Authority believed that inadequate monitoring of the sector had led to a gap between mining proceeds and revenue growth; revenues from the sector fell short of the financial returns that companies were enjoying.⁵⁶

3.4. 2000 to date

The boom in mining exploration that began in the late 1990s continues. Under President Jakaya Kikwete (the fourth president), Tanzania adopted free-market economic policies. The most dominant minerals in the country now are gold, diamonds and tanzanite. Tanzania's extractives industries consist of large and small-scale mining activities, which have been central to the country's economic growth. Mining has been a source of employment, with estimates of more than one million artisanal small-scale mining (ASM) operators, two-

⁵¹ The Society for International Development (2009).

⁵² Reed (1996), 'Structural Adjustment, the Environment and Sustainable Development'.

⁵³ Magai and Márquez-Velázquez (2011), '[Tanzania's Mining Sector and Its Implications for the Country's Development](#)'. Working paper No. 04/2011.

⁵⁴ The other laws that were repealed were the Mining (Controlled Areas) Ordinance, the Mining (Loans) Ordinance, The Gold Trading Ordinance, the Diamond Industry Protection Ordinance, and the Gemstone Industry (Development and Protection) Act, 1967. See www.sds.org/wp-content/uploads/2010/02/Article-re-Mining-Contracts-in-Tanzania.pdf

⁵⁵ Campbell (ed.) (2004), 'Regulating Mining in Africa: For Whose Benefit?' Nordic Africa Institute.

⁵⁶ Readhead (2017), 'Improving Mining Revenue Collection – Tanzania's Mineral Audit Agency'. NRGi.

thirds of whom are gold miners.⁵⁷ Further, mining and quarrying activities in Tanzania contributed 3.7% to its gross domestic product (GDP) (projected to reach 10% in the National Development Vision 2025) with US\$ 1.78 billion in 2014, compared to only US\$ 598 million in 2009, representing a value increase of almost 200%.⁵⁸ This notwithstanding, a contribution of less than 4% to the economy given the rate of abundance is modest in comparison to certain top resource-rich countries in the world, which have been able to generate revenues of staggering proportions from their mineral resources.

This experience of the resource curse is associated mainly with challenges related to how to enable capable actors and enhance robust institutions that can support turning the natural resources into sustainable revenues fostering desired economic multipliers in the country. For Tanzania, the resource curse has resulted in problems such as issuing of unnecessary tax incentives, reports of tax evasion by large multinational mining companies operating in the country, rent-seeking (income for free), weak accountability mechanisms and social exclusion, and low human development indices. Additionally, the United Nations Development Programme (UNDP's) 2018 Human Development Index (HDI) ranking value for Tanzania in 2017 was 0.531 – which put the country in the low human development category – positioning it at 154 out of 189 countries and territories.⁵⁹ Further, approximately 70% of Tanzanians continue to live with less than US\$ 2 per day, with the majority of the poor based in rural areas and highly dependent on depleting natural resources for food, fuel and fodder.⁶⁰ Revenue from natural resource extraction can, therefore, serve as a crucial tool for Tanzania to improve its development outcomes.

Key points:

- Pre-independence, various laws ensured that mining rights were owned by the two colonial governments at different times, changing hands only to include private companies associated with the colonial powers. Involvement of African miners was limited. Earnings from the mining sector were seen as beneficial only to the colonial powers and British and German companies invested their money in their home countries.
- Post-independence, the then-president Nyerere advocated for African Socialism including in mineral wealth ownership. This was one of the reasons for the growth of the ASM sector.
- However, the financial crisis of the 1980s and a reduction in commodity prices affected the national economy deeply.
- In the 1990s liberalisation and privatisation of the mineral sector took place with stronger laws being introduced to this effect. As a result, there was a growth in foreign investment.
- Today, the boom in mining exploration continues. However, this has not translated into a growth in GDP and IFFs are said to be the main reason for this.

3.5. Trends of illicit financial flows in Tanzania

Since the 1990s various reports on the extent of IFFs in Tanzania have encouraged political and public debates on the contribution of the mining industry to the economy and the activities of various multinationals operating in the country. Notably, the payment of taxes by the leading mining companies operating in the country (see Figure 1). Between 2002 and 2011, Tanzania is said to have experienced the greatest potential

⁵⁷ Bryceson and Geenen (2016), 'Artisanal frontier mining of gold in Africa: Labour transformation in Tanzania and the Democratic Republic of Congo'.

⁵⁸ Data from the Tanzanian mining investment website available at: www.tanzaniainvest.com/mining.

⁵⁹ Human Development Indices and Indicators: 2018 Statistical Update. Tanzania (United Republic of). Available at: http://hdr.undp.org/sites/all/themes/hdr_theme/country-notes/TZA.pdf.

⁶⁰ The latest 2018 figures from the World Bank Group places Tanzania as the sixth-fastest growing economy in Africa. Although the real gross domestic product (GDP) growth rate slowed in 2017, in 2018, economic growth is expected to be around 6.8%. The World Bank Group (2018), 'Global Economic Prospects'.

average annual tax loss from trade misinvoicing, averaging at a gross of US\$ 1.87 billion. This is more than that of Kenya, Ghana, Uganda and Mozambique.⁶¹ Another report from a 2017 presidential committee commissioned to examine the economic and legal implications of the country's export of gold and mineral concentrates alleged that one company, Acacia Gold Mining PLC, through activities including BEPS, trade misinvoicing, and transfer pricing had under-declared revenues and tax payments leading to a loss of up to US\$ 84 billion between 1998 and 2017.⁶² The figure was about 5.6 times more than the proposed national budget for 2017/2018 of US\$ 15 billion.

Figure 1: Mining companies in Tanzania



In 2007 a report from the Tanzania Public Accounts Committee to parliament revealed that mining companies had declared US\$ 1 billion in losses because of generous capital expenditure allowances and weak documentation.⁶³ Similarly, a 2008 report⁶⁴ estimated that Tanzania had lost at least US\$ 265.5 million for years as a result of an excessively low royalty rate and government tax concessions that allowed companies to avoid paying corporation tax – and possibly even made possible tax evasion by some companies, if allegations were true. Another 2010 audit by the Tanzania Minerals Audit Agency (TMAA) found that 12 mining companies had over-declared their capital allowances and operating expenditures, in a bid to reduce their tax liability.⁶⁵ Several Tanzania mining companies have also been accused of using their subsidiaries or holding companies in tax havens to reduce their domestic taxes.⁶⁶ A study by Makwembere and Kangamungazi in 2017 also indicated that the mining companies in Tanzania accused of tax avoidance did

⁶¹ Baker et al. (2014), 'Hiding in Plain Sight: Trade Misinvoicing and the Impact of Revenue Loss in Ghana, Kenya, Mozambique, Tanzania, and Uganda: 2002–2011'.

⁶² 'Tanzania: Acacia Disappointed By the Findings of the Second Presidential Committee', AllAfrica, 14 June 2017.

⁶³ Curtis and Lissu (2008), 'A Golden Opportunity: How Tanzania is Failing to Benefit from Gold Mining'.

⁶⁴ Ibid.

⁶⁵ Curtis, NGowi, and Warris (2012), 'The one billion dollar question: How can Tanzania stop losing so much tax revenue?'

⁶⁶ Ibid.

so either legitimately (through tax avoidance schemes, demanding unnecessary tax concessions), or illicitly through false accounting, trade mispricing and misinvoicing, and illicit transfer of cash.

All these reports and findings have led the Tanzanian government to form various commissions to look into the mining sector. They aim to specifically address why the government was receiving such a small contribution from the sector and identify ways to increase revenue streaming out of it.⁶⁷ Further, the Tanzanian government has made significant efforts towards new state legislation to govern the mining sector. In summary, these new acts of legislation have been aimed at giving more controlling power to the state, and to some extent, the citizens of Tanzania, over the natural resource sector. Most of the mining sector's regulatory and control reforms are being implemented by the current president, John Pombe Magufuli, who has been in office since November 2015. See Box 1 in the next section for a summary of some of the new legislation.

The next section will highlight developments in the mining sector since the current president came into power. This exposes the current complexities in introducing new policies to govern the mining sector and in tackling IFFs such as money laundering, tax evasion and corruption.

Key points:

- Various studies and commission reports have come up with roughly the same conclusions as to the losses in tax revenue from the mining sector. The main recommendation is that the government needs to do more in terms of policies to elicit higher tax revenue contributions to the GDP.
- Multinational companies operating within the sector were identified as the biggest culprits of IFF practices.

4. Curbing illicit financial flows and foreign direct investment trade-offs?

The Organisation for Economic Co-operation and Development (OECD) notes that IFFs in developing countries specifically reduce both public and private domestic expenditure and investment and thus result in fewer hospitals and schools, fewer police officers on the street, fewer roads and bridges.⁶⁸ These developmental impacts of IFFs have been a significant driver in African countries' attempts to combat them. It has been used to justify the clamp down on the activities of major mining companies in Tanzania. There is a real indication that this kind of approach to dealing with foreign mining companies in Tanzania is having an adverse impact on the investment and employment climate in the country.

Since his election, President John Magufuli has introduced major reforms in several sectors in an effort to increase revenue collection by the Tanzania Revenue Authority, especially from the mining sector, in order to redistribute these funds for public goods and services. A review of the tax regime is underway while being cautious not to burden citizens financially or make it administratively harder for the Tanzania Revenue Authority to collect the taxes. At the start of his tenure, Magufuli led a crackdown on tax evasion and a shake-up of the revenue service, which allegedly resulted in a 1.3 trillion Tanzanian shillings (US\$ 564 million) recovery of unpaid taxes in just two months.⁶⁹ He also concentrated his attention on the activities of some of

⁶⁷ These commissions include the Kipokola Commission (2004), the Mboma Commission (2004), the Bukuku Commission (2005), the Masha Commission (2006), and the Bomani Commission (2008). All attributed a lack of transparency and secrecy in the sector as key reasons why the sector was making a minimal contribution.

⁶⁸ OECD (2014), 'Illicit Financial Flows from Developing Countries: Measuring OECD Responses'.

⁶⁹ Matthews (2019), '[Tanzania's descent into despotism](#)', 30 January 2019.

the biggest and oldest mining companies in the country, like Acacia, especially on allegations of illegal operations and tax avoidance on their Tanzanian profits. This will be the main focus of this section.

In July 2017, the Tanzania Revenue Authority gave a series of notices of adjusted assessment (the “Assessments”) to Acacia for historical corporate income tax. The company was charged with an assessed bill of a US\$ 190 billion (Sh 424 trillion) for allegedly operating in the country illegally and also for failing to fully disclose its export earnings over 17 years between 2000 and 2017. The bill is split into US\$ 40 billion in unpaid backdated revised taxes and an additional US\$ 150 billion in penalties and interest.⁷⁰ It is based on the findings of two presidential commissions set up to look into the sector (see the previous section). The first commission reported that Acacia had grossly under-reported the amount of gold in containers of copper-gold concentrate bound for export. The second estimated the revenue that the government had lost over the years, and the tax demand is said to take that into account.⁷¹ Some analysts maintain that the US\$ 190 billion tax bill is too high to ever be paid.⁷² The assessed tax bill was four times the GDP of Tanzania and 32 times larger than Acacia’s revenue from two of its mines over the last ten years, according to research from BMO Capital Markets.⁷³

In the same year, the president correspondingly brought into law three new acts of legislation, which creates a tighter regulatory framework of the natural resources sector (mining, mineral extraction, oil and gas) (see Box 1).

Box 1: New legislative framework for natural resources in Tanzania

The Natural Wealth and Resources (Permanent Sovereignty) Act 2017 (‘Sovereignty Act’), the Natural Wealth and Resources (Review and Re-Negotiation of Unconscionable Terms) Act 2017 (‘Contract Review Act’) and the Written Laws (Miscellaneous Amendments) Act 2017 (‘Amendments Act’) form the new legislative framework for the natural resources sector in Tanzania.⁷⁴ This follows previous extensive amendments, including to the Mining Act, Cap.123 of the Laws of Tanzania (Act No. 14 of 2010) (the ‘Mining Act’) by the Tanzania Extractive Industries (Transparency and Accountability) Act, 2015, whereby a number of changes affected mineral rights holders. The Mining Act had two further amendments in 2017 as a result of a change in the Tanzanian government’s approach to the mining sector, amongst others.⁷⁵ The new Mining (Mineral Rights) Regulations 2018 were published on 10 January 2018 vide G.N No. 1 of 2018. The Regulations replace the Mining (Mineral Rights) Regulations, 2010.⁷⁶

The broad scope of these acts, coupled with the relatively short period allowed for parliamentary and public debate, has given stakeholders a limited opportunity to understand the full impact of the legislation.⁷⁷ The mining industry lobby, the Tanzanian Chamber of Minerals and Energy, for example, opposed the new laws citing that consultations and debates had not been adequately run to deal with the vast effects the laws would have. While the promulgation of the 2018 Regulations provided an opportunity for the Tanzanian government to clarify some of the uncertainty created by the new acts, they may have had the opposite effect, further increasing uncertainty about the stability of the legal framework in Tanzania, and imposing significant

⁷⁰ [Acacia Receipt of Tax Assessments](#), Acacia, 24 July 2017.

⁷¹ [‘Tanzanian president Maqfuli’s record mining fine is a warning to the global extractive industry’](#), QuartzAfrica, 28 July, 2017.

⁷² [‘Tanzania tax row knocks Acacia Mining shares’](#), CNBC Africa, 26 July, 2017.

⁷³ Ibid.

⁷⁴ Woodroffe, Genasci and Scurfield (2017), [‘Tanzania’s New Natural Resources Legislation: What Will Change?’](#) provide a discussion of what changes the legislation will bring.

⁷⁵ [Amendments to the Mining Act in Tanzania](#), Dentons, 14 February 2018.

⁷⁶ Legal Update – 19 January 2018. Available at: <https://fbattorneys.co.tz/legal-update-19-january-2018/>.

⁷⁷ Woodroffe, Genasci and Scurfield (2017).

additional compliance obligations on mineral right holders.⁷⁸ Since the introduction of these laws, many businesses have experienced a downturn and complications to their operations, with ensuing loss of jobs and skills transfer.

Nevertheless, on this issue, President John Magufuli has gained favour with most of his constituents, especially for his perceived zeal in emphasising economic nationalism and reasserting national sovereignty from foreign intervention. Further, he has been dealing with internal corruption cases and accusations of tax evasion. He has called for the renegotiation of mining contracts, limited the use of offshore bank accounts to try and curb money laundering and introduced the use of stabilisation clauses in mining contracts. This naming and shaming of mining companies that were seen as not contributing enough to the economy in proportion to the resource benefits they receive has only been the tip of the underlying reforms in Tanzania.

On the other hand, Acacia, which suffered a massive drop in its share price at the London Stock Exchange following the accusations, rejected each set of findings and reiterated that it had always fully paid taxes due. The company also questioned the legitimacy of the report findings, saying that the figures were grossly overestimated.⁷⁹ They sought international arbitration for two of their mines, after the government tore up mineral rights agreements, forcing a renegotiation of those contracts. As the government was not willing to negotiate, the company said it would use the investor-state dispute settlement provision from an existing bilateral investment treaty between Tanzania and the UK to oblige the government to negotiate. An initial deal was reached in 2017 allowing for the creation of a locally operating company to manage Acacia's operations in Tanzania; a 50–50 split of economic benefits from Acacia's operations, with the government's share being in the form of royalties, taxes and a 16% free-carry interest in the Tanzanian operations; and a payment of US\$ 300 million to the government of Tanzania to resolve outstanding tax claims, to be paid overtime on terms to be settled by the parties.⁸⁰

Over the past months, parent company and major shareholder, Barrick Gold Corporation has been negotiating with the Tanzanian government. In February 2019, Barrick Gold Corporation announced that it had arrived at a proposal that sets forth the commercial terms to resolve outstanding disputes concerning Acacia Mining's operations in Tanzania. The proposed framework is similar to the October 2017 deal.⁸¹ If this is to be successful, Acacia and the government of Tanzania need to approve the terms. However, there are serious questions as to whether President John Magufuli will agree to this. To date, the deal is yet to be accepted, and Acacia has cut output by a third since the government banned the export of mineral concentrates in 2017.⁸²

This ongoing row between the government and the mining companies and its impact on Acacia's financial activities and Barrick Gold's investments, topped with uncertainty about the implications of the new laws, has created a sense of unease among investors. The new legislation also prevents any recourse to international courts in case of disagreement with the government over mining contracts.⁸³ Many have indicated that they are now cautious about Tanzania's current and future market, which had previously been the most successful in attracting inward foreign direct investment (FDI) and doing business compared to its East African counterparts since privatisation and economic liberalisation that started in the mid-1990s. The United Kingdom is the largest foreign investor in the mining sector in Tanzania followed by India, China, Kenya,

⁷⁸ Herbert Smith Freehills LLP mining and natural resources e-bulletin, '[Tanzania's New Mining Regulations: More Uncertainty For The Mining Sector?](#)'

⁷⁹ Hodgson (2017), '[Shares in Acacia Mining plummeted 14% after being hit with a huge US\\$190 billion fine](#)'.

⁸⁰ '[Barrick and Tanzanian Government Progress Discussions in Settlement of Acacia Disputes](#)', Barrick, 20 February 2019.

⁸¹ Ibid.

⁸² '[Acacia Mining core profit slumps as Tanzania woes continue](#)', Reuters, 25 April 2019.

⁸³ Section 6(2)(i) of the Contract Review Act.

USA, the Netherlands, South Africa, Canada, Germany and Oman. Additionally, the 2018 United Nations Conference on Trade and Development (UNCTAD) World Investment Report (WIR), indicated that there had been a decline in levels of FDI in the United Republic of Tanzania, as foreign investors held back their investments because of policy changes in tax administration and mining royalty.⁸⁴ Nonetheless, it is hard to believe that many of the mining companies will completely leave Tanzania, given the long-term investments that they have in the country, or will reconsider their plans to invest in the country, given its mineral wealth. In fact, the government claims that there are more than 20 offers from different mining firms to construct gold and copper smelters in the country. This is not unusual, as natural-resource-rich countries find it easy to attract FDI.

The core of this long-running tax dispute touches on accusations of illicit financial flows via trade mis-invoicing, where previous reports have indicated high figures of potential average annual tax losses in Tanzania (see section 3.5). The HLP report categorised trade mis-invoicing under the commercial category of IFFs, together with abusive transfer pricing and base erosion and profit shifting (BEPS) (see section 2). Nonetheless, illicit financial flows via trade mis-invoicing are not always easy to prove, and this has been an issue that many expert organisations have highlighted, including the World Customs Organisation (WCO) and in the recommendations of the HLP report. See Box 2, capturing the main issues when looking at IFFs/TM and some of the recommendations that have been made therein.

Box 2: Illicit financial flows via trade mis-invoicing (IFFs/TM)

Notwithstanding whether the Acacia tax bill was warranted or not, IFFs via trade mis-invoicing (IFFs/TM) have been debated at length in literature and research publications.⁸⁵ Although the existence of IFFs/TM is indisputable, proving this and calculating exact revenue lost as a result can be hard. To prove estimates of trade mis-invoicing, two macro approaches can be used. One is the Partner Country Method (known as mirror data analysis), which measures discrepancies in bilateral trade records between trade partners; and the second is the Price Filter Method (known as unit price analysis), which measures the mis-invoiced value of trade transactions for which the unit price is considered abnormal.⁸⁶ Both options are an extremely time-consuming and costly affair for the customs and revenue authorities. They would involve investigating patterns of TM risk across countries, commodities and over long periods of time. Further, the World Customs Organisation (WCO) notes that even estimates garnered from the same method with the same trade data ranged widely according to different assumptions. Added to that, the high estimates of IFFs/TM that feature prominently in current literature, research, and even media outlets, should not be understood as a reliable quantitative measurement of the scale of IFFs/TM, but rather as a risk indicator, which can be useful in comparing the risk of IFFs/TM across commodities and countries and over a longer time period.⁸⁷ Thus, IFFs/TM often continue, with companies exploiting the lack of awareness among stakeholders, the lack of enough information on the activities and reporting books of companies, and the capacity limitations of government agencies.

The HLP report and the WCO have given some recommendations on how to deal with IFFs/TM, including having clear and concise laws and regulations that make trade mispricing illegal, customs authorities to use available databases of information about comparable pricing of world trade in goods to analyse imports and exports and identify transactions that require additional scrutiny, and for countries to develop a more robust dataset of local and regional comparables of trade transaction data.⁸⁸ Enhancing partnerships among national customs administrations, establishing Financial Intelligence Units (FIUs), tax and police authorities, are essential so that information and data can be obtained and

⁸⁴ UNCTAD (2018), '[World Investment Report 2018: Investment and New Industrial Policies](#)'.

⁸⁵ For example, see analysis by Forstater (2018), '[Illicit Financial Flows, Trade Misinvoicing, and Multinational Tax Avoidance: The Same or Different?](#)' CGD Policy Paper.

⁸⁶ The World Customs Organisation Study Report on [Illicit Financial Flows via Trade Mis-invoicing](#) (IFFs) (2018).

⁸⁷ Ibid.

⁸⁸ 'Illicit Financial Flows from Africa'. Report Commissioned by the AU/ECA Conference of Ministers of Finance, Planning and Economic Development. p. 80.

shared promptly to better detect IFFs concealed in trade transactions.⁸⁹ To this end, Tanzania is among the five East African Community (EAC) partner states that have been coordinating their customs and revenue authorities to improve the efficiency of border procedures and enhance border control. Specifically, they have improved their capacities in customs and audits of cross-border businesses. The revenue authority has set up a transfer pricing unit to specifically deal with transfer pricing matters.

Key points:

- President John Magufuli has introduced major reforms in the mining sector. These include a series of three new laws in 2017. Though some have welcomed these laws, to others, they have hurt the investment and employment climate in the country.
- The ongoing row between Acacia (the biggest and oldest mining presence in Tanzania) and the government has taken many twists and turns. The company continues to deny claims of any forms of IFFs and the government remains adamant that it has to pay more taxes in proportion to the minerals it extracts.
- This has resulted to some extent in a reduction of inward foreign direct investment (FDI) and 'doing business' ranking.
- Although the existence of IFFs/TM is indisputable, proving this and calculating exact revenue loss can be hard. This has been the focus of a lot of literature and research.
- The HLP report and the World Customs Organisation (WCO) have given some recommendations on how to deal with IFFs/TM. Both emphasise partnerships between revenue and customs authorities working cross country, and capacity building to identify occurrences of IFFs/TM.
- Still, investors in the mineral sector in Tanzania seem to be staying put, given their years of investments and benefits they receive from the minerals, despite the current president's commitment to clamping down on activities within the sector.

5. Illicit financial flows within the mining process

So far, the paper has looked at the concept of IFFs at the continental level, then narrowed the focus to Tanzania's mining sector, providing the background and history of resource control and ownership. It then looked at trends in IFFs and the difficulties presented in trying to deal with perceived instances of IFFs while still maintaining FDI. This serves to give a clear understanding of Tanzania's struggles with IFFs, and especially of why the government has been keen on increasing control of the sector and challenging mining companies that have operated in the country since the pre-independence period. Proving the occurrence of IFFs might be challenging, as it is a complex phenomenon. In this section, we will discuss the stages in the mining process in Tanzania that are most susceptible to the occurrence of IFFs.⁹⁰ It will specifically focus on the opportunities and risks of IFFs. This evaluation is important, especially when it comes to fiscal regimes designed to combat IFFs arising from exploration, the allocation of licenses, production, processing, assaying, selling, customs and export, to the end phase/closure of mines. The main conclusion is that some policies if aptly targeted at specific stages, might be more effective and better meet revenue collection objectives to ensure that some IFFs loopholes are closed.

⁸⁹ The World Customs Organisation Study Report on Illicit Financial Flows via Trade Mis-invoicing (IFFs) (2018).

⁹⁰ The below process has used elements developed from the IFF risks in Ghana's gold value chain – [DRAFT infographic from Value Chain Risk Maps](#), February, 2019, by Fritz Brugger & Rebecca Engebretsen.

Illicit financial flows in the Tanzanian mining sector

While many state and non-state actors have a general awareness of illicit financial flows in the Tanzanian mining sector, a closer look at the stages of the mining process reveals that the risks and opportunities to overcome these are unequally distributed.

ecdpm

Exploration

In this first step of the mining process where mineral ore is analysed and categorised, there are risks of inflating expenditure, bribery and illicit transfers of trade samples collected.

Awarding of contracts/licences

Possible risks include corruption and bribery as well as under-invoicing and under-declaration of the value of the actual gold.

Production

During the production stage, the tax deductibility of internal loans that surpasses a permissible threshold as a result of reinvestment or expansion poses a particular risk.

Processing

Besides smuggling and illegal exports of minerals, vandalism occurs regularly at the processing stage.

Assaying

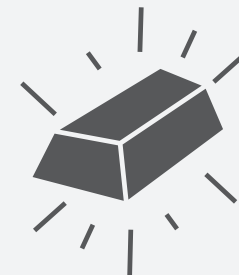
Misreporting may lead to illicit financial flows.

Selling, customs and export

Possible risks at this stage include the under-invoicing of sales contracts, misreporting quantity and misclassification.

End phase/closure

Abusive transfer and mispricing play a particular role at this stage.



ILLICIT FINANCIAL FLOWS



5.1. Exploration

Exploration is the first step of the mining process, where mineral ore is analysed and categorised. It is at this stage where mining companies can inflate expenditure. Bribery is also possible during this phase. Mining companies also have the opportunity to illicitly transfer of trade samples collected, especially in cases where the government has no information or data on the quantity or quality of the minerals being explored. As a result of the new laws in 2017, many plans for the exploration and development of gold in Tanzania were cancelled. Some companies have threatened to shut down operations in Tanzania as they believe the implementation of these new laws will make it illegal to recoup the cost of unsuccessful exploration projects against the few successful ones and require them to share valuable geological data with the government for free.⁹¹ Tanzania's Mineral Act imposes a commercial cap of fifty thousand shillings (US\$ 22) above which export samples are subject to royalty payments.⁹² There is, however, no clear framework for implementing this, giving mining companies leeway to export samples. As noted, there is a high risk of tax evasion at this stage, due to weak oversight and accountability mechanisms but also especially due to the lack of administrative capacity in the country. See Figure 1 for a list of the leading mining companies with operations or exploration ventures in Tanzania.

5.2. Awarding of contracts and licenses

Under the current Tanzanian mining regime, contracts and licenses to explore and operate are negotiated on an individual company basis. Applications are made through the Tanzanian Ministry of Energy and Minerals. The minister is responsible for granting retention and mining licenses. The Mining Commission has a wide-ranging responsibility, including the review of special mining license applications before submission to cabinet; the granting of prospecting and primary mining licenses; the suspension and revocation of licenses; and the monitoring of mining operations (including the assessment of the quantity and quality of minerals produced; the audit of expenditures for tax purposes; the assessment of local content performance and investment in the local economy; and the monitoring of environmental management).⁹³ Formerly, the Mining Advisory Board (MAB), an appointed commissioner for minerals, an appointed chief inspector of mines and the TMAA performed the responsibilities now under the Mining Commission. Under the old Mining Act of 2010, the minister was responsible for the approval of special mining licenses; however, under the 2017 changes to the Mining Act, cabinet approval is required. Further, the minister is no longer allowed to enter into mining development agreements.

The awarding of contracts and licenses are core issues to consider when trying to combat IFFs, as contracts and licenses also stipulate the tax rates, incentives, and exemptions awarded to a particular mining company. For instance, an independent government audit in 2003 reviewing the mining contracts, alleged that four gold mining companies, including Barrick and AGA, overstated their losses by US\$ 502 million between 1999 and 2003, indicating that the government lost revenues of US\$ 132.5 million.⁹⁴ The audit also noted that thousands of documents were missing that would have shown whether royalties valued at US\$ 25 million were, in fact, paid for 939 past shipments.⁹⁵ As a result of this, contracts were renegotiated, eventually leading to companies making 'voluntary payments' of US\$ 200,000 annually to local governments, in addition to a 3% royalty to the national government on the net value of exports. Companies also started paying corporate income taxes.⁹⁶

⁹¹ ['Investors wary as Tanzania moves to assert more control over mines'](#), Reuters, 24 September 2017.

⁹² Akong et al. (2017), 'The Impact of Illicit Financial Outflows from the Mineral Sector in Africa', p.48.

⁹³ Woodroffe, Genasci and Scurfield (2017).

⁹⁴ Curtis and Lissu (2008), p. 9.

⁹⁵ Curtis and Lissu (2008), p. 24.

⁹⁶ Sauvart (2013), 'Yearbook on International Investment Law & Policy 2011–2012', pp. 358–359.

Another important point to consider is the existence of double taxation agreements (DTAs). DTAs are important as they deal with the allocation of taxing rights between states and in some instances, can also encourage foreign direct investment. This can be through the provision of certain benefits to foreign companies through tax reliefs. In many instances, sub-Saharan African countries have become increasingly concerned about the negative impacts of certain tax treaties.⁹⁷ These DTAs have been criticised for having no or very low withholding tax levied on interests, dividends and royalties. Currently, Tanzania has nine existing DTAs. Nonetheless, the only known DTA to have been terminated was with Switzerland, and the reason was that the treaty applied to Tanzania as an extension of a tax treaty signed between Switzerland, the United Kingdom and Ireland in 1954.⁹⁸ Additionally, the stabilisation clauses included in these treaties is also important. Stability clauses in mining contracts are sometimes seen as mostly benefiting the investor by assuring, at least on paper, a stable and predictable investment climate,⁹⁹ while constraining the fiscal policy options available to the host country, as they freeze fiscal laws in time.¹⁰⁰ However, Tanzania has changed this so that stabilisation clauses in investor-state agreements now will only be permitted if they are confined to specified periods (as opposed to the lifetime of a mine), can be fully renegotiable from time to time, and are based on the 'economic equilibrium' principle.¹⁰¹

Ultimately, a number of mining contracts often lack transparency, as they are shrouded in secrecy and collusion¹⁰², which allows them to circumvent existing legal provisions for the payment of royalties and taxes. This opens them up to instances of corruption and bribery to ensure a contract is awarded to a specific company. In 2017, the then mining minister and the chief of the state-run Mineral Audit Agency were fired as a result of being linked to an investigation of under-invoicing and under-declaration of the value of the actual gold, copper and silver contained in shipping containers for exports. Additionally, the Minister for Energy and Minerals of Tanzania published the Mining Regulations 2017, which stated that all mining companies with special mining licenses (SML) must go public at the Dar Es Salaam Stock Exchange (DSE). This is with the aim of creating transparency and also monitoring the tax activities of the multinational enterprise.

There are also other aspects in the licensing law (not directly related to IFFs) requiring the increase of local content and environmental standards by mining companies. Mining license-holders are required to ensure that local providers of goods and services notify the Commission about health, safety and environmental standards, upcoming contracts, and compliance with local content plans.¹⁰³

5.3. Production

At this stage, the risk of IFFs includes tax deductibility of internal loans that surpasses a permissible threshold as a result of reinvestment/expansion. During the production stage, minerals are recovered and extracted from the surface and underground using a variety of tools and machinery.

⁹⁷ For a critical analysis of the impact of tax treaties in sub-Saharan Africa see Hearson (2015), 'Tax Treaties in Sub-Saharan Africa: A Critical Review'.

⁹⁸ Kulaba (2016), '[A study by Tanzania Tax Justice Coalition. Gain or Loss to Tanzania?](#)'

⁹⁹ Oshionebo (2010), 'Stabilization Clauses in Natural Resource Extraction Contracts: Legal, Economic and Social Implications for Developing Countries'. 10 *Asper Review of International Business and Trade Law* 1-33.

¹⁰⁰ Baker (2014), 'An analysis of double taxation treaties and their effect on foreign direct investment', *International Journal of the Economics of Business* 21(3).

¹⁰¹ Significant recent changes to Tanzania's mineral law regime. 27 July, 2017, the Africa Group, Legal Briefings. 'Economic equilibrium' clauses require the state to compensate investors for the cost of complying with new laws (for example, through adjusted tariffs, extension or renewal of rights, tax reductions, etcetera.).

¹⁰² African Development Bank Group (2017), '[Bank Group's Policy On The Prevention Of Illicit Financial Flows](#)'

¹⁰³ Briefing '[Tanzania's New Natural Resources Legislation: What Will Change?](#)'.

5.4. Processing

The risk of smuggling and illegal exports of minerals (generally gold in Tanzania) is high during the processing stage, especially among small-scale artisanal miners. Mining companies are also vulnerable, as they are particularly affected by the threat to the safety of their workers and vandalism, which disrupts activity and affects the overall perception of the business environment and thus of investment in the sector. Tanzania has launched an international gold trading centre in the gold-rich region of Geita to curb mineral smuggling and ease mineral trading and ensure that businesses pay the required levies to the government. Further, in February 2019, the parliament approved a bill removing the 5% withholding tax and 8% VAT rates for small-scale miners. This was to encourage more legal mining within the sector.

5.5. Assaying

Misreporting by companies can also happen during the assaying stage where the weight and purity of quantities of the marketable gold are determined. In Ghana, for example, mining companies and refineries provide assay results as the basis for the calculation of royalties, as the government lacks the facilities to independently evaluate gold fineness, exposing it to the risk of under-invoicing.¹⁰⁴ In Tanzania, for every gold bar produced, the samples are taken between two parties: the TMAA auditor and mine staff.¹⁰⁵

5.6. Selling, customs and export

Under-invoicing sales contracts, misreporting quantity and misclassification are some of the risks of IFFs at these stages. The TMAA monitors the quantity and quality of all mineral exports of large- and medium-sized mining companies.¹⁰⁶ However, it faces many challenges, including inadequate financial and human resources to audit several mining operations, and delays in taking action by various government agencies.¹⁰⁷ The 2017 ban on the export of unrefined gold and copper ore produced by Acacia Mining was said to be due to under-invoicing of sales contracts, misreporting quantity and misclassification, from the 2017 Osoro committee audit findings. The report estimated about US\$ 84 billion in unpaid mining taxes as a result of trade mis-invoicing between 1998 and 2016. Mispricing in international trade results in either trade mis-invoicing inflows, when exports are over-invoiced and imports are under-invoiced, or trade mis-invoicing outflows, when exports are under-invoiced, and imports are over-invoiced.¹⁰⁸ Under-invoicing of exports allows firms to acquire foreign exchange that is not disclosed to national authorities; exporters can freely use the foreign currency without complying with controls and regulations (for example, a potential option may be the sale of foreign currency in the parallel exchange rate market).¹⁰⁹

5.7. End phase/closure

The end phase/closure of mines is an important stage as it has environmental, social, and human rights impacts that can last well beyond the mining operation itself. The UN Economic Commission for Africa (ECA), for example, notes that the criminal component of IFF practices may result in widespread, systematic degradation of the environment.¹¹⁰ Specifically, abusive transfer mispricing of minerals may under-price the environmental cost of mine closures, leaving the state to assume the liability, with a lasting impact on the

¹⁰⁴ Readhead (2016a), 'Case Study March 2016 Transfer Pricing in the Extractive Sector in Ghana'.

¹⁰⁵ Shamika (2010), '[Frequently Asked Questions About Gold Mining Operations in Tanzania](#)'.

¹⁰⁶ Redhead (2016b), 'Resource Charter Case Study. Improving Mining Revenue'. Tanzania's Mineral Audit Agency.

¹⁰⁷ Akong et al. (2017).

¹⁰⁸ Fotoyi (2016), '[Illicit Financial Flows in the Mining Sector in South Africa: Implications for Industrialisation](#)'.

¹⁰⁹ Ibid.

¹¹⁰ Akong et al. (2017), 'The Impact of Illicit Financial Outflows from the Mineral Sector in Africa', p. 42.

population's health and safety.¹¹¹ In Tanzania, after mining closure, the Tanzania Minerals Audit Agency assesses whether mining companies have given the government adequate financial assurance to guarantee the costs of reclamation (including shut-down, closure and post-closure). This will ensure the costs of reclamation are covered by the mine operator and not the government.¹¹² In January 2019, Acacia was fined 300 million Tanzanian shillings (US\$ 130,000), two days after the government appointed a new mining minister, over allegations of breaching environmental regulations at its North Mara mine.¹¹³

6. Policy takeaways

Whereas several aspects of IFFs in Tanzania have been highlighted in various government reports and literature, a national assessment to understand the scale and impact of IFFs is yet to be conducted by the government. Such a study would be useful for stakeholders to understand the implementation of the Mbeki report recommendations at a national level and help in the development of a national action plan. The study would provide the evidence base for further analysis and for the national identification of knowledge, data gaps, and contextual factors that allow IFFs to thrive in Tanzania.

The complexities of trying to tackle IFFs in Tanzania show that there is a need to understand and consider local dynamics and interests. It is not possible to come up with a one-size-fits-all approach. For example, in Tanzania, the historical context of ownership and governance of natural resources has played a big role in how the government is currently trying to shape the allocation of rights and foreign investment in the sector.

While recent evolutions in Tanzania's actions towards curbing IFFs in the gold mining sector have moved from mere political and policy statements towards legal, enforceable mechanisms, there is an underlying risk that these new legislative and regulatory frameworks are being introduced too rapidly and vigorously without clear clarifications on how they will transform the gold mining sector and create more tax revenue. This has created uncertainty over business conditions and investment and, more importantly, the compliance requirements, lack of recourse to international arbitration and administrative implementation and governance of the sector under the new regulations.

A further step for the country would be for the government to clarify how these new legislative and regulatory frameworks will work. This can be done through a commitment to working with a wide range of stakeholders, including businesses, to analyse the effects of the laws. This would provide an opportunity to restore and retain investor confidence that, now that the laws have been passed, they will be consistent, stable and allow for an appropriate degree of regulatory flexibility.

The issue of illicit financial flows via trade mis-invoicing (IFFs/TM) and the vulnerabilities exposed in the exploration of minerals stage of mining operations highlight the importance of transparency and the power of data in the mining sector. It is crucial for countries to have updated data on production, revenue payments, applicable tax rates and the taxable income of mining companies and trading information.

There is a need to develop the technical-administrative capacities of government agencies in order for them to be effective in detecting IFFs and also in implementing the provisions of law. Thus, it is important for the government to commit more resources towards capacity building for officials in the gold mining sector, particularly in preventive measures, risk mitigation and compliance with the new mining laws.

¹¹¹ Ibid.

¹¹² Shamika (2010).

¹¹³ [‘Tanzania fines Acacia Mining for breaching environmental regulations’](#), Reuters, 10 January, 2019.

Different stages within the mining process are vulnerable to the occurrence of IFFs. However, most of the flows seem to be taking place where there is a risk of trade mis-invoicing, including during the exploration, awarding of contracts and licenses, assaying and the selling, customs and exportation stages. More strategic cross-cutting policy reform targeting of these stages might lead to better results in combating broader IFFs through tax evasion, corruption and money laundering, whilst further limiting tax avoidance through mis-invoicing.

7. Conclusion

The need for a holistic approach towards curbing illicit financial flows in the mineral sector of vulnerable resource-rich African countries is of paramount importance. Specific African countries now need to take on the mantle of implementing the HLP report recommendations on dealing with the criminal, corrupt and, more importantly, the commercial components of illicit financial flows at national levels (see section 2).

From the example of Tanzania, it is also clear that changing the legal and regulatory contexts of mining sector operations is necessary, but not sufficient, to reduce the creation of IFFs. There is a need to target evidence-driven policy reform on the key phases of mining most vulnerable to IFFs, as discussed in section 5. Ample recognition by the government of, and involvement and engagement with, different groups of stakeholders, including the mining companies, in the broader mining sector governance reform process is also necessary. This would help efforts towards curbing illicit financial flows.

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