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ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ADVOCAT LAW PRACTICE
CRA – COELHO RIBEIRO & ASSOCIADOS
FALCON & HUME INC
GENI & KEBE
HERBERT SMITH FREEHILLS
HOLLAND & HART LLP
HOLLAND & KNIGHT
JOSH AND MAK INTERNATIONAL
LEXIM ABOGADOS
LIEDEKERKE WOLTERS WAELBROECK KIRKPATRICK SCRL
MAYER BROWN
MINTER ELLISON
PINHEIRO NETO ABOGADOS
QUINZIO & CÍA ABOGADOS
RSM BOGARÍN Y CÍA SC
SQUIRE PATTON BOGGS
STIKEMAN ELLIOTT LLP
VHG SERVICIOS LEGALES SC
WILLIAM FREIRE ABOGADOS ASSOCIADOS
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I am pleased to have participated in the preparation of the sixth edition of The Mining Law Review. The Review is designed to be a practical, business-focused ‘year in review’ analysis of recent changes and developments, their effects and a look forward at expected trends.

This book gathers the views of leading mining practitioners from around the world and I warmly thank all the authors for their work and insights.

The first part of the book is divided into 18 country chapters, each dealing with mining in a particular jurisdiction. Countries were selected because of the importance of mining to their economies and to ensure broad geographical representation. Mining is global but the business of financing mining exploration, development and – to a lesser extent – production is concentrated in a few countries, Canada and the United Kingdom being dominant. As a result, the second part of this book includes four country chapters focused on financing.

The advantage of a comparative work is that knowledge of the law and developments and trends in one jurisdiction may assist those in other jurisdictions. Although the chapters are laid out uniformly for ease of comparison, each author had complete discretion as to content and emphasis.

Much of the mining sector is emerging from a lengthy down-cycle. The world economy is expanding, albeit at a deliberate pace. Demand for minerals is generally sustained and prices are climbing. Exploration in many parts of the world, and in Canada in particular, has rebounded.

The mining industry’s hard work over the past few years is finally paying off. Tight cost controls combined with economic growth have improved profitability and investors have noticed. Price earning ratios are favourable and suggest that investors anticipate increased profits in the future. This improved state of affairs encourages corporate growth, whether via new projects or acquisitions.

All of this portends to increased activity for mining lawyers, something that the mining bar has not seen in some time.

As you consult this book you will find more on topics apposite to jurisdictions of specific interest to you, and I hope that you will find this book useful and responsive.

Erik Richer La Flèche
Stikeman Elliott LLP
Montreal
October 2017
Part I

MINING LAW
Chapter 1

AUSTRALIA

Jay Leary and Geoff Kerrigan

I OVERVIEW

2017 has seen an economic upturn across the Australian mining sector through a combination of increased output, sustained increases in commodity prices (particularly for coking coal and thermal coal) and productivity improvements, the combination of which has allowed the Australian mining sector to realise economic gains, driven by structural change and improvements to industry-wide productivity during the difficult economic climate of previous years.

Increased economic returns have supported repayment of debt and returns to the shareholders (both through dividends and share buy-backs), as well as new capital investment in the sector: examples include the recent opening of Rio Tinto’s Silvergrass iron ore project (Western Australia), BHP’s approval of initial funding for its South Flank iron ore expansion project (Western Australia) and further investment by BHP in its Olympic Dam project (South Australia). Increased global demand for rare metals utilised in battery technologies (principally lithium) has also supported capital investment and mergers and acquisition activities in that sector.

Government policy in Australia is generally geared towards fostering a framework in which growth in the mining sector can be encouraged, recognising the critical role mining plays in Australia’s overall economic growth and the fact that Australia holds some of the world’s largest resources of gold, iron ore, lead, nickel, uranium and zinc.2

i Constitutional framework

Australia is a federal constitutional monarchy under a parliamentary democracy, formed in 1901 as a result of an agreement among six self-governing British colonies, which became the six states (and which also later included three self-governing territories). The head of state is Queen Elizabeth II, who is represented by the Governor-General. The Queen appoints the Governor-General on the advice of the Prime Minister of Australia, but the Queen has no active role in the day-to-day operations of government. Australia’s Constitution establishes a centralised federal government (known as the Commonwealth government), as well as various state and territory governments. The Constitution also reserves exclusive

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1 Jay Leary is a partner and Geoff Kerrigan is a senior associate at Herbert Smith Freehills. The authors also gratefully acknowledge the assistance of Tayler Wright, graduate at Herbert Smith Freehills in the preparation of this article.

responsibility for certain matters (i.e., trade, commerce and defence) to the Commonwealth government, and allocates law-making responsibilities among the Commonwealth and the states and territories.

In relation to minerals ownership, the default legal position is that all title to minerals is vested in the state or territory in which they are located. The legal framework around the development of mining projects is, therefore, generally governed by the mining laws of the various states and territories – however, the commissioning of a mining project will require compliance with a range of Commonwealth laws (i.e., environmental, employment, foreign ownership and native title), as well as certain state and territory laws (i.e., resource royalty obligations and stamp duty).

ii  Government policy
The current Australian federal government, led by a Liberal-National party coalition, was elected in July 2016. Federal governments in Australia have three-year maximum terms before another election must occur. Government policy at all levels aims to provide a relatively well-defined system of laws and procedures governing the development of mining projects, as well as a proactive foreign investment regime. Regardless of political persuasion, all governments are aware of the importance that a favourable foreign investment culture provides the impetus for funding of large-scale mining projects. In this regard, Australia consistently ranks in the top echelon of leading ‘inward-investment’ destinations according to Behre-Dolbear, which ranked Australia second only to Canada.3

II  LEGAL FRAMEWORK
i  Legislative overview and jurisdictional separation
Each of the various states and territories has enacted its own laws relating to exploration and development of mining operations. While there has been little effort to standardise these laws, they have many common features, and generally Australia has a relatively uniform legal approach to mining. Each state and territory government is responsible for granting and administering all tenements to explore for and produce minerals within its borders. Depending on its nature, a tenement holder is entitled to an exclusive right to explore, maintain or extract minerals within the tenement boundaries.

All of the various legislative regimes have at least two common stages – exploration and mining – with some also including a third retention stage, which allows a tenement holder to retain rights over a prospective area after a discovery until commercial production is feasible. The common types of tenements are summarised below:

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<table>
<thead>
<tr>
<th>Purpose</th>
<th>Exploration licence</th>
<th>Retention licence</th>
<th>Mining lease</th>
</tr>
</thead>
<tbody>
<tr>
<td>Allows the holder to carry out exploration and assessment activities to determine potential prospectivity.</td>
<td>Retains and protects title over a mineral discovery where mining is currently impracticable until commercial production becomes feasible.</td>
<td>Allows for development and commercial extraction and disposal of minerals from the tenement area.</td>
<td></td>
</tr>
<tr>
<td>Typical term</td>
<td>Usually granted for an initial term of five years (with the right to renew). Often subject to compulsory surrender/relinquishment requirements each year during the term.</td>
<td>Usually granted for an initial term of five years (with the right to renew).</td>
<td>Varies depending on jurisdiction (e.g., a 21-year initial term in Western Australia and for a variable period (usually determined by the mine life) in Queensland).</td>
</tr>
<tr>
<td>Rights</td>
<td>Entry to land to carry out exploration operations. Extract certain quantities of minerals for assessment. Right to apply to convert into a retention licence or mining lease.</td>
<td>Entry to land to carry out appraisal (and resource maintenance) activities. Right to apply for conversion into mining lease when production becomes commercially viable.</td>
<td>Exclusive possession of tenement area for mining operations. Right to construct and operate production facilities (subject to additional approvals). Extract commercial quantities for sale/export.</td>
</tr>
<tr>
<td>Features</td>
<td>Minimum annual exploration expenditure commitments apply to ensure proper appraisal/analysis occurs. Yearly rental payments are required to keep the tenement in good standing.</td>
<td>Holder is required to establish nature of resource and demonstrate why production is commercially unfeasible (but can subsequently become commercially feasible). Yearly rental payments are required.</td>
<td>Royalty obligations, payable to government based on extracted mineral. Yearly rental payments are required. Environmental rehabilitation bond payments.</td>
</tr>
</tbody>
</table>

**ii Mineral reporting requirements**

Generally, most tenements impose conditions requiring the holder to provide the government with annual resource delineation reports, as well as ongoing information on the operations carried out in respect of the tenements – primarily to ensure the government is kept appraised of the activities being undertaken on the tenement and their prospectivity.

**iii Recent changes to public reporting or disclosure requirements for mining companies**

Mining companies listed on the Australian Securities Exchange (ASX) are subject to continuous disclosure requirements (imposed by the ASX Listing Rules – which each listed entity must comply with, as well as the Corporations Act 2001 (Cth)) in relation to both their operations and mineral resource reporting, to ensure fair and informed market participation. There are a range of disclosure obligations imposed by the ASX Listing Rules, but the key principle is that any information that a reasonable person would expect to have a material effect on the price or value of the shares of the company must immediately be released to the market.

There are also disclosure requirements that are specific to mining companies – these require disclosure to be made in relation to all mining, exploration and tenement activities in accordance with the Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves (the JORC Code). Companies must promptly report on any material changes in its mineral resources or ore reserves (as defined in the JORC Code), and these reports must be prepared by a ‘competent person’ (who must be a member or fellow of the Australasian Institute of Mining and Metallurgy or the Australian Institute of Geoscientists, or both).

In November 2012, after detailed consultation, the ASX released new disclosure rules for mining companies (underpinned by significant changes to the ASX Listing Rules and the
updated 2012 version of the JORC Code) to ensure the disclosure requirements continue to represent international best reporting practice and facilitate listed mining companies’ access to capital.

The key changes, effective from 1 December 2013, require disclosure of additional information in relation to:

a. exploration results for material projects;

b. initial (or materially changed) estimates of ore reserves and mineral resources for material projects; and

c. historical or foreign estimates for material projects.

In addition, prior written consent from the ‘competent person’ for the disclosure of the estimates and the supporting information is required when estimates (or material changes to estimates) are reported to the market for the first time – however, the ASX has streamlined the consent requirement for subsequent disclosures of the same material. Listed mining companies must also include a mineral resources and reserves report in their annual financial reports in addition to the quarterly reporting regime. New, more onerous requirements also apply to public reporting on exploration and production targets and forward-looking financial information associated with production targets. Effective from 1 December 2014, there is also a further requirement for a feasibility or pre-feasibility study to be carried out prior to the declaration of an ore reserve.4 In April 2016 the corporate regulator, the Australian Securities and Investments Commission (ASIC), published guidance material for reporting production targets and financial forecasts in line with ASX’s requirements, in particular the requirement for proponents to have ‘reasonable grounds’ that funding for the project will be available when required, before a production target can be published. ASIC has authority to take regulatory action if reporting is incorrect or misleading.5 These requirements were re-issued in October 2016 following constructive feedback from the sector, in particular, due to the impact the more onerous disclosure requirements had on access to equity capital for listed companies, with the modified guidance broadening the circumstances in which disclosure will be permitted provided the relevant assumptions are also disclosed. ASX has also published interim guidance for the disclosure of scoping studies/preliminary economic assessments of projects, with the regulators expressing a concern that the published interim guidance is not being properly adhered to.

III  MINING RIGHTS AND REQUIRED LICENCES AND PERMITS

i. Title

In Australia, the default legal position is that all title to minerals is vested in the state or territory in which they are located. The overwhelming majority of land available (and prospective) for mining activity in Australia is Crown land or public reserves. Mining activities on Crown land or public reserves are regulated by the general mining legislation and controlled by the Department of Mines of each respective state or territory, who are responsible for

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administering and granting tenements to interested parties to carry out mining activities. The granting of a tenement provides the holder with authorisation from the relevant state or territory to carry out exploration or mining activities in that area. While the state or territory remains the legal owner of the minerals, a tenement holder is entitled to exclusive possession of a tenement area (for mining purposes) and the right to sell and realise value from minerals extracted from a tenement, subject to the payment of a royalty to the government.

ii Surface and mining rights

Tenement holders’ rights to carry out mining activities on the land surface usually depend upon the particular mining operations in question – but typically include rights to access water and public roads, to construct buildings, plants, roads and railways and to conduct primary treatment operations and other ancillary acts.

Where a tenement holder seeks to engage in these activities on private land, there is an obligation to consult with private landowners and agree access compensation. Consultation usually commences after wider exploration activities are completed (including detailed geological and geophysical surveys), leading to an access agreement or arrangement being entered into to enable the pursuit of an application and grant of a mining tenement. Generally, mining tenements will not be granted over privately held land unless some form of access or compensation arrangement has been agreed (and if there is a failure to agree such, there is provision for arrangements to be determined by court process).

iii Additional permits and licences

There are numerous other permits and licences required at each stage of the mining cycle in Australia. The major permits and licences applicable for most mining developments include environmental permits, planning and development approvals, health and safety permits and rights to use water, electricity and other utilities.

A key issue for many miners currently in Australia is the volume of governmental approvals required to commission mining projects and the duplication of these approvals sometimes required by state and Commonwealth regulators. The federal coalition government plans to address this issue by seeking to eliminate duplication and streamline approvals as much as possible to attempt to assist the mining industry develop new projects. Definitive plans and policies have not yet been finalised, but Australia has many times in the past contemplated moving to a centralised approvals system and abolishing the multiple state-based regimes, which cause delay and duplication. However – progress to date on this goal has been limited.

As an illustration of the regulatory issues facing miners – in 2014 the Gina Rinehart-led Hancock Prospecting commissioned the Roy Hill iron ore project, located in the Pilbara region of Western Australia. The project (which is a 55 million tonnes per annum greenfields iron ore project) required an estimated 4,000 separate governmental approvals to reach the final commissioning and construction phase.

Closure and remediation of mining projects

The mining laws in most states and territories require mining lease holders to provide a rehabilitation bond to the Department of Mines, which is returned to the holder once the mined land is fully rehabilitated (although Western Australia dispensed with this requirement in July 2013, moving completely to a mine rehabilitation fund model and Queensland is currently considering incorporating such a model into its financial assurance framework). Additionally, most regimes require a mining lease holder to put in place a detailed rehabilitation plan, which generally requires complete costings of full rehabilitation activities to be submitted to the Department of Mines and ongoing updates if the scope of operations changes. Mining regulators in Australia are vigilant in their ongoing assessment and clarification of rehabilitation plans, and have the power to require changes or adjustments, as well as call for additional funds to be added to the rehabilitation bond if they deem it insufficient to repair the land in question after mining ceases. Mine rehabilitation has also become an increasing focus as a number of projects reach the end of their intended mining life and have been sold to smaller companies for nominal consideration and assumption of rehabilitation obligations.

ENVIRONMENTAL AND SOCIAL CONSIDERATIONS

Environmental, health and safety obligations

Environmental assessment, approvals and compliance with legislative requirements are mandatory for the commissioning and operation of all mining projects in Australia. Environmental assessments and approvals are governed by both Commonwealth and state and territory legislation. Depending on the size, significance and impact of the mining project in question, the regulator may require environmental assessment to be undertaken in respect of:

- minimisation of impact on flora, fauna and land or habitats;
- environmental pollution and contamination of land; and
- management and use of water resources, including protections against groundwater contamination.

Health and safety issues are governed by occupational health and safety legislation administered by each respective state and territory in Australia through statutory bodies with wide-ranging powers. The structure of the legislative framework for health and safety differs across Australia. Many states regulate health and safety at mine sites through a specific piece of legislation that differs to the legislation applicable to industry more broadly. Mine operators should also be aware of the myriad other pieces of health and safety legislation that may regulate certain parts of their operations. Separate statutory regimes exist to govern (among other things) the safe operation of rail infrastructure, aerodromes, the transport of goods by road, electricity, dangerous goods and explosives. Notwithstanding this, the fundamental principles of each piece of health and safety legislation are broadly similar. Each piece of legislation requires the duty holder to take a risk-based approach to safety by identifying hazards, assessing the risks

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8 For further details see: http://hsfnotes.com/mining/2017/08/22/queenslands-mining-sector-should-experience-significant-changes-to-financial-assurance-and-rehabilitation-requirements-with-proposed-reforms/.
that arise from those hazards and taking reasonably practicable steps to control those risks. A primary duty of care is imposed on the mine operator to manage and control work sites, and to ensure the ongoing health and safety of its workers (which includes contractors and other indirect employees). Directors and officers of mining companies also have a personal duty to exercise due diligence to ensure their company is compliant with all applicable workplace health and safety laws. In addition, often quite onerous duties are imposed on the most senior person at a mine to take responsibility for the implementation of the mine’s safety management system.

Legislative reform in this area is frequent. In 2015/2016, there was new mine safety legislation introduced in New South Wales, an ongoing process assessing options to modernise the mine safety legislation in Western Australia, and reforms were made to rail safety and legislation governing the transport of goods by road in several states. In May 2017, a Queensland parliamentary select committee reported on the re-identification of coal miner’s pneumoconiosis in Queensland (both in relation to open-cut and underground operations). The report made a number of recommendations, including establishing a Mines Safety and Health Authority responsible for ensuring the safety and health of mining and resource industry workers in Queensland, to be overseen by a parliamentary committee and an immediate reduction in the occupational exposure limit for respirable coal mine dust. The Queensland government has committed to implementing all of the select committee’s recommendations.

ii Environmental compliance
Companies wishing to commission mining projects must prepare (sometimes in conjunction with the relevant environmental regulatory body) an assessment of the anticipated environmental impact of their project. That assessment is then generally opened for public consultation or comment. A determination is then made by the relevant environment minister and the grant of environmental approval is generally subject to conditions that aim to minimise the overall environmental impact of the mining project.

In addition to obtaining state or territory governmental approval for a project, assessment and approval under the Commonwealth Environmental Protection and Biodiversity Conservation Act 1999 (Cth) is required to take an action that will have an impact on ‘a matter of national environmental significance’. Generally speaking, ‘matters of national environmental significance’ involve sensitive areas or species (e.g., the Great Barrier Reef) but impacts on Commonwealth lands, waters and politically sensitive actions, such as large-scale mining projects (particularly uranium projects), are also caught.

While there is provision for the Commonwealth to delegate authority to the states or territories in certain circumstances, in practice this rarely occurs – especially in relation to large-scale or high-value projects. This potential duplication of environmental approvals between state and Commonwealth regulators is another key issue for mining companies to navigate in Australia and one that causes significant delays in some projects.

iii Third-party rights
Until 1992, the Australian legal system did not recognise that Australia’s indigenous inhabitants had any rights or interests in relation to land or waters. The Mabo decision in the
High Court of Australia9 recognised the ‘native title’ rights of Aboriginal people in relation to land in which those rights survived the acquisition of sovereignty by non-indigenous people. Native title law in Australia is complex and cannot be covered extensively here, but generally speaking, the key provisions in respect of native title rights are set out in the Native Title Act 1993 (Cth) (NTA). The NTA aims to:

a protect and recognise native title rights;
b provide for the validation of past acts and intermediate past acts;
c establish ways in which future acts affecting native title may proceed; and
d establish a mechanism for determining competing interests.

The NTA also confirms that certain grants, mainly freehold grants and leases conferring rights of exclusive possession, have extinguished native title rights. Where native title is not extinguished, the NTA protects those rights by imposing a firm regime, which governs any ‘act’ (i.e., the grant of a mining tenement) occurring after 1 January 1994.

Generally speaking, any grant of a mining tenement after 1 January 1994 will be valid provided that it complies with the NTA regime. In most cases, the proposed grant triggers a ‘right-to-negotiate’ process, whereby the Department of Mines, the proposed tenure holder and the native title-holder are required to negotiate in good faith the process by which a mining tenement can be granted. Such agreements commonly include compensation to the indigenous community, provision of employment or community benefits and protection for areas of cultural heritage significance. If the parties cannot reach agreement, there is an adjudicated process that can be accessed under the NTA. A full Federal Court decision in 2017 raised concerns regarding the valid of execution of such agreements where not all members of the claimant group had signed the agreement.10 However, the federal government promptly amended the legislation to rectify the issue.11

Crucially, in most cases a right of veto does not arise – however, the process can be time-consuming and costly, and depending on the proposed area, certain projects cannot proceed without an agreement with the indigenous native title-holder (this is usually dictated by state and territory legislation rather than the NTA).

There are also Aboriginal cultural heritage rights that may exist on certain land independent of any native title rights that may arise, and there are defined mechanisms (usually enshrined in state and territory legislation) which govern this.

V OPERATIONS, PROCESSING AND SALE OF MINERALS

It is rare for governments or governmental instrumentalities to participate in mining operations. Project development is generally carried out by commercial parties, who gain authorisation to conduct mining activities through the grant of mining tenements.

i Processing and operations

The importation and use of earth-moving, construction and mining machinery is strictly regulated due to the threat it can pose to the environment by introducing soil, plant material and other quarantine risks. The Australian Quarantine and Inspection Service is responsible

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11 Native Title Amendment (Indigenous Land Use Agreements) Act 2017.
for monitoring importation and use of such mining machinery. Typically, new machinery does not require an import permit in order to enter Australia, but may be subject to an inspection to ensure it is free of contamination. All used machinery requires an import permit and may be subject to quarantine restrictions upon arrival. Regardless of whether new or used, all machinery imported requires a cleanliness declaration stating the machinery is clean and free of all soil, plant and animal debris.\(^{12}\) Port and rail infrastructure is typically privately owned (often by miner operators) and access to infrastructure is regulated by state and federal competition laws, with a recent example of this being the successful Federal Court proceedings taken by Glencore to have the Port of Newcastle ‘declared’ for the purpose of the national competition law, allowing the national competition regulator to arbitrate prices and access terms.\(^{13}\) The federal government is currently drafting legislation that may have the consequence of reversing this decision.\(^{14}\)

ii  **Sale, import and export of extracted or processed minerals**

There are generally very few legislative restrictions put in place in relation to the processing, exporting or sale of Australian minerals. As a signatory to the Nuclear Non-Proliferation Treaty, Australia has generally sought to restrict the sale of Australian uranium to countries who are also signatories to that treaty, and where Australian uranium is exported, Australia has required purchasers to track the material (more closely than is required by the International Atomic Energy Agency) to ensure it is used only for peaceful purposes. In recent times, Australia has sought to take an active role in policing the use of exported uranium, and has participated in international sanctions by banning the export of uranium to certain countries. Certain Australian states have prohibitions on the uranium mining.

Other than the foregoing, and an overarching requirement to have export clearance, there are generally no legislative export controls or limitations in place for extracted or processed minerals.

iii  **Foreign investment**

Foreign investment is overseen by the Foreign Investment Review Board (FIRB), a Commonwealth government body responsible for administering the Foreign Acquisitions and Takeovers Act 1975 (Cth) (the Act) and examining proposals by foreign persons to invest in Australia. The FIRB is responsible for reviewing such proposals and making recommendations to the Australian Treasurer on whether they should be approved in accordance with the Act – however, the Treasurer has the ultimate decision to approve or reject a proposal (and does not have to accept the FIRB’s recommendation). On 1 December 2015, the Act was significantly amended to update Australia’s foreign investment legislative framework and to ensure that Australia continues to maintain a welcoming environment for foreign investment that is not contrary to Australia’s national interest.

In considering proposals, the FIRB assesses whether it is ‘contrary to the national interest’ – however, the Act does not define ‘national interest’. This is intentional and allows proposals to be assessed on a case-by-case basis, recognising that national interests change over time and flexibility is necessary to account for variable economic and industry conditions. This


\(^{13}\) Port of Newcastle Operations Pty Ltd v. Australian Competition Tribunal [2017] FCAFC 124.

\(^{14}\) Competition and Consumer Amendment (Competition Policy Review) Bill 2017 (Cth).
flexibility has been brought into focus with the recent decision by the Australian Treasurer to block the proposed bids for a 99-year lease of 50.4 per cent of the NSW electricity distributor Ausgrid by Chinese state-owned company State Grid and Hong Kong-based Cheung Kong Infrastructure.

Generally, when considering whether a proposal is in the ‘national interest’, regard is given to broad topics contained in Australia’s foreign investment policy (such as national security, competition, and other governmental policies (e.g., tax or environment) that affect the economy and broader community) and the ‘character’ of the proposed investor.

Under Australia’s foreign investment framework, certain foreign investment proposals require approval irrespective of their value. All direct investment in Australia by foreign governments and their related entities, including state-owned enterprises and sovereign wealth funds, require approval. Acquisitions by foreign persons that are valued at or above certain relevant monetary thresholds also require approval. The table below sets out the relevant thresholds for acquisitions by foreign government investors, all non-government investors other than investors from certain countries (including China, New Zealand, United States, Chile, Japan, South Korea, Singapore and Thailand) to which Australia has agreed different thresholds pursuant to certain free-trade and other agreements (agreement country investors, not including foreign government investors) and all other investors (foreign persons).

<table>
<thead>
<tr>
<th>Investor</th>
<th>Relevant threshold for acquisition (indexed, as at 1 January)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Foreign persons</td>
<td>Exploration tenure: Approval generally not required. Mining or production tenure: A$0. Acquisitions in operational or producing mining projects: A$55 million.</td>
</tr>
<tr>
<td>Agreement country investors*</td>
<td>Exploration tenure. Approval generally not required. Mining or production tenure: A$1,094 million (US, NZ and Chile – all others A$0). Acquisitions in operational or producing mining projects: A$1,094 million.</td>
</tr>
<tr>
<td>Foreign government investors</td>
<td>Exploration tenure: A$0. Mining or production tenure: A$0. Acquisitions in operational or producing mining projects: A$0.</td>
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</tbody>
</table>

* Investors from Singapore and Thailand are subject to lower thresholds.

In addition, approval may be required for acquisition of an interest in an Australian land corporation (a company having more than 50 per cent of its assets consisting of ‘Australian land’). As interests in Australian land also include interests in mining and production tenure, such interests must be taken into account in considering if an entity in which a foreign investor is proposing to acquire securities in is an Australian land corporation.

In addition, where the proposed acquisition is by a foreign government investor, the acquisition of an interest in an operational mine will require approval, irrespective of the value of the investment. For agreement country investors and other foreign persons, the threshold for approvals for acquisitions of interests in operational mines is higher (A$1,094 million for agreement country investors and A$55 million for foreign persons). The lower thresholds for agreement country investors can only be relied upon if the entity making the investment is an ‘enterprise’ or ‘national’ of the relevant agreement country.

Generally speaking, the application for a new mining tenement (or transitions from exploration to mining tenements) will generally not trigger any FIRB approval requirement, as the granting of property rights by a government will not constitute an ‘acquisition’ for the purposes of the Act. The only exception to this is in the case of a foreign government investor, who must seek approval for conversions of tenements from exploration to mining).
VI CHARGES

i Royalties
Royalties are payable to the Crown on extraction of minerals. The amount and calculation of such royalties varies depending on the location and the mineral. Typically, royalties are either flat-rate royalties (on a ‘cost per tonne’ basis), ad valorem royalties (percentage of the value of minerals recovered) or profit-based royalties. Private royalties may also be payable where the mining rights have been transferred between private parties subject to the payment of an ongoing private royalty.

ii Taxes
General duties and taxes are payable in the same manner as any other business within Australia, such as local government rates and fees, stamp duty, goods and services tax, capital gains tax or income tax. The Commonwealth government is currently considering a proposal to introduce a Junior Mineral Exploration Tax Credit, which would allow tax losses from greenfield exploration to be distributed as a tax credit to Australian resident tax shareholders in those companies. This is intended to replace the Exploration Development Incentive Scheme that ended in May 2017.

VII OUTLOOK AND TRENDS

i Competitiveness and productivity in Australia
Australia is considered an attractive environment for domestic and foreign investment, benefiting from a climate of relatively low interest rates, low inflation, a competitive currency relative to other global currencies and geographical proximity to key Asian markets. For the year ended 31 December 2016, foreign direct investment in Australia across all sectors increased by 5 per cent to A$3,192.4 billion, drawing on capital inflows from major trading partners such as the United States of America, the United Kingdom, Belgium, Japan, Hong Kong and Singapore.\(^\text{15}\)

In previous periods, increasing costs, decreasing commodity prices and an overall decline in productivity in Australia placed pressure on the mining sector in Australia. In response, the industry focused on reducing its cost base and improving productivity and at the same time continuing previously planned investment in production capacity during that period. For example, in December 2016, BHP reported productivity gains of US$1.2 billion, contributing to over US$11 billion of productivity gains delivered over the past four years.

In 2017, a combination of productivity improvement, cost reduction and investment in output started delivering economic benefits to the mining sector due to a sustained increase in demand for Australia’s premium seaborne commodities (principally iron ore, metallurgical coal and thermal coal), resulting in a stabilisation of prices and a corresponding increase in economic returns to industry participants.

Australia

ii Innovation and technological change
There is a growing awareness among mining companies that technological innovation, which can enable mining companies to streamline production, reduce bottlenecks and reduce labour costs, will be critical in keeping rising operational costs in check and increasing productivity. Automation, in the form of remote operations technologies, is already an increasing feature of the larger mining operations. We expect this trend will continue and that the use of mining technology will become more widespread as the costs decrease over time. Willingness to innovate and embrace new technology to enhance productivity and operational efficiency has given a competitive advantage to early adopters.

As mining companies embrace these changes, they will need to be alive to the cyber and data protection risks that accompany the use of new technologies. Inadequate cybersecurity exposes mining companies to a number of potential impacts including damage to a company’s reputation, equipment, profits, production and workforce challenges or delays to change, as well as serious safety and security impacts. Large companies are particularly vulnerable targets due to their significant role in global supply chains and national economies. Many mining companies have adopted vigilant cybersecurity policies and have educated staff on managing risks to enhance cybersafety in response.

iii Commodity prices and demand
2016 to 2017 saw prices across a number of commodities increase (although not to the previously historically high price level) and when combined with costs savings and productivity improvements led to a material increase in underlying profits for companies across the Australian mining sector.

The adjustment from peak prices is driven by both supply-side market imbalances where buyers have been able to negotiate price decreases due to the available excess quantities and other factors such as a relative decrease in the economic activity of key importers such as Japan, China and Taiwan.

The markets for Australia’s key mineral exports, coal and iron ore, recovered from 2015’s lows in 2016 and, combined with spikes in gold and lithium prices, have generated greater market activity. This is particularly the case for Australia’s production of seaborne coal and iron ore, which are generally of a high grade and quality, allowing producers to realise a price premium and meet the requirements of customers who require higher grade products to achieve productivity and environmental targets in their own operations. Demand for lithium, in which Australia is one of the world’s major suppliers, continues to be driven by investment and research and development by battery producers and car-makers seeking to secure supply for future developments.

iv Access to capital
Increases in commodity prices, and commercial returns from mining operations have increased the attractiveness of mining stocks, with the VanEck Vectors Australian Resources Exchange Traded Fund increasing by 23.76 per cent in the past 12 months. However, the increase in the prices of mining stocks is yet to translate into a corresponding increase in equity capital markets activity for the sector.

Debt funding for mining projects continuing to be challenging, although there was some positivity with project financing for Australian gold and lithium developments closing during 2016–17. As a result, the smaller miners continue to assess the viability of
non-traditional financing arrangements such as metals streaming, private royalties and other forms of innovative financing. Offtake partners have also been a source of debt and equity funding for greenfield development projects.

For major miners, increased cash-flow from existing operations has allowed capital expenditure to be funded from retained earnings, although those miners have also had to navigate competing demands from shareholders for available cash to be returned to shareholders via dividends and share buy-backs.

Private equity funds continue to show interest in the Australian mining sector and have been linked to a number of potential merger and acquisition transactions within the sector, although the number of mining projects acquired or funded by private equity funds continues to be low.

v Corporate consolidation in the Australian mining sector

2017 continued two key trends in mining mergers and acquisitions, being offshore investment and consolidation in the gold and rare metals (principally lithium) and major multinational miners looking for opportunities to divest assets that are considered 'non-core' to their global portfolio (principally in relation to thermal and metallurgical coal). The largest M&A transaction in the Australia mining sector in 2016-17 was Yancoal’s US$2.69 billion acquisition of Rio Tinto’s Hunter Valley thermal coal mines, which completed in September 2017 following a contested process between Yancoal and Glencore. This was the largest mining M&A transaction in Australia for a number of years.

A number of sale processes for prominent thermal and metallurgical coal assets were undertaken in 2016–17 that are either ongoing or did not result in a transaction. This reflects a cautious approach being taken by both buyers and sellers in the current market and may reflect long-term uncertainty regarding sustainability of the current levels of commodity prices.

The lithium sector continued to be active, with major lithium producers General Lithium, Jiangxi Ganfeng Tianqi and Ablemare all increasing their investment in their jointly owned Australian projects in 2016–17, both through equity investment and underwriting long-term offtake contracts to support those projects as they ramp-up production.

vi Sustainability and community

As automated technologies and lean business models are introduced to reduce costs and improve productivity, access to capital is limited and the market adjusts to lower commodity prices, so there will be an impact on the communities built around mining.

Stakeholders are calling for increased transparency in the way mining companies work with communities and manage the environmental impact of operations. Mining companies withdrawing from communities and scaling down operations will need to manage potential reputational damage and the impact on local economies, including social dislocation. Activist organisations are increasingly litigious and savvy with their use of social media and other corporate accountability mechanisms, such the complaints investigation processes through the National Contact Point for the OECD Guidelines for Multinational Enterprises. To meet increased expectations, mining companies will need to maintain open communication, proactively seek to minimise adverse impacts and collaborate with a range of stakeholders.
Chapter 2

BRAZIL

William Freire

I OVERVIEW

Brazil offers considerable geological diversity and is one of the greatest mineral powerhouses in the world. The country is a major player, being globally ranked as follows as a producer of:

- niobium: first;
- tantalite: second;
- iron ore: third;
- graphite: third;
- bauxite: third;
- vermiculite: third;
- ornamental stones: fourth; and
- kaolin: fifth.

Brazil exports nickel, magnesite, manganese, tin, chromium and gold. It is self-sufficient in limestone, industrial diamonds, talc, titanium and tungsten, and it produces and imports copper, diatomite, phosphate and zinc.

The trade balance for mining is always larger than the country’s overall trade balance. In 2013, the trade balance for mining (US$31.967 billion) was at least 12.5 times greater than the overall trade balance (US$2.56 billion). In 2014, the trade balance for mining was US$26,35 billion and the overall trade balance of the country was US$4.036 billion (negative). In 2015, the trade balance for mining, even during a moment of serious crisis, was US$15.194 billion. The trade balance for mining in 2016 was US$15.3 billion.


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1 William Freire is founder and managing partner of William Freire Advogados Associados.
2 With Vale SA being the largest individual producer.
II LEGAL FRAMEWORK

As a result of the paramount role mining plays in Brazil, the essential structure of the legal regime governing mining is defined in the Federal Constitution. Brazil is a federal republic composed of 26 states and the Federal District, but the power to enact laws on mining is exclusively held by the Union (Federal Government).

Administrative competency with regard to mining (grants, monitoring and sanctions) is exercised by the Ministry of Mines and Energy and by the National Mining Agency, a federal quasi-government agency. There is mineral administrative competency for the states only for the purposes of inspection, but this is not exercised in practice.

The legal regime governing mining in Brazil is spread among different levels of regulation: the rules are established in the Federal Constitution, in the Mining Code (a law in the strict sense of the word), in the laws that govern some classes of mining rights, and in various regulations, principally those issued by the Ministry of Mines and Energy and the National Mining Agency. There are other regulations that can also indirectly apply to mining, such as foreign trade, work in underground mines, tax and sanitation rules related to mineral water, and the rules governing the purchase of land by foreign-owned companies.

The regime is a mixed system and covers the acquisition of mining rights through the priority regime, a separate bidding system for mining, and activities in strategic areas called national reserves. Within this system, the following form the core of the Brazilian mining legal regime:

- the Union has a sovereign right over mineral resources and deposits and controls all stages of their development;
- mining must be carried out in the national interest;
- there is a legal separation between ownership of the land and the mineral wealth contained in it;
- mining is a public utility activity;
- only Brazilians or companies founded in accordance with Brazilian laws, with headquarters and management in Brazil can mine;
- the Union has the power to grant mining titles, and to monitor and sanction them;
- guarantee of the right of priority;
- guarantee of a single holder for each mining right;
- the grant of the mining concession is a natural consequence of a valid application in a unrestricted area with a positive final exploration report;
- mining companies are guaranteed ownership of the product of the mining;
- there will be a charge for occupation during the exploration phase;
- there must be a commitment to the performance of the Economic Development Plan;
- environmental sustainability is one of the attributes of the mine;
- landowners will receive a share of the product of the mining; and
- right to a fair indemnification for the mining title holder in cases in which government measures hinder or make it unfeasible to develop the mineral deposits that are the object of the administrative mining procedure.

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3 Article 176 of the Federal Constitution.
4 That is, on deposits, mines and other mineral and metallurgical resources.
5 These are areas that the government normally receives back as a result of a declaration of forfeiture or waiver of the mining company and are offered for development (exploration or mining) through the electronic bidding system known as ‘availability’.
III MINING RIGHTS AND REQUIRED LICENCES AND PERMITS

i Title

According to the Federal Constitution, the Union has control over mineral activity, which requires prior consent of the Ministry of Mines and Energy or of the National Mining Agency. Although the Federal Constitution uses the expression ‘belongs to the Union’, there is discussion in the legal doctrine regarding the juridical nature of this relationship between the Union and these resources and mineral deposits. This means that it is not a classic relationship of ownership, as known under civil and administrative laws, but rather, a relationship of sovereignty that gives the Union the power of granting, regulation and control.

Mining companies will invest, take risks, and, if they are successful, identify deposits that will then be under the control of the Union; however, they are assured ownership of what is mined. Undiscovered mineral deposits have no value; therefore, since the Union cannot afford to invest, it needs private investors to do so. Another interesting point is that mining activities around the world have not led to the exhaustion or reduction of mineral reserves. In fact, exactly the opposite has occurred: discovery of deposits leads to more investment, which, in turn, leads to the discovery of new deposits. So, even in the face of intensive exploration, the stock of mineral reserves has been increasing considerably.

ii Surface and mining rights

There is a legal separation between ownership of the land and the ores contained in it, that is, underground or outcropped.

Under the Mining Law, there are four ways to acquire mining rights:

a. original acquisition, when the mining company is the first to make an application in an unrestricted area;

b. acquisition in specific bidding procedures for the mineral sector offered by the National Mining Agency (availabilities); 6

c. acquisition of mineral rights in National Reserve areas; and

d. acquisition of existing third-party mining rights.

Types of mining right

Brazilian legislation establishes the following mining rights:

a. exploration authorisations and mining concessions (a double title within the same administrative proceeding);

b. claimstake mines;

c. mineral licensing; and

d. the small-scale mining consent regime.

Juridical nature of the mining rights in Brazil

It is correct to say that, where Brazilian Mining Law is concerned, there is no relationship between the juridical nature of exploration consent (authorisation) as it is used in the Federal Constitution and in the Mining Code, and the general administrative act known as autorização, as it is used in broad terms in administrative law.

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6 These are mining rights that go back to the Union as a result of waiver or loss.
In the same context, it is correct to say that there is no relationship between the juridical nature of exploitation consent (mine concession) as it is used in the Federal Constitution and in the Mining Code, and the general administrative contract known as *concessão*, as it is used in broad terms in administrative law.

The same can be said for mineral licensing and small-scale mining.

**Exploration consent (authorisation) and exploitation consent (mining concession)**

Any substance (except radioactive minerals or minerals used to generate nuclear energy) may be developed under authorisations and concessions, which are granted in the same administrative proceeding. The exploration authorisation is always granted for a certain period.

Mining concessions are granted without a pre-established term, and are linked to the depletion of the deposit. The grant is made through an administrative act published in the Official Gazette of the Union.

**Claimstake mines**

The claimstake mine is a class of mining rights under which the holders retain ownership of the deposit. This mining right was created in 1934, as a result of the transition from the accession regime to the concession regime, when legal separation between ownership of the land and the mineral wealth contained therein began. Under the Federal Constitution and the Code of Mines of 1934, those who already held mining rights were grandfathered in under the same conditions. The only claimstake mines now in existence are those remaining from that time.

**Mineral licence**

Mineral licensing has the following characteristics:

- it is used for the development of substances for immediate use in civil construction and other minerals; and
- it applies to an area under 50 hectares.

Generally speaking, the mineral-licensing regime does not require preliminary exploration.

**Small-scale mining consent**

Small-scale mining consent is the regime that allows immediate development of a mineral deposit that, due to its nature, size, location and economic use, can be developed without the need for preliminary exploration work.

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7 I – Sand, gravel and clay for immediate use in civil construction, in the preparation of aggregates and mortars that are not submitted to an industrial beneficiation process, and are not used as raw material in the transformation industry;
II – rocks and other mineral substances, when used for paving stones, guard-rails, curbs, rails and similar purposes;
III – clay used in the manufacture of red ceramics; and
IV – rocks, when crushed for immediate use in civil construction and limestone used to correct agricultural soils.
Minerals subject to small-scale mining are gold, diamonds, cassiterite, columbite, tantalite and wolframite in alluvial, eluvial and colluvial forms; scheelite, other gemstones, rutile, quartz, beryl, muscovite, spodumene, lepidolite, feldspar, mica and others, in types of occurrence that may be indicated at the criteria of the National Mining Agency. The term is five years, which may be renewed.

Acquisition of mining rights

In addition to the normal documents that show the legal capacity of the applicant, in the exploration phase the application must be accompanied by an exploration plan, and in the development phase, it must be accompanied by an economic development plan.

Administrative mining proceedings in Brazil are very slow, principally due to the double-title system for the authorisation–concession regime (which is responsible for more than 90 per cent of the mineral GDP), the lack of structure of the public administration and the obstacles that must be faced to obtain the environmental licence.

The Mining Code does allow assignment of mining rights, and this is a common procedure in Brazil; however, mining rights can only be assigned to those with the legal and economic capacity to acquire these rights.

Assignment of mining rights requires the prior consent of the Union through the National Mining Agency.

The following activities are governed by special laws outside the Mining Code:

a deposits of mineral substances that constitute a government monopoly (petroleum, gas and substances for nuclear energy);

b mineral or fossil substances of archaeological interest;

c mineral or fossil specimens intended for museums, teaching establishments and other scientific purposes;

d mineral waters in the development phase; and

e underground water deposits.

Ownership of the land and mining rights

Considering the legal separation between ownership of the land and the ore contained therein, mining companies can hold mining rights without purchasing the land or receiving consent from the landowner. There are, therefore, mechanisms that enable mining companies to occupy land belonging to third parties, in the event of an impasse.

There is a specific judicial procedure within the exploration phase by which to assess the amount due to the landowner or possessor, being income for occupation and reimbursement for possible damages.

In this situation, during the mining phase (until beneficiation) the most appropriate instrument to be used, established in the Mining Code, is the mineral easement. For other situations, such as manufacturing of the mineral product or pipelines, the most common instrument utilised is the general administrative easement.

Mining is considered to be a public utility activity – a very important attribute in overcoming resistance by landowners.

Legal restrictions exist on the acquisition of rural land by foreigners or foreign-owned Brazilian companies. The basic rules are as follows:

a acquisition of the rural land must be linked to the implementation of agricultural, ranching, industrial or settlement projects related to the company's social purpose;
b the sum of the rural areas belonging to foreigners, including foreign-owned Brazilian companies, of any nationality, may not exceed 25 per cent of the surface area of the municipality; and

c individuals or legal entities, or foreign-owned Brazilian companies, of the same nationality, may not own more than 40 per cent of the total amount of 25 per cent of the area of the municipality in which acquisition by foreigners is allowed.

There are no restrictions on the acquisition of urban real estate for foreign-owned companies.

Restrictions on surface or mining rights

Mining on indigenous lands is allowed under the Federal Constitution of 1988, but has not yet been regulated by the National Congress. As a result, there is no organised and regular mining on indigenous lands in Brazil. It is also allowed in the old quilombo areas, in spite of the additional difficulty surrounding environmental licensing of the activity in these locations.

Mining is also allowed in border zones. Companies need prior consent from the National Defence Council for this purpose, with the exception of companies that work with minerals for immediate use in civil construction.

To act in the border zone, mining companies must meet the following requirements, in addition to the general requirements for mining in Brazil:

- at least 51 per cent of the capital must belong to Brazilians;
- at least two-thirds of the workforce must be Brazilian; and
- the administration or management must be carried out by a majority of Brazilians, to whom the predominant powers are assured.

Legal nature of administrative mining acts

According to traditional doctrine, classic authorisations in administrative law are those discretionary and temporary administrative acts. The theory followed by Brazilian legal scholars, however, is that the administrative mining act called (improperly) ‘authorisation’ is, in reality, a ‘consent for mineral exploration’ with specific attributes, and with the characteristics of a binding administrative act.

In Brazil, the mining concession does not have the same attributes as the classic concession in administrative law. It is not formalised by an administrative contract (but by publication of the administrative act in the Official Gazette). It is not for a certain time, nor is it preceded by a bidding procedure.

This same interpretation can be made for the other regimes (licensing and permission).

iii Additional licences and permits necessary for mineral activities

Mining companies basically need three types of permit to mine:

- a mining right granted by the National Mining Agency or by the Ministry of Mines and Energy;

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8 The border zone is an internal strip, 150 kilometres wide, running parallel to the country’s land border.
environmental licences and other environmental permits (deforestation licences to intervene in the Atlantic Forest, licences to intervene in natural caves etc.); and consent of the municipality, which will only evaluate the compliance of the mineral activity with the municipal legislation.

iv Closure and remediation of mining projects
The measures to properly close mines and to mitigate or remediate the damage caused by mining are established in both mineral and environmental legislation.

From the start of the undertaking, mining companies must state how they intend to close the mine. This information, contained in the economic development plan and the mine closing plan, is continually updated. An interesting aspect is that, today, less attention is paid to the closing of the mine, and more to the future use of the mined area.

In Brazil, environmental insurance is still not mandatory, nor must provisions be made to pay for the costs associated with the mine closing or remediation of the environmental damages. However, there is a tendency towards this, and there are several bills being discussed that would make this insurance mandatory.

IV ENVIRONMENTAL AND SOCIAL CONSIDERATIONS

i Environmental, health and safety regulations
In regard to environmental matters, the Federal Constitution establishes that the power to legislate is shared among the Union, the states and the Federal District. Municipalities may pass legislation on matters related to local interest, including for environmental matters. Administrative environmental competency is shared among the Union, the states, federal district and the municipalities.

Environmental protection is given a separate chapter in the federal Constitution and in all the state constitutions.

Environmental laws can be classified as general or specific to mining. Examples of general laws are the National Environmental Policy Law, the Forest Code, the National Water Resources Policy Law and the National Solid Waste Policy Law. In relation to mining, the specific rules cover mineral activity in special environmentally protected areas (conservation units, such as parks, and areas of permanent preservation, such as the banks of waterways).

There are also fairly strict laws governing occupational health and safety. There are also generic rules and other specific rules, such as the Mining Regulation Rules.

ii Environmental compliance
Generally, environmental licensing is carried out by the environmental bodies of the states. The exceptions are licensing by the municipalities or by the federal environmental agency - IBAMA.

In Brazil, the system in effect requires three separate environmental licences: the preliminary licence, which is the most important because it attests to the environmental feasibility of the project, the installation licence and the operating licence.

The general rule is that environmental licensing begins with the preliminary environmental licensing.

As three separate environmental licences are required, the entire environmental licensing process is quite time-consuming. Besides the difficulties inherent to the environmental licensing process, there are also difficulties resulting from gaps in the environmental legislation,
the lack of structure of the environmental agencies, thoughtless interference by the Public Attorney’s Office and the proliferation of opportunistic non-governmental organisations (NGOs), all of which tend to delay environmental licensing.

iii  Third-party rights

Mineral aspects

The Mining Code states that miners and mining companies are exclusively liable for damage that their activities cause to third parties.

This prevents the Union from being sued in the event that the activity causes harm to a third party, but an exception occurs when the government is negligent. In this case, an inefficient public entity can be sued together with the miner or mining company.

Environmental aspects

In general, miners and mining companies are exclusively liable for damages that their activities cause to third parties, not only in a diffuse aspect, but also in relation to individual damages.

Here, there is also an exception, and the party harmed may sue the government, if there has been any omission that has contributed to causing the damage or harm.

Indigenous rights

The law protects the rights of indigenous people. Mining on indigenous lands technically depends on a special law and authorisation of the National Congress. In light of the absence of actual law and lack of regulation governing how this authorisation could be given, there is, however, no regular mineral activity on indigenous lands.

The intent of lawmakers was to protect non-acculturated Indians and their lands. This has, however, led to a situation in which many unscrupulous people declared themselves to be Indian, in light of the complacency of the agency responsible for this control. This has led to many problems, not just for mining, but also for farmers and lumber companies.

The federal Constitution states that when mineral activity on indigenous lands is regulated, the indigenous peoples will be entitled to a share of the mining taking place on their lands.

Another Brazilian characteristic related to indigenous lands deserves mention. These are the demarcations made without any technical criteria, under pressure by demagogic interests or pressure from NGOs. To give an example, in the state of Roraima, demarcated indigenous lands occupy at least 46.37 per cent of its territory.

Quilomba communities

Quilombolas are the remnants of the quilombolo communities. These are ethnic-racial groups with their own unique history, which have specific territorial relations and a presumption of African ancestry. Brazilian legislation has a curious feature in that recognition of a person as quilombola is through self-declaration, which has led to a great deal of abuse.

In projects in which there is a possibility of interference with quilombo lands or in which there are elements that could cause direct socio-environmental harm inside the quilombola community, this matter will be analysed in the environmental licensing procedure.

In the event that quilombola families are displaced, the mining company must submit indemnification proposals, in accordance with the rules stipulated by Convention 169 of the International Labor Organisation, which was ratified by Brazil.
iv  Additional considerations
There is a growing industry created by NGOs and entities that supposedly have environmental or social purposes. Many of these entities, which claim to be environmental or social, depend on government funds to survive.

There are hundreds of domestic and foreign NGOs that act in Brazil without any control or regulation. In fact, it is clear that they do not have environment concerns, but financial or political interests.

V  OPERATIONS, PROCESSING AND SALE OF MINERALS
i  Processing and operations
The Mining Code states that mining is the set of operations intended to provide industrial use of deposits, from extraction to beneficiation.

Foreign labour in mining follows the general rules for other activities. There are no specific rules or restrictions.

Since the Federal Constitution requires that mining companies be founded in accordance with Brazilian law and have headquarters and management in the country, foreign managers must reside in Brazil and have a specific work visa.

ii  Foreign investment
There are no restrictions on movement of capital specifically with regard to mining. It is sufficient for companies with foreign capital to meet the requirements established in Article 176 of the Federal Constitution (be founded in accordance with Brazilian law, and have headquarters and management located in Brazil).

VI  CHARGES
i  Royalties
In broad terms, mineral activity is subject to the same fiscal regime as other activities, but there are specific financial obligations for mining.

Financial compensation for exploiting mineral resources
Financial compensation for exploiting mineral resources (CFEM) is compensation that must be paid to the Union, resulting from the activity of mining, of a non-tax nature.

However, on 26 July 2017, a rule was published, which is still pending approval by the National Congress, and which established calculation of the royalty on the gross revenue taxable base, allowing deduction only of taxes paid in the sale of the ore.

This same rule establishes that mining companies make transfer pricing adjustments when they calculate the royalties and when they export the mineral commodities to legal entities that are affiliated or located in tax havens.

In the event of consumption, transformation or use of the ore by the holder of the mineral, the taxable base is considered to be the production cost. This base was increased by the same rule mentioned above, which requires in these cases that the royalty be calculated over the market value, according to the methodology defined by the National Mining Agency.

Until November 2017, the CFEM rates varied depending on the mineral exploited, as follows. According to Law No. 8.001/90, the percentages were:
a) aluminum ore, manganese, rock salt and potassium: 3 per cent;
b) iron, fertiliser, coal and other mineral substances: 2 per cent;
c) gold: 1 per cent, when extracted by mining companies, with exemption for small-scale miners; and
d) precious stones, lapidable coloured stones, carbonados and precious metals: 0.2 per cent.

At the closing of this chapter, there was a proposal presented to alter the base and rates of financial compensation to the Union. As a result of this, the rates will be altered, notably to increase the royalty on the development of gold, diamonds, niobium and iron ore, and it will be reduced for substances directly used in civil construction.

The rates for mineral substances in general are as follows:

a) gold and diamonds, when mined under the small scale mining consent regime, other precious stones and lapidable colored stones: 0.2 per cent;
b) rocks, sands, gravels, clays and other mineral substances when intended for immediate use in civil construction: 1.5 per cent;
c) gold and other mineral substances, except iron ore, for which the rate will be defined based on the international product price: 2 per cent;
d) bauxite, manganese, diamonds, niobium, potassium and rock salt: 3 per cent; and
e) there is an interesting proposal for iron ore, in which the percentage varies according to the ore price on the international market.

<table>
<thead>
<tr>
<th>Iron ore rates</th>
<th>International price in US$/ton (according to the Platts Iron Ore Index – Iodex)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2 per cent</td>
<td>price &lt; 60.00</td>
</tr>
<tr>
<td>2.5 per cent</td>
<td>60.00 ≤ price &lt; 70.00</td>
</tr>
<tr>
<td>3 per cent</td>
<td>70.00 ≤ price &lt; 80.00</td>
</tr>
<tr>
<td>3.5 per cent</td>
<td>80.00 ≤ price &lt; 100.00</td>
</tr>
<tr>
<td>4 per cent</td>
<td>price ≥ 100.00</td>
</tr>
</tbody>
</table>

As mentioned, the alterations proposed in 2017 need to be validated by the National Congress.

**Annual fee per hectare**

The annual per-hectare fee is owed by the holder of the exploration authorisation until the final exploration report is submitted. Within the original term of the exploration authorisation, the amount works out at a minimum of 3 reais per hectare, according to a Bill before the legislature at the time this chapter was written.

This requirement ends with the filing of the final exploration report.

**Participation of the landowner in the result of the mining**

One of the expenses associated with mining is to pay the landowner a share of the result of the mining (PPRL). The landowner is entitled to this share of the results of the mining simply for owning the land with exploitable mineral substance, even without making any investment. This is a legal requirement that has been in effect since 1967, which compensates the landowner for the loss of the right of preference to mine on his or her land. The amount is equivalent to half the rates of the CFEM referred to above.
Tax
In general, mining activities are subject to the same taxes as other activities, except for the fees collected by some states, and beginning in 2018, by the Union, as a result of the monitoring of the mining companies.

Mining Activity Monitoring Fee
Beginning in January 2018, the National Mining Agency will charge mining companies a fee ranging from 500 to 5,000 reais for each mining right held. The amount will vary according to the phase of the mining proceeding (exploration to the development concession).

On the other hand, the states of Minas Gerais, Pará, Amapá, Mato Grosso do Sul and Goiás created similar fees, collected at fixed rates over the volume of tons of ore sold.

Tax on profits
Taxes on profits are the corporate income tax and the social contribution on net income, the rates of which, added together, can reach 34 per cent.

Tax on circulation of goods and services
The rates of tax on circulation of goods and services (ICMS) in internal operations can vary from 17 per cent to 19 per cent. In interstate operations, the rates can vary from 7 per cent to 12 per cent.

Social Integration Programme and contribution to financing of social security
Together, the rates for the Social Integration Programme (PIS) and the contribution to the financing of social security (COFINS) are 9.25 per cent with the right to deduct credits, or 3.65 per cent without the right to the credits.

Property taxes
The property taxes are the rural real estate tax on rural real estate, and the urban real estate tax on real estate in urban areas.

Duties
Imports of goods and services are subject to import tax, ICMS, PIS and COFINS. Nonetheless, there are several federal and state benefits that can substantially reduce the tax rates on the import of capital goods, or suspend or defer their application.

Other fees
Owners of land occupied by mineral activities are entitled to three types of payment:

- for income and damages that the mineral activity causes in the exploration phase;
- indemnification for the mineral easement, equivalent to the time of use and damages caused to the property, during the mining phase; and
- the PPRL, referred to above, only if there is ore on the property and when it is mined and sold.
**Incentives for export**

There are incentives for ore export, such as the non-levying of ICMS, PIS and COFINS, with maintenance of the credits of these taxes assured in relation to previous operations, due to the principle of non-accumulation.

In the case of ICMS, use of the credits accumulated as a result of exports is principally through their transfer to other establishments of the mining company in the same state, or to third parties through prior authorisation of the tax authorities.

It should be noted that the states normally make it difficult to use the accumulated credits, which can lead to unusable credits. This fact has led to many lawsuits by mining companies in order to enable them to use these credits, which are assured by the Constitution.

**Ore exports**

Ore exports to affiliated companies located abroad are subject to transfer pricing rules and, in the case of commodities, the parameter prices used are their prices on internationally recognised commodities exchanges.

**Environmental compensation**

Brazilian law establishes several types of environmental compensation to be paid by mining projects that have the potential to cause significant environmental impact, or due to the removal of highly protected environmental assets.

There is no environmental compensation specific to mining.

**Environmental compensation as a result of significant environmental impact**

Environmental compensation is owed by projects with the potential to cause significant environmental impact, as verified in a preliminary environmental impact study. This compensation is to support the implementation and maintenance of the environmental unit of the Full Protection Group, with the amount to be defined according to the size of the project and the degree of its environmental impact.

**Environmental compensation for intervention in the Atlantic Forest**

The right to cut or remove primary or secondary vegetation in the medium or advanced stages of regeneration of the Atlantic Forest biome is conditional upon environmental compensation. This is done by allocating to the environmental agency an area equivalent to that which is deforested, with the same ecological characteristics, in the same watershed, and whenever possible, in the same micro-watershed.

If environmental compensation is not possible, the forest will have to be replanted, with native species in an area equivalent to the area that was deforested, whenever possible in the same micro-watershed.

**Speleological environmental compensation**

Speleological compensation is owed for projects that cause an irreversible negative impact on underground caverns classified as having a high degree of relevance.

**Other environmental compensations**

Since the power to enact environmental laws is shared by the Union, the states and Federal District (and municipalities can also enact laws regarding environmental matters of local
interest), it is possible that other environmental compensation may be created by the states. For example, compensation may be payable for the removal of trees that are protected from being cut down by law, as in Minas Gerais, the largest mineral producer within Brazil.

VII OUTLOOK AND TRENDS

Besides the economic and institutional crisis, the mineral industry has been suffering as a result of a variety of circumstances that go beyond the commercial and geological risk that are normal in this activity.

In despite of the efforts of the current administration, the mineral industry was particularly affected by the many years of lack of mineral and environmental policy and chronic inefficiency of the public administration.

In August 2017, at time of writing, three bills were before the National Congress, seeking to increase the rates of financial compensation for mineral development (owed to the Union), as showed above, alterations to the Mining Code and alteration to the structure of the public mining administration.

No alterations are planned for the system of priority and the terms of the exploitation concessions, which are granted in Brazil through administrative acts (no public contracts) and over an undetermined period of time, linked to the depletion of the mineral deposit.
I OVERVIEW

Burkina Faso’s gross domestic product (GDP) has increased from 4 per cent to 5.9 per cent from 2015 to 2016, supported by a significant increase of public investment in the mining sector.

The International Monetary Fund (IMF) foresees a growth of 6.5 per cent of GDP in 2017. The state also anticipates that the mining sector will contribute to 10.2 per cent of its GDP in 2020 (compared to 8.3 per cent in 2016).

Burkina Faso has a rich and various mining potential illustrated by the multiple ongoing mining projects.

Burkina Faso is the fourth-largest gold producer in sub-Saharan Africa and gold is the first exportation product in Burkina Faso with a constant increase in production (estimated at 40 tons in 2016 and expected to reach 45 tons in 2017). Other significant mineral resources are also being extracted in the country, such as zinc, manganese, copper and iron.

With more than US$1.6 billion of direct contribution to the state budget since 2008, the Burkina Faso mining sector is attracting a large number of investors.

A new Mining Code was adopted on 26 June 2015 by the National Transition Council (NTC) after the popular uprising, and entered into force on 16 July 2015.

The reform of the new Mining Code was, in particular, aimed at striking a balance between state interest and the rights of the mining operators, as well as including new provisions on environment protection, human rights and the fight against rural poverty, notably by creating a local development fund for areas hosting mining sites, in line with the legislation of other francophone mining jurisdictions.

It should also be noted that in order to promote good governance and transparency in the mining sector, Burkina Faso became a member of the Extractive Industries Transparency Initiative (EITI) in 2008.

II LEGAL FRAMEWORK

The main laws applicable to the mining activities in Burkina Faso are:

\( a \) Law No. 036-2015 dated 26 June 2015 relating to the Mining Code;

\( b \) Decree No. 2017-023 dated 23 January 2017 relating to mining taxes and royalties;
Burkina Faso is a member of the West African Economic and Monetary Union (WAEMU) and the Economic Community of West African States (ECOWAS) and is therefore bound by the following regulation and guidelines:

- the West African Economic and Monetary Union (WAEMU) Regulation No. 18/2003/CM/WAEMU dated 23 December 2003 relating to the Mining Code; and

**III MINING RIGHTS AND REQUIRED LICENCES AND PERMITS**

### i Title

The mining titles, as defined in the Mining Code, are as follows:

- exploration licence;
- industrial exploitation licence (large-scale or small-scale mines);
- semi-mechanised exploitation licence for mining substances;
- authorisation for the industrial exploitation of quarry substances; and
- authorisation for the semi-mechanised exploitation of quarry substances.

An exploration licence is required to apply for an industrial exploitation licence (large-scale or small-scale mines). Industrial exploitation licences (large-scale mines) are used for the largest projects in Burkina Faso.

**Ownership of minerals**

Any mineral substances and natural deposits contained in the soil and the subsoil are the property of the state of Burkina Faso. However, any holder of a mining title is granted exclusive rights on the area of its licence for the relevant mineral subject to its mining title and is entitled to dispose of the minerals that have been extracted.

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2 Article 5 of the Mining Code.
3 The Mining Code notably defines ‘small mines’ on the basis of the contemplated volume of production.
4 Article 6 of the Mining Code.
State participation
The Mining Code provides that the state shall be granted a 10 per cent free equity participation in the company holding an exploitation licence and allows the state to acquire additional equity if it reaches an agreement with the mining company in accordance with the investor.5

It should be noted that, as is the case in other francophone jurisdictions, the state benefits from a priority dividend that is payable to the state before any other allocation of the distributable profit.

Surface and mining rights
As a general principle, mining licences are served on a ‘first-come, first-served’ basis.

Exploration licence
The application for an exploration licence must be filed with the mining registry together with specific documents and information, such as information on the applicant, the projected work plan for the first year of exploration and its corresponding budget.6 There is no requirement that the applicant be a company incorporated under Burkinabe law for exploration licences.

The exploration licence is granted by an order of the Minister of Mines within 60 days of the date of application provided that the applicant complies with the mining regulation. The granting of the licence to the applicant is, in particular, conditioned upon the payment by the applicant of a fixed duty and a copy of the certificate of registration of the applicant.7

The exploration licence confers on its holder the exclusive right to explore within the limits of its perimeter the mineral substances specified in the licence and the exclusive right to dispose of the products extracted during the exploration.8

Industrial exploitation licence (large-scale or small-scale mines)
The application for an industrial exploitation licence must be filed at least 90 days before the expiry of the exploration licence relating to the same area and minerals.9 The applicant must be a company incorporated under Burkinabe laws.10

The application is filed with the mining registry along with the documents specified by Article 70 of Decree No. 2017-036 dated 26 January 2017 relating to the management of mining titles and authorisations, which notably includes:

- a feasibility study established by a local or internationally recognised firm (which shall include a training and promotion plan for the local managers and staff);
- any favourable advice from the Minister of Environment based on an environmental and social impact study, an environmental management and social plan and a rehabilitation and closure plan;
- a draft mining convention to be signed with the state;
- a commitment to transfer to the state 10 per cent in the exploitation company;

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5 Article 43 of the Law No. 036-2015 concerning the Mining Code in Burkina Faso.
6 Article 28 of the Decree No. 2017-036 dated 26 January 2017 relating to the management of mining titles.
7 Article 31 of the Decree No. 2017-036 dated 26 January 2017 relating to the management of mining titles.
8 Article 32 of Act No. 036-2015 dated 26 June 2015 concerning the Mining Code of Burkina Faso.
9 Article 41 of the Law No. 036-2015/NCT relating to the Mining Code of Burkina Faso.
10 Article 100 of the Mining Code.
The semi-mechanised exploitation licence

This licence can be granted only to companies created under Burkinabe law.

The application for a semi-mechanised exploitation licence is filed with the mining registry.

Decree No. 2017-036 dated 26 January 2017 relating to the management of mining titles lists the documents required for the application, which includes an environmental impact study as well as environmental feasibility advice from the Minister of Environment.

The semi-mechanised exploitation licence is granted by a decision of the Council of Ministers within 60 days of its application, following the advice of the Minister of the Environment and Minister of Mines.

The semi-mechanised exploitation licence confers on its holders the exclusive right to exploit and dispose of the mining substances specified in the licence according to mining regulation.\(^\text{15}\)

Authorisations for industrial exploitation or semi-mechanised exploitation of quarry substances

The application for an authorisation of exploitation of quarry substances is filed with the mining registry with the documents specified in Decree No. 2017-036 dated 26 January 2017 relating to the management of mining titles and authorisations, which includes information on the applicant and, depending on the nature of the works, an environmental impact study.

The authorisation for industrial exploitation of quarry substances is granted by an order of the Minister of Mines.

\(^{11}\) Article 72 of Decree No. 2017-036 dated 26 January 2017 relating to the management of mining titles.

\(^{12}\) Article 40 of Law No. 036-2015 concerning the Mining Code.

\(^{13}\) Article 45 of the Mining Code.

\(^{14}\) Article 47 of the Mining Code.

\(^{15}\) Article 57 of Law No. 036-2015 concerning the Mining Code.
The authorisation for industrial exploitation of quarry substances confers on its beneficiaries the exclusive right to exploit quarry substances contained on and below the surface. It also grants several rights such as the right to dispose of its products on the internal market or to export them.\textsuperscript{16}

The same process applies to semi-mechanised exploitation of quarry substances.

**Conditions for undertaking mining activities**

Any individual or legal entity of any nationality holding a mining title or obtaining an authorisation can carry out mining activities governed by the Mining Code as long as it elects to have its main domicile in Burkina Faso and has an agent whose identity and qualifications are provided to the Administration of Mines.\textsuperscript{17}

In addition, any holder of an exploitation licence must set up a legal entity governed by Burkinabe law and have its registered office in Burkina Faso.

Holders of mining titles shall comply, among others, with a number of obligations depending on the type of their licence, which include, *inter alia*:

\begin{itemize}
  \item[a] exploration licence:\textsuperscript{18} carry out the exploration programme submitted to the mining administration; 
  \item produce an annual report of completed work; 
  \item begin the exploration work at least six months after being granted the licence and pursue it; 
  \item comply with the environmental regulations; 
  \item inform local authorities of the nature of work to be undertaken on the territories subject of exploration licence; and 
  \item generally, comply with the obligations set out in the Mining Code; 
\end{itemize}

\begin{itemize}
  \item[b] exploitation licence:\textsuperscript{19} begin the development work within two years from the validation of the licence; and 
  \item exploit the deposit in accordance with the feasibility study and the development plan submitted to mining administration. 
\end{itemize}

Failure to comply with the obligations set out in the Mining Code may give rise to penalties specified by Article 55 of the Mining Code and may result in the withdrawal of the licence.

**Term of the mining rights**

An exploration licence is valid for a period of three years from its issuance and is renewable twice for successive periods of three years (subject to the fulfilment of duties and obligations provided by the Mining Code).

Industrial exploitation licences for large-scale mines are valid for an initial period of 20 years as from their issuance or for the life of the mine (as determined in the relevant feasibility study) if earlier.

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\textsuperscript{16} Article 89 of Law No. 036-2015 concerning the Mining Code.
\textsuperscript{17} Article 98 of the Mining Code.
\textsuperscript{18} Articles 36 and 37 of the Mining Code.
\textsuperscript{19} Articles 51 to 54 of the Mining Code.
Industrial exploitation licences for small-scale mines are valid for an initial period of 10 years as from their issuance and for the life of the mine (as determined in the relevant feasibility study) if earlier.

Both industrial exploitation licences for mines are renewable for consecutive periods of five years until the relevant deposits are exhausted.

The semi-mechanised exploitation licence is valid for five years as from its issuance and renewable for three additional years.

The authorisation for industrial exploitation of quarry substances is valid for a period of five years as from its issuance and renewable for a period of three years.

The authorisation for semi-mechanised exploitation of quarry substances is valid for a period of three years as from its issuance and renewable for a period of three years.

The authorisation for artisanal exploitation of quarry substances is valid for a period of two years from its issuance and renewable for a period of two years.

The authorisation for temporary exploitation of quarry substances is valid for the period defined in the authorisation without exceeding one year.

**Assignment of mining rights**

Assignment of mining titles remains subject to the approval of the Minister of Mines.20

The procedure of transferring a mining title is described in Decree No. 2017-036 dated 26 January 2017 relating to the management of mining title that also describes the procedure for assignment, transmission, merger, spin-off and transformation of mining title. The transferee must offer the same guarantees as the transferor of the mining title for the execution of the obligations stipulated under the Mining Code.

Industrial exploitation licences and semi-mechanised licences can only be transferred to companies created under Burkinabe law.

**Protection of mining rights**

The protection of the holder of a mining title stems from the Mining Code and, as the case may be, a mining convention entered into between the holder of an industrial exploitation licence and the state.21

The mining convention is valid for the same period as for the industrial exploitation licence (20 years).

The mining convention supplements the Mining Code and contains a number of additional protections for the holder of a mining licence.

For example, the Mining Convention guarantees that the mining facilities and the extracted substances cannot be requisitioned or expropriated by the state except on grounds of public necessity and subject to payment of fair and prior compensation.22

It also contains stabilisation provisions that offer assurances to the holder of a mining title that it will not be affected by a change in certain taxes during the period of the mining title.

The stabilisation of tax regime is guaranteed by the provisions of the Mining Code for each holder of an exploitation licence or an authorisation of exploitation during the validity

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20 Article 52 of Decree No. 2017-036 dated 26 January 2017 on the management of mining titles and authorisations.
21 Article 96 of the Mining Code.
22 Article 16 of the Mining Code.
period of the relevant licence, without exceeding 20 years. The stabilisation protection applies to any mining tax, royalty or duty but it is not applicable to the holders of an authorisation of artisanal exploitation23 or exploration licences.

It should also be noted that mining titles and authorisations as well as mining conventions shall be published in the Official Gazette of Burkina Faso.24

**Maximum area of the licence**

The maximum area granted for an exploration licence is 250 square kilometres and 1 square kilometre for the semi-mechanised exploitation licence.25

The maximum area for an industrial exploitation licence depends on the deposit that is the subject of the projected exploitation (as specified in the feasibility study) and cannot exceed the area of the exploration licence.26 In practice the applicant specifies the relevant area in the application and the Decree granting the licence determines the boundaries of the licence.

**Additional permits and licences**

Additional permits and licences (such as environmental licences) may be required depending on the nature of the mining project, its location in Burkina Faso and the relevant needs of infrastructure for the project.

Note that prospection, processing, transportation, transformation and sale of mineral substances are subject to an administrative authorisation of the Mining Administration.

**Closure and rehabilitation of mining projects**

The Decree No. 2017-068 dated 15 February 2017 relating to the rehabilitation and closure of mines provides that the holder of an industrial or semi-mechanised exploitation licence or an authorisation for industrial exploitation of quarry substances shall provide a rehabilitation work plan and a closure plan relating to the mining site.

Any holder of an industrial exploitation licence, a semi-mechanised exploitation licence or an authorisation for industrial exploitation of quarry substances shall open and provision a fiduciary account either at the Central Bank of West African States (CBWAS) (BCEAO) or in any commercial bank in Burkina Faso in order to secure the environment protection and rehabilitation programme costs.27

The rehabilitation programme and its estimated rehabilitation costs is submitted each year to a technical committee formed by the Minister of Mines, the Minister of Environment and the relevant local authorities.

At least one year before the end of the exploitation works, the title holder submits its closure plan and the estimated closure and decommissioning costs to the technical committee mentioned above.

At the end of exploitation, the licence or authorisation holders must carry out the rehabilitation works on the mining sites in order to be given a discharge that releases them

23 Article 169 of Mining Code.
24 Article 15 of the Mining Code.
25 Article 35 of the Mining Code.
26 Article 50 of the Mining Code.
27 Article 141 of the Mining Code.
from their obligations. If the holder of the licence or authorisation fails to perform its rehabilitation obligations, the state can dispose of the necessary amounts to undertake the rehabilitation works of the mining site.28

IV ENVIRONMENTAL AND SOCIAL CONSIDERATION

i Environmental, health and safety regulations

The Mining Code and regulations contain general provisions that regulate the environmental, health and safety aspects of mining activities but the environmental aspects are more specifically regulated by the Environmental Code and its implementing regulations.

In addition, any applicant for a mining title, except for exploration licences or authorisation for quarries, is required to undertake an environmental impact study (along with a public survey and an environmental management and mitigation plan).

Environmental compliance

Mining activity shall be undertaken in respect of all applicable national mining laws and comply with environment and safety regulations.29

The industrial exploitation licence and semi-mechanised exploitation licence of mineral substances are also granted following the advice of the Minister of Environment based on the social and environmental impact study.30

For the exploration and exploitation of radioactive ores, the mining title and authorisation holders are submitted to specific regulations relating to environment radiological monitoring.31

There is no specific environmental licence mentioned in the Mining Code but the environmental impact study and the advice of the Minister of Environment are key to obtaining an exploitation licence.

Each mining title or authorisation may be withdrawn without any compensation by the mining administration after a formal notice has remained unsuccessful for 60 days in the case of non-compliance with the obligations set out in the environmental and social impact study.32

Third-party rights

Local populations have the right to take part in the process of decision, elaboration and implementation of programmes that have an impact on the environment. They also have the right to use natural resources and may indirectly benefit from the profits of exploitation of mineral substances.33

The public authorities shall take the necessary actions to satisfy the essential needs of the population in order to prevent problems that may be prejudicial to the environment.34

29 Article 139 of the Mining Code.
30 Article 56 of the Mining Code.
31 Article 140 of Mining Code.
32 Article 112 of the Mining Code.
33 Article 8 of Law No. 006-2013/AN relating to the Environment Code in Burkina Faso.
34 Article 87 of Law No. 006-2013/AN relating to the Environment Code in Burkina Faso.
The mining title and authorisation holders undertaking mining activities shall also be bound to respect the human rights of the affected communities.\textsuperscript{35}

The occupancy of lands by the title holders confers on the landowner or occupiers the right to fair and prior compensation.\textsuperscript{36}

\textbf{Local development/mining funds}

It should also be noted that the Mining Code has created funds that may require a contribution from the holders of mining titles, including:

\begin{itemize}
\item \textit{a} a local mining development fund, financed by the state (15 per cent of the collected proportional royalties) and by a contribution of the licence holders equal to 1 per cent of their turnover before tax;
\item \textit{b} a rehabilitation and closure fund;
\item \textit{c} a rehabilitation and securement fund in relation to artisanal mining sites and fight against the use of prohibited chemical products; and
\item \textit{d} a fund for the financing of the geological and mining research and support to the training of earth sciences.
\end{itemize}

\textbf{Additional considerations}

A mining title may be withdrawn on the grounds of non-compliance with the environmental and social impact study.

\section{OPERATIONS, PROCESSING AND SALE OF MINERALS}

\textbf{i Processing and operations}

The processing of mineral substances is subject to a specific administrative authorisation of the mining administration (which does not imply the granting of the mining title).\textsuperscript{37}

Any individual or legal entity undertaking on a usual basis processing operations of mineral substances is required to make a biannual declaration to the Minister of Mines.\textsuperscript{38}

\textbf{Use of foreign labour and services}

\textbf{Use of foreign labour}

The Mining Code provides that the holders of mining titles, as well as their suppliers and subcontractors, must give priority to employing, of equal qualification and irrespective of their gender, Burkinabe executives having the skills required for the effective conduct of mining operations.\textsuperscript{39}

The company shall submit a training plan of local executives to the mining administration in order to replace gradually the expatriated staff. The employment contracts of foreign employees shall also be covered by labour administration.\textsuperscript{40}

\textsuperscript{35} Article 20 of the Mining Code.
\textsuperscript{36} Article 123 of the Mining Code.
\textsuperscript{37} Article 11 of the Mining Code.
\textsuperscript{38} Article 172 of the Mining Code.
\textsuperscript{39} Article 101 of the Mining Code.
\textsuperscript{40} Article 102 of the Mining Code.
Use of foreign services
The mining title holders and the beneficiaries of authorisation and their subcontractors shall give priority to local companies for any contract for the supply of goods and services at equivalent conditions of price, quality and time.\textsuperscript{41}

Sale, import and export of extracted or processed minerals
Any individual or legal entity taking part on a usual basis to the operations of buying, sale, importation or exportation of minerals is required to make a biannual declaration to the Minister of Mines. The sale of minerals, in particular, is subject to an administrative authorisation of the mining administration.\textsuperscript{42}

Pursuant to the WAEMU Regulation No. 09/2010/CM, the importation and exportation of gold from or to foreign countries are subject to the prior authorisation the Minister of Finances.\textsuperscript{43} Note that repatriation requirements also apply (see below).

Foreign investment
Exchange control regulations apply in Burkina Faso, in particular the WAEMU Regulation No. 09/2010/CM/ on external financial relations of Member States of the WAEMU.

Subject to compliance with foreign exchange regulations foreign investors have the right to transfer, in the currency used at the time of the investment, profits, all types of proceeds from the invested capital, proceeds from liquidation or realisation of their assets and salaries.

Within the CFA Franc zone the transfer of funds is free. There are no exchange controls between Burkina Faso and the other countries that belong to the CFA Franc zone.

In line with WAEMU regulations, most financial operations must be performed through authorised (locally licensed) intermediary banks. Specific authorisations must be obtained to open offshore accounts or onshore foreign currency accounts.

In addition, pursuant to the WAEMU regulations, onshore and offshore accounts in foreign currency held by Burkinabe entities are subject to an approval of the Minister of Finance (acting with the prior consent of the Central Bank of the West African States. In practice, the opening of offshore or onshore accounts in a foreign currency may prove difficult.

All revenues from the sale of minerals must be repatriated to Burkina Faso\textsuperscript{44} within one month of the due date of payment, which in turn must occur within 120 days of the date of shipment.

Subject to compliance with the above WAEMU regulations, there are specific protections of foreign investment beneficial to the mining title or authorisation holder during the validity period of the title or authorisation, such as:

\begin{enumerate}
  \item the right to transfer abroad the funds intended for the repayment of debts contracted abroad and for the payment of foreign suppliers;
\end{enumerate}

\textsuperscript{41} Article 101 of the Mining Code.
\textsuperscript{42} Article 11 of the Mining Code.
\textsuperscript{43} Article 9 of the WAEMU Regulation No. 09/2010/CM/ of 1 October 2010 on external financial relations of members States of the WAEMU.
\textsuperscript{44} Article 176 of the Mining Code.
the right to transfer abroad the dividends and income from invested capital and the
proceeds of the liquidation or the market value of its asset; and

the right to free access to currencies at market rates.45

VI CHARGES

Article 143 et seq. of the Mining Code set out specific taxes and duties to be paid by mining
title and authorisation holders, which includes the payment of fixed and proportional
duties. Fixed duties are paid prior to the issuance, renewal, transfer, farm-out transaction,
extension of mining titles or authorisation and amendment of development and exploitation
plan of mines and quarry substances and are specified by the Decree No. 2017-023 dated
23 January 2017 relating to mining royalties and taxes.46

The fixed duties include duties on quarry substances, and duties on mining substances.
These are generally of nominal value.

i Royalties

The proportional duties are specified by the Decree No. 2017-023 dated 23 January 2017
relating to mining royalties and taxes, and include:

A surface tax, to be paid annually by any title or authorisation holder, based on the
occupied land area and the duration of the title or authorisation; for example, the surface tax
for industrial exploitation licences (large scale mines) (other than for uranium) is as follows:

a five initial years: FCFA 7,500,000/square kilometre per year;
b six to 10 years: FCFA 10,000,000/square kilometre per year; and
c from the 11th year: 15,000,000/square kilometre per year.

Proportional royalties related to the value of extracted or sold products are based on the value
and nature of the extracted products.47

For example, the proportional royalties for industrial exploitation licences (large-scale
mines) are calculated as a percentage of the turnover of the sold product that has been
extracted:

a 8 per cent for uranium;
b 7 per cent for diamonds and other precious stones;
c 3 per cent to 5 per cent for gold depending on the market price fixed by the London
Metal Exchange (3 per cent if the gold price is less than US$1,000, 4 per cent if the
gold price is between US$1,000 and US$1,300 and 5 per cent if the gold price exceeds
US$1,300);
d 4 per cent for other precious metals; and
e 3 per cent for base metals and other mineral substances.

ii Taxes

Mining titles holders benefit from a specific tax regime at the exploration and exploitation
phases.

45 Article 174 of the Mining Code.
46 Article 9 to 11 of the Decree No. 2017-023 dated 23 January 2017 relating to mining royalties and taxes.
47 Article 146 of the Mining Code.
**Burkina Faso**

**Exploration phase**

Mining title holders are exempted during the exploration phase from paying VAT on importation and acquisition of goods required to carry out the geological or mining activities except for certain goods.

Mining title holders also benefit from an exemption on:
- industrial, business, agricultural profit or corporate tax;
- minimum flat-rate perception tax;
- contribution of business licensing tax;
- tax instalments;
- apprenticeship tax; and
- registration fees of capital increase.

**Exploitation preparatory works**

The exploitation licences or authorisations of exploitation of quarry holders are exempted from the payment of VAT as specified by Article 154 of the Mining Code when:
- the preparatory works are carried out by the licence or authorisation holder; and
- the construction of the mine is subject to a turnkey contract.

These exemptions shall not exceed two years for mines but may be extended to one additional year if the investments represent more than 50 per cent of the projected investments.\(^ {48}\)

The benefit of the exemptions shall end from the date of the first commercial production.

**Exploitation phase**

The exploitation licence holders are subject to the payment of:
- tax on profits on a standard basis; and
- tax on the securities income at a rate of 6.25 per cent.

Any exploitation licence holder benefits from a tax exemption for seven years on:\(^ {49}\)
- minimum flat-rate perception;
- contribution of business licensing tax;
- apprenticeship tax; and
- Mortmain tax (taxe de biens de mainmorte).

However, for exploitation licences which term is under 14 years, the exemption period shall not exceed half of the planned term.

These exemptions start from the date of the first commercial sale.

**iii Duties**

During the exploration phase, any importation of equipment intended for exploration activities is subject to the payment of the following duties or charge\(^ {50}\) based on its value:
- a custom duty of 5 per cent;
- a statistical charge of 1 per cent;

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\(^ {48}\) Article 157 of the Mining Code.

\(^ {49}\) Article 162 of the Mining Code.

\(^ {50}\) Article 149 of the Mining Code.
c a community solidarity levy of 1 per cent;
d a community levy of 0.5 per cent; and
e any other community levy.

Such taxation is also applicable to spare parts of the imported machines and equipment which value may not exceed 30 per cent of the CIF import value of the machines and equipment imported.

Exploration title holders benefit from the temporary admission regime for the imported materials, professional equipment and machines intended for exploration activities.\(^{51}\)

During the exploitation preparatory works period of three years, the industrial exploitation licence holders are exempted from the payment of duties for the importation of equipment intended for the production of energy and for the operation of special vehicles.\(^{52}\)

As regards importation of exploitation equipment, from the date of its first commercial production, each industrial exploitation licence holder is subject to the payment of the same duties as for the exploration phase (see above) for importation of equipment intended for the production of energy and for the operation of special vehicles.\(^{53}\)

The advantages granted during the exploitation phase to the mining title holder also benefits its subcontractors.

iv Other fees

The issuances, renewals, extensions and transfers of mining title are subject to the payment of registration fees. Article 107 of the Mining Code provides that a capital gains tax of 20 per cent is applicable on the transfer or assignment of the rights and obligations attached to mining titles.

VII OUTLOOK AND TRENDS

There is a very positive trend for mining projects in Burkina Faso, in particular for gold, supported by a sophisticated mining legal regime and a stable business environment.

Eleven gold mines have been built in the past 10 years and a number of new projects are in the phase of development or production. 1.4 million ounces of gold were produced in Burkina Faso in 2016, representing an increase of 1,300 per cent over 10 years.

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51 Article 151 of the Mining Code.
52 Article 155 of the Mining Code.
53 Article 164 of the Mining Code.
I OVERVIEW

Canada is a constitutional monarchy with a Westminster-style parliamentary democracy. Canada is also a federal state in which legislative authority is constitutionally divided between the federal government of Canada and the provincial governments of Canada’s 10 provinces. The federal government and the provinces are sovereign within their respective spheres of competence. Canada also has three sparsely populated northern territories, but they do not enjoy independent constitutional status and derive their powers from Canada’s federal government. Legislative powers, including those regarding certain mining matters, may be transferred by the federal government to its territories through a process known as ‘devolution’. The devolution process as to mining matters is complete in connection with Yukon and the Northwest Territories, and continues in connection with Nunavut. The provinces delegate certain powers to cities and other municipalities, effectively creating a third level of government.

i Division of powers

The constitutional division of powers in Canada is complex, but as a general rule the federal government has jurisdiction over matters of national and international importance, while the provinces have jurisdiction over matters of local importance. For example, the federal government has authority over trade and commerce, while the provinces have authority over property law, land use and planning and contract law.

ii Legal systems

Two distinct legal systems exist in Canada. With the exception of Quebec, the provinces and the territories are common law jurisdictions that follow the Anglo-American tradition. In the largely French-speaking province of Quebec, private law, including property and contract law, is civil and conceptually similar to that of France and other continental European countries.

iii Mining

Generally stated, the governments of Canada, the provinces and the territories are favourably disposed to mining and provide a comparatively stable and well-developed legal framework for mining.

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II  LEGAL FRAMEWORK

Jurisdiction over mining in Canada is shared between the federal government of Canada and the provincial governments of the 10 provinces.

Except for uranium, each province has exclusive power over mineral exploration, development, conservation and management within its territory irrespective of who is the owner of the land or minerals. For example, on federal lands situated within a province, while federal law continues to apply to such lands, it is provincial law that applies to the exploration and development of minerals.

The governments of Canada and the provinces share jurisdiction over a number of areas, including the environment and taxation.

Finally, the federal government of Canada has exclusive jurisdiction over some matters that indirectly affect mining, such as foreign investment and export controls. The federal government also has exclusive power over mineral exploration, development, conservation and management within the three territories, although much of this power has been devolved to the territorial administrations.

Laws directly relating to mining deal with property and land-use planning, mining rights, the regulation of mining activities, taxation and the environment.

The governments of Canada, the provinces and the territories have each enacted laws relating to mining, effectively creating multiple distinct regimes. While little conscious effort has been made at standardisation, these regimes have many common features and as a result provide a relatively consistent legal approach to mining.

III  MINING RIGHTS AND REQUIRED LICENCES AND PERMITS

i  Title (ownership)

In Canada, lands and minerals that have not been sold or otherwise granted are owned, subject to aboriginal title, by the Crown (i.e., the federal or provincial governments acting in the name of Her Majesty the Queen).

Until the early twentieth century, governments in Canada when granting land to private parties would often also grant the ownership of minerals under such lands. Governments have stopped this practice and have since retained the ownership of minerals. The only exception is the grant of minerals made in recent decades as part of some aboriginal land claim settlements.

This means in practice that, except in the limited instances of private ownership resulting from land grants or aboriginal ownership resulting from recent land claim settlements:

a  each province owns the minerals located within its territory provided that such minerals are not otherwise owned by the government of Canada; and

b  Canada owns all minerals under federal lands located in the 10 provinces and three territories, as well as offshore.

ii  Surface and mining rights

In those instances where land ownership does not confer ownership of the underlying minerals (the vast majority of cases), one person may hold surface rights (e.g., ownership of land) while another may hold mining rights (e.g., the right to prospect, explore or carry out extractive and processing activities).
In such cases, the rights and interests of the holder of the surface rights may conflict with those of the holder of the mining rights. Mining legislation in each province or territory, as supplemented by the relevant property law, deals with such conflicts.

As a general rule, the exercise of mining rights may not materially interfere with the use and enjoyment of surface rights. When they do interfere, the surface rights holder must be adequately compensated. In those instances where financial compensation is not an adequate remedy and the surface rights holder is a private party, most Canadian jurisdictions provide for the holder of the mining rights to acquire the surface rights.

Mining rights in Canada fall into two broad categories, namely ‘claims’ or exploration licences, and mining leases. A claim or exploration licence grants its holder the exclusive right for a limited period to carry out exploration work within a designated area. Exploration work may include overburden removal, exploratory drilling and test ore extraction and milling. A mining lease allows its holder to carry out extractive and processing activities on a commercial scale.

There are two systems for acquiring mining rights in Canada, the ‘free-entry’ system and the ‘Crown discretion’ system. The former is the prevalent system and is in force in all provinces and territories with the exception of Alberta, Nova Scotia and Prince Edward Island, which use the Crown discretion system.

Under the free-entry system, persons interested in carrying out exploration work may designate or ‘claim’ on a first come, first served basis those areas where they wish to carry out the work. Such designation will be recognised provided that certain formalities are met and, most importantly, provided that the area is not already subject to another person’s similar claim or exploration permit, or is otherwise off limits to mining (e.g., the area is located within a national park). A claim also entitles its holder to the right to obtain a mining lease. Such right is not subject to governmental discretion if all of the conditions precedent to issuance have been met.

Under the Crown discretion system, persons interested in carrying out exploration work must apply to the authorities for the requisite authorisation and the authorities have discretion (within limits) to approve or decline the application. Although generally a free-entry jurisdiction, in Quebec authorities have the discretion to refuse applications for sand and gravel mining leases for reasons of public interest.

### Additional permits and licences

Various permits and licences are required at every stage of the mining cycle, and are too numerous to comprehensively list here. However, they include:

- prospecing permits or licences required in most provinces prior to commencing prospecting work; and
- environmental permits and licences, as well as surface rights permits and licences necessary to carry out exploration work (particularly if such work is accompanied by extensive surface disturbance) or extractive and processing activities under mining leases.

### Closure and remediation of mining projects

Most provinces require a closure and rehabilitation plan to be filed prior to commencing mining activities, including in some cases prior to commencing exploration work. Financial guarantees are also required to cover all or a substantial part of the plan’s costs. In addition, annual reporting and periodic plan updates may be required.
IV ENVIRONMENTAL AND SOCIAL CONSIDERATIONS

i Environmental, health and safety regulations
The federal government and the provinces each have jurisdiction over environmental matters. The provinces have the broader jurisdiction by virtue of their general constitutional power to legislate over mineral exploration, development, conservation and management. The federal jurisdiction covers discrete matters falling within federal powers, including matters relating to navigable waters, fisheries, migratory birds, species at risk and the transportation of dangerous goods. Some provinces have entered into agreements with the federal government to provide for environmental cooperation in an attempt to avoid unnecessary duplications, delays and costs.

The regulatory regimes of the governments of Canada and the provinces are broadly similar and comprise environmental assessment and review procedures to evaluate the environmental, economic, social and cultural impacts of new mining projects, including their infrastructure, prohibitions on releases into the environment (air, water and soil), licence and permit requirements, spill-reporting and clean-up requirements, environmental emergency preparedness, ministerial powers to issue orders and statutory offences.

Environmental assessment legislation, depending on the size and scope of the project proposed, can require the proponent to produce an environmental impact statement describing the project, analysing the project’s likely effects on the environment, suggesting mitigating measures where mitigation is possible and describing residual adverse effects where it is not. Projects that could have significant adverse environmental impacts are usually submitted to an administrative agency for a structured review that may lead to the issuance of guidelines or general or specific directions. Major projects are also generally subject to public review by an independent board or panel, which may produce recommendations or a final decision.

Health and safety issues are addressed through occupational health and safety legislation as well as specific legislation for certain types of mining (e.g., coal or uranium mining). Directors and officers have a duty to take all reasonable care to ensure that the corporation complies with applicable health and safety laws, and can be held personally liable.

ii Environmental compliance
Directors and officers may be held personally liable for the environmental consequences of a corporation's activities, particularly where the director is an inside director (that is, an officer or employee of the corporation or a major shareholder). Secured lenders who take no action to control or realise on security are generally not liable for their borrower's environmental failures.

iii Third-party rights
The Constitution Act 1982 recognises and affirms the existing aboriginal and treaty rights of the aboriginal peoples of Canada, which include the First Nations (Indian), Inuit and Metis people of Canada. In furtherance of such recognition and affirmation, Canadian courts have imposed on the federal and provincial governments a general duty to consult any aboriginal group whose aboriginal and treaty rights may be affected by a governmental decision, including the grant of permits or licences relating to mining activity. The duty to consult ‘arises when the Crown has knowledge, real or constructive, of the potential existence of the aboriginal right or title and contemplates conduct that might adversely affect it’.
Aboriginal rights are communally held rights to use lands and resources in a manner consistent with ancestral uses of such lands and resources. These rights may not be sold or otherwise alienated by the aboriginal group to any person other than the federal government. Aboriginal rights confer exclusive use of the land and resources with respect to the traditional uses. For example, if an aboriginal group has an aboriginal right to hunt on certain land, then it has an exclusive right to continue to do so on such land. Aboriginal title confers an exclusive right to control the land, subject to certain qualifications, including an inability to alienate the land, except to the Crown, or to develop or misuse the land ‘in a way that would substantially deprive future generations of the benefit of the land’.

Courts have determined that the federal and provincial governments can infringe on aboriginal rights but there must be a compelling reason to do so, and a mine may be a sufficiently compelling reason. However, before a government infringes on an aboriginal right it must consult with the affected aboriginal group and, through such consultation, mitigate any negative impact. The duty to consult is proportionate to the strength of the case supporting aboriginal right or title, and may be satisfied if there has been a reasonable and good-faith effort made to consult and reach agreement. The courts have made it clear, however, that the duty to consult does not impose an obligation to reach agreement. No party has a veto and both parties must act in good faith.

Although the duty to consult is imposed only on governments, it is now normal behaviour for a mine proponent to be a participant in the process. In some cases (e.g., Alberta through its land management and resource development consultation policy and guidelines), the private party is required to directly interact with the relevant aboriginal group, but in most cases the private party will want to be involved in order to mitigate the risk of a legal challenge by an aboriginal group and the adverse effect that such a challenge could have on a project. Certain provinces, including Ontario and Quebec, have implemented amendments to mining legislation that either incorporate the duty to consult in mining legislation, or specifically recognise that the mining legislation is to be interpreted in a manner compatible with the duty to consult aboriginal groups.

The best mitigant to any challenge by an aboriginal group is the impact benefit agreement. This agreement is negotiated between an aboriginal group and a mine proponent. It is a private contract, which typically provides that, in exchange for support for the project, access to the mine site and local knowledge (among other things), the mine proponent will, for example, employ and train members of the community, hire local subcontractors, fund education and vocational training, pay compensation, open its capital to community investment and follow certain environmental practices. The impact benefit agreement is typically preceded by a pre-development agreement, which essentially governs the period prior to construction and commercial production. In light of a recent Supreme Court of Canada decision regarding aboriginal title, obtaining the consent or agreement of affected aboriginal groups through private agreements is now more important than ever.

In 2014, aboriginal title over specific areas of land was confirmed by the Supreme Court of Canada for the first time. While confirming that the duty to consult and accommodate prior to aboriginal title being established is a spectrum depending on the strength of the claim and the seriousness of the potential infringement, the court concluded that, once an aboriginal group’s title to land has been established, anyone seeking to use the land must obtain the consent of the aboriginal group. If such consent is not obtained, the government can only encroach on aboriginal title in narrow circumstances. The government must be able to demonstrate that: (1) it has fulfilled its duty to consult with the affected aboriginal group.
and, through such consultation, mitigate any negative impact; (2) there is a compelling and substantial objective; and (3) the use is consistent with the Crown's fiduciary obligation to the aboriginal group. Accordingly, in areas where First Nations have established aboriginal title, the consent of relevant First Nations will generally be required and obtaining such consent is advisable for mining operations located in areas in respect of which aboriginal title is claimed although not yet established.

iv Additional considerations

Exceptionally, the federal government has extensive jurisdiction over the mining of uranium. The source of the federal government's power is its constitutional power to make laws for Canada's 'peace, order and good government'. An independent federal regulatory agency, the Canadian Nuclear Safety Commission (CNSC), regulates the use of nuclear energy and materials, and implements Canada's non-proliferation obligations. CNSC licences are required for each phase in the life cycle of a uranium mine: site preparation and construction, operations, decommissioning and abandonment. The licensing process is comprehensive, and no licence will be issued unless the CNSC is satisfied that the mine proponent is able to protect health, safety, security and the environment, and to satisfy Canada's international non-proliferation obligations.

Federal legislation requires mining companies (among others) to publicly disclose, on an annual basis, certain payments to governments, both domestic and international, including aboriginal entities. Reportable payments include taxes (other than consumption taxes and personal income taxes), royalties, fees, production entitlements and infrastructure improvement payments that exceed the amount prescribed by regulation or, if no amount is prescribed, C$100,000. The legislation applies to any mining company that: (1) is listed on a Canadian stock exchange; or (2) has a place of business, does business or has assets in Canada and meets two of the three thresholds relating to assets, revenue and number of employees. In Quebec there is similar legislation at the provincial level, although with a domestic focus.

V OPERATIONS, PROCESSING AND SALE OF MINERALS

i Processing and operations

Mining operations and mineral processing within Canada are subject to comprehensive legal regimes designed to protect health, safety and the environment. These regimes have numerous permitting, licensing and continuous compliance requirements. While increased processing of minerals in Canada is a stated objective of most governments in Canada, governments have rarely imposed secondary or tertiary processing obligations on mine operators.

ii Sale, import and export of extracted or processed minerals

The government of Canada has the constitutional power to regulate international trade and commerce. Canada favours international trade, including in natural resources, and is reluctant to impede the free flow of goods. While Canada has an import and export control regime in place, anchored by the Export and Permits Act, this regime serves primarily to satisfy Canada's international obligations and interests, including nuclear non-proliferation and sanctions imposed by the United Nations.
iii Foreign investment

The Investment Canada Act

The direct acquisition of control of a Canadian mining business by a WTO investor that is not a state-owned enterprise (SOE) would be reviewable under the Investment Canada Act (ICA) if the enterprise value of the investment is above a certain threshold. In June 2017, this threshold was set at C$1 billion. Starting in 2019, the threshold will be adjusted annually according to a formula based on the change in Canada’s nominal gross domestic product. As part of the implementation of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union, the threshold for review is expected to be increased to C$1.5 billion in enterprise value for non-state owned enterprises from CETA and other trade agreement investors.

The review threshold for the direct acquisition of control of a Canadian business by a WTO SOE is based on the book value of the assets of the target (C$379 million in 2017). The thresholds for direct and indirect acquisitions where neither the investor nor the persons who control the vendor are from WTO countries are also based on the book value of the target’s assets but are considerably lower (C$5 million and C$50 million, respectively). Indirect acquisitions of control of a mining business by or from WTO investors are exempt from review.

The relevant test for approval under the ICA is whether the acquisition is of ‘net benefit to Canada’, taking into account a number of factors, including the impact on employment, capital expenditures, technological development and the level of resource processing in Canada. The approval of the Industry Minister under the ICA is often conditional upon the foreign investor’s entering into binding undertakings with the federal government of Canada (usually in force for three to five years) in which the investor commits to maintaining one or more of Canadian head office operations, production levels, participation of Canadians in management, employment levels, research and development expenditures and capital expenditures with respect to the Canadian business. Uranium mining is subject to special rules. The basic policy of the government of Canada is to ensure a minimum level of Canadian ownership of 51 per cent in uranium mining, although lower levels of Canadian ownership are acceptable if there is de facto Canadian control or no Canadian partners can be found.

Reviewable investments by SOEs are subject to guidelines that essentially require the SOE investor to have a commercial orientation and to meet Canadian-equivalent corporate governance standards.

Of particular significance in the natural resources sector is the fact that the ICA may apply to a target business that does not have a strong connection to Canada. For example, if the target business is a mining company with a head office in Canada that generates all of its revenue outside Canada, its acquisition may still be considered an acquisition of a ‘Canadian business’ subject to ICA notification or review.

In addition to the foregoing investment review, the ICA provides for a ‘national security’ review process for the establishment of a new business, the acquisition of control of a Canadian business (irrespective of the value of its assets), a minority (non-controlling) investment in a Canadian business and, in addition, the acquisition of an entity with some Canadian operations. If the Minister of Industry has reasonable grounds to believe such establishment, acquisition or investment may be ‘injurious to national security’, the Federal Cabinet has broad remedial powers, including ordering that the investment not be implemented, requiring the investor to provide undertakings, and compelling divestiture of a completed transaction.
The ICA regulations

The ICA regulations do not specifically identify business sectors or activities that raise national security concerns, nor do they identify factors to be considered by the government in assessing whether an investment may be injurious to national security. This is further complicated by the broad application a national security review may have, catching not just large transactions, but also smaller transactions that fall below the monetary threshold for general review, minority investments that do not constitute an acquisition of control and transactions where the target may not have a significant Canadian presence.

Moreover, there is no formal pre-clearance mechanism. Despite this, for transactions that are notifiable or reviewable under the general investment process, early filing of a notification or application for review will trigger a 45-day period during which the Minister is required to issue a notice of review or possible review. In the absence of receiving such notice, foreign investors can assume that no national security review will occur. However, in the case of a minority (non-control) investment, the national security regulations provide that the Canadian government has until 45 days after the closing of the transaction to advise that the investment may be subject to a national security review. This means that the government is not required to provide guidance prior to closing, raising the possibility of a divestiture order in the event a national security concern is identified.

The government has signalled that the purpose of the national security mechanism is to ‘ensure that Canada’s sovereignty is not threatened’ and that it should not be ‘mistaken as a form of protectionism’. There are good reasons, including Canada’s desire to attract foreign investment and not to provoke restrictions on Canadian investment abroad, to believe that national security will not be expansively interpreted. Nevertheless, foreign investors will no doubt be monitoring future investments with interest.

The Competition Act

The Competition Act (Canada) provides for the pre-notification of larger transactions, namely acquisitions where the following thresholds are exceeded:

- **a** the ‘size of the parties’ threshold, where the parties to the transaction, together with their respective affiliates, have assets in Canada, or gross revenues from sales in, from or into Canada, the book value of which exceeds C$400 million;
- **b** the ‘size of the transaction’ threshold, where the book value of the assets in Canada being acquired, or the gross annual revenue from sales in or from such assets, exceeds C$88 million; and
- **c** shareholding thresholds in respect of the acquisition of voting shares in a corporation or of interests in non-corporate entities.

The parties to a notifiable transaction must make a statutory filing and wait for the required statutory waiting period prior to closing (unless an advanced ruling certificate or waiver is received). For transactions that raise potentially significant competition concerns, the Competition Bureau may, within 30 days of receiving the parties’ statutory filing, issue a ‘second request’ for additional information. Issuing a second request has the effect of extending the statutory waiting period until 30 days after the parties have provided all the information specified and have certified compliance with the second request; however, for transactions that do not raise material competition concerns, the Competition Bureau will continue to provide comfort to merging parties either in the form of an advance ruling certificate or a ‘no-action’ letter along with a waiver of the pre-notification filing. In such
situations, the parties may choose to not make a statutory filing but instead to file only a ‘competitive impact brief’ explaining the competitive impact of the transaction, in which they would seek an advance ruling certificate or a ‘no-action’ letter.

VI CHARGES

i Royalties
All provinces and territories (with the exception of Prince Edward Island) impose mining taxes or royalties. However, there are significant differences among the provinces and territories. The differences include the calculation methodology, the applicable rate or rates and the minerals subject to the mining taxes. There are few mining taxes or royalties based solely on production or extraction. Most mining taxes or royalties are calculated on a net smelter return, net mine profit or some other net mine proceeds basis where some but not all costs (e.g., financing expenses) are taken into account. Mining taxes and royalties are most often deductible for income tax calculation purposes.

ii Taxes
The federal and provincial governments levy income tax. Residents of Canada are subject to income tax on their worldwide income. Subject to treaty relief, non-residents of Canada are subject to withholding tax on Canadian-sourced passive income (e.g., interest, dividends), and income tax on Canadian-sourced business income and capital gains. Income is determined each year on an accrual basis. Provincial corporate income tax is calculated in a manner similar to federal income tax (with some province-specific variations), but at lower rates that vary from 10 to 16 per cent depending on the province.

Mining exploration is fraught with risk and mining production is capital-intensive. To compensate for this, the Canadian tax system has adopted a number of measures designed to provide tax relief and encourage mining activity, including:

a favourable deduction of Canadian exploration expenses and Canadian development expenses;
b accelerated depreciation for certain types of tangible property;
c tax credits for certain intangible property expenses;
d 20-year operating loss carry-forward period;
e indefinite carry-forward for capital losses; and
f flow-through share mechanisms that allow corporations to pass along exploration and development expenses deductions to their shareholders.

iii Other fees
In addition to administrative fees levied pursuant to mining legislation, mining activities in Canada are generally subject to the same taxes applicable to other businesses. These will include federal and provincial payroll taxes, custom duties on the importation of machinery, equipment and ores and concentrates, land transfer taxes, the federal goods and service and provincial sales taxes, and regional and municipal property taxes.
VII  OUTLOOK AND TRENDS

Canada is a stable democracy with a well-established rule of law and good infrastructure. It is extraordinarily well endowed with natural resources. It is also a relatively high-cost jurisdiction. While foreign investment in the Canadian mining sector has been affected by the recent global downturn in commodity prices, this has been offset to some extent by the decline in the strength of the Canadian dollar and Canada continues to attract strong interest from foreign investors.

Investment, including foreign investment, in the resources sector is an important aspect of the Canadian economy. Historically, the principal challenges for mining operations in Canada have included obtaining environmental and other approvals, and a lack of infrastructure, particularly in the remote northern regions. Trends being observed in Canada include the desire of Canada’s federal government and several provincial governments to ensure that environmental impact assessments and other regulatory process are finite, and cannot be needlessly delayed by third-party challenges. The view is that there is sufficient knowledge and experience to mitigate most (if not all) risks posed by mining and infrastructure development, and that the process is being abused, thus needlessly increasing project costs and delaying development. In other words, governments across Canada view natural resource development as being positive, provided that it has the support of local populations; it is compliant with all laws, particularly environmental laws; and it is financially beneficial to the province or territory wherein it is located. This represents a considerable change from the situation of 10 to 20 years ago, particularly in central and eastern Canada.

In order to tap into demand for minerals, Quebec and Ontario have each announced plans to develop their northern regions. Both plans will require considerable infrastructural investment. The intent in both provinces is to develop infrastructure using public–private partnerships and other schemes in which the private sector shares the burden. While the plans have many features in common (e.g., consultation with local populations, including First Nations and Inuit, creation of very large protected areas and rational land-use planning), the Ontario plan appears at first glance less centralised than the Quebec one.

Under the Ontario plan, the First Nations appear to have a greater advisory role. Among other things, they will be asked to provide their perspectives on protection and conservation for the purpose of land-use planning, and will be directly involved in the implementation of land-use planning.

Quebec’s updated plan for the economic development of its vast northern territory (i.e., all of Quebec north of the 49th parallel) was unveiled in 2015. The updated plan places considerable emphasis on how infrastructure and economic development must benefit and meaningfully involve local populations. The Quebec government has earmarked almost C$2 billion to be spent over the first five years of the plan (2015–2020) to improve access to, and telecommunications within, the northern territory and increase environmental knowledge in a manner that benefits communities, First Nations and mining and forestry companies.
Chapter 5

CHILE

Marcelo Olivares

I OVERVIEW

Chile is one of the few countries in the world that holds vast mineral wealth. Since 1940 it has constituted the national economy’s largest export product. Today, it represents 10 per cent of GDP and it is the main economic activity in five of its 15 regions. Chile is the world’s largest copper producer, accounting for 30 per cent of the world’s production; it is also the world’s largest producer of natural nitrates, iodine and lithium. Such indicators make Chile a highly attractive destination for foreign investment – the mining industry actually accounts for 45.4 per cent of the total foreign investment.

Such circumstances require a constant review and implementation of standards to further optimise the aforementioned figures. This is why, for example, the state is implementing a new energy policy, taking into consideration that for several mining companies, energy accounts for about 20 per cent of their direct costs. Another long-term energy policy objective, proposed by the Ministry of Energy, is to become one of the three countries in the Organisation for Economic Co-operation and Development that has the lowest prices in electricity supply for residential and industrial sectors by the year 2035. In terms of world-class qualified suppliers for the industry, Chile is focusing its efforts in those regions where mining is the main economic activity, adding a skills certification system to allow technicians to cover the industry’s demands. It is constantly promoting partnership and collaboration among all the parties involved in the mining industry to ensure favorable scenarios for suppliers and increase the market of mining services, both on a national and international scale. Through the Production Development Corporation, Chile has created new programmes with the collaboration of business enhancers for the development of start-ups related to technology and platforms that serve the mining industry. Also, to promote the venture market, the Santiago Stock Exchange has completed an agreement with TSX Venture Exchange to promote capital investment for both exploration and exploitation through a double listing procedure that allows listed Canadian companies to be automatically listed on the Santiago Stock Exchange to raise capital for their projects.

In terms of foreign investment, there are different mechanisms under which a foreign investor can inject foreign currency for a specific project, with alternative mechanisms that allow the investor to participate in the formal exchange market.

In terms of mineral rights, any local or foreign person, whether natural or juridical, can acquire or apply for mining concessions; in order to carry out mining activities and

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operations, however, as a result of legal responsibilities, the owners of such concessions must have a company incorporated in Chile, which can be a subsidiary of the parent company duly integrated into the country.

II LEGAL FRAMEWORK

The system of mining property in Chile is mainly regulated by the following laws:

\[ \begin{align*}
a & \quad \text{The Constitution of the Republic of Chile, Article 19, No. 24, subparagraphs 6 to 10 (CRC);} \\
b & \quad \text{Organic Constitutional Law No. 18.097 on Mining Concessions (from 21 January 1982) (OCL);} \\
c & \quad \text{Mining Code (Law No. 18.248, from 14 October 1983) (MC);} \quad \text{and} \\
d & \quad \text{of the Mining Code Regulation (from 27 February 1987).}
\end{align*} \]

The main authorities regarding the mining industry are the Ministry of Mining represented by regional ministerial secretaries throughout the country, and the National Service of Geology and Mining (Sernageomin), which is a decentralised entity with legal personality, aiming to advise the Ministry of Mining and contribute to governmental programmes for the development of mining and geological politics. Its main mission consists in the decentralised execution of politics for the regulation and control of a safe, sustainable, competitive and inclusive mining industry and in the creation of geological information about the national territory, in order to provide geological support.

III MINING RIGHTS AND REQUIRED LICENCES AND PERMITS

\[ \begin{align*}
i & \quad \text{Title} \\
\text{In accordance with Article 19, Paragraph 24 of the CRC, the state has absolute, exclusive, inalienable and non-prescribable ownership of all mines, which includes guano deposits, metalliferous sands, salt beds, coal and hydrocarbons deposits and other fossil substances, with the exception of surface clays, in spite of the property of natural or legal subject on the lands which hold deposits. Surface lands are subject to the obligations and limitations established by law in order to facilitate the exploration, exploitation and benefits of such mines.} \\
\text{The law sets out which of these substances, except for liquid or gaseous hydrocarbons, may be subject to concessions for exploration or exploitation. These concessions are always awarded by court ruling and have the duration, entail the rights and impose the obligations that the relevant law expresses. The mining concession requires the owner to undertake the necessary activity to meet the public interest that justifies the awarding. Its responsibilities in terms of legal protection is established by the law, aiming directly or indirectly to obtain compliance with that request and providing the grounds for revocation in the event of a breach or termination of single domain over the concession. In any case such grounds and their effects must be established at the time of granting the concession.} \\
\text{Surface and mining rights} \\
\text{The CRC provides that the state has absolute, exclusive, inalienable and non-prescribable ownership over all mines, being able to explore and exploit the mineral substances the OCL states subject to such labours through mining concessions.}
\end{align*} \]
The mining concession is an *in rem* right that is independent from the ownership of the land upon which that right is established, even though both belong to the same person; therefore, the separation of the ownership of the mining concession (which grants the rights to explore and exploit minerals) and the surface soil property where the labours of exploration and consequent mining exploitation is intended to be executed is established.

The mining concession is transferable and transmissible; it is subject to mortgage and other real rights and, generally, subject to any act or contract; it is governed by the same civil laws as any other real estate, except when the OCL or MC state otherwise.

Mining concessions are awarded in a non-contentious legal proceeding, and can be of two types: exploration concessions and exploitation concessions. An exploration concession authorises the holder to explore minerals located within its perimeter, while exploitation concessions authorise exploration and exploitation.

Regarding the areas and extent of mining concessions, they must be a parallelogram with right angles (square or rectangle), the sizes of which, according to the type of concession, may be:

- *a* mining exploration concessions: a minimum of 100 hectares and a maximum of 5,000 hectares for each concession, and only one concession request is allowed; and

- *b* mining exploitation concessions: the minimum for each concession is 1 hectare and the maximum is 10 hectares, and applicants are allowed to request a group of concessions together up to 1,000 hectares.

These mining concessions may be granted only with respect to minerals that the OCL states as eligible for exploration and exploitation – called concessible substances – that are defined as all metallic or non-metallic mineral substances and, more generally, all fossil substances as they appear in nature, except those the OCL declares as not grantable. In its turn, the OCL states as non-concessible mineral substances: (1) liquid or gaseous hydrocarbons (therefore, it does not include coal, which is grantable); (2) lithium; (3) deposits of any kind in sea waters subject to national jurisdiction; and (4) deposits of any kind located completely or partially in areas that, according to the law, are declared important to national security. These substances may only be exploited directly by the state or its companies, or through administrative concessions or special operation contracts.

The two main charges or obligations in the Chilean mining legislation are the payment of an annual mining patent, in compliance with the obligation to protect the mining concession under the CRC, and the payment of a flat tax in the event that the mineral substances exploited companies exceed a certain volume of sales.

Being under the obligation to protect the mining concession in Chile entails the payment of an early annual patent, by March each year, the amount of which varies depending on whether a concession of exploration or exploitation has been granted. For every hectare or fraction covering an exploration concession, a sum equivalent to one-fiftieth of a monthly tax unit (UTM) must be paid, and for the surface comprising the exploitation concession, the equivalent sum of one-tenth of a UTM² must be paid. In Chile there are no further obligations, such as a minimum investment or the execution of mining operations, in order to maintain the concessionaire’s right.

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2 Possessions whose main economic interest lies in non-metallic substances or metalliferous placer deposits, such as such as those constituted over grantable wealth of existing salt beds, can obtain a discount and pay only one-thirtieth of a UTM per hectare.
iii Additional permits and licences

Given the separation of ownership of mining concessions and surface property, the MC establishes special rules in this regard. Access to surface lands during the process for the constitution of the mining concession is separate from when the concession is awarded.

During the procedure for the awarding of the mining concession the holder of a mining petition (exploration concession) or mining claim (exploitation concession) may carry out any work needed to establish the mining concession (the required physical examination for these purposes, including the execution of the survey in case of mining claims). The holder of a mining claim is also authorised to undertake any labour needed to make the mine productive, and become owner of the mineral substances.

In order to carry out exploration or exploitation work the holder must, according to the nature of the concession, obtain written permission from the owners of the surface land and any administrative authorities if the execution of the work affects or could affect populated areas, or areas of public interest or national security, as detailed in Articles 14, 15 and 17 of the MC. In the event that the owner of the surface land or any other person refuses access to the petitioner or the holder of a mining claim, the judge may authorise the assistance of the police, if Sernageomin reports favourably on the necessity of such work.

Also, once the mining concession is awarded, it entitles the holder to impose a special mining easement over the surface land after determining the compensation payable to the owner of the land, previously agreed or settled in court. Mining easements may encompass transit, electrical services and occupation, under the terms and extent of Article 120 of the MC.

iv Geological Exploration Work Information

In May 2017 the Ministry of Mining, by Decree No. 104, created a new obligation for individuals or companies that carry out basic geological exploration work, either by themselves or by third parties. The new obligation imposes the duty to provide general information obtained from the basic geological exploration works to the National Geology and Mining Service (Sernageomin). Once the geological information is provided to Sernageomin, it becomes public information. As a first request, Sernageomin has this year required information on some territorial areas regarding exploration works carried out in the past four years.

v Closure and remediation of mining projects

This procedure applies in general to all mining labours that have an extraction capacity of more than 10,000 gross tons per month for mine sites; in a simplified version, it applies for those who have equal to or less than that amount of extraction capacity, and also for mineral exploration. Planning and implementation is progressive during the various stages of mining labour operations, and lasts for their duration. Amended by Law No. 20,819, issued on 14 March 2015, a new method was added for calculating the useful life of mining projects of extraction or benefit, whose ore capacity is between 10,000 and 500,000 ton per month and should be measured according to the ‘measured mineral resources’, indicated and inferred, certified by a competent person in reserves and mining resources, according to a diagnostic study, under the procedures and parameters established for these purposes by Law 20,235, the amendment refers to ‘mineral resources’, instead of ‘probable or proven reserves’.

The legislator provides two types of procedure for the approval of a closure plan, according to the mineral extraction capacity of the labours or the facilities. If it exceeds
10,000 gross tons per month, the procedure is ‘of general application’; if that capacity is equal to or less than 10,000 gross tons per month and in a mining exploration site, a simplified procedure applies.

A mining site in operation that qualifies for the general application procedure must provide guarantees for the closure plan. For this purpose the closure plan, already approved by Sernageomin, must be assessed under the parameters of Law No. 19,300, the Environmental Act, within a maximum period of two years of the plan’s coming into force.

The authority in charge of the review and approval of the technical aspects of the mining sites closure plans and their updates for the sector, as well as reviewing compliance, is Sernageomin.

Approval of the closure plan must be obtained before the start of exploration or exploitation, or the operation of a benefit plant.

Warranties

Warranties are provided for the cost of the final implementation of the closure of the mining site or facilities, in a prospective system that is periodically evaluated (only the mining labour closure plans of general application). The warranty is created from the beginning of mining operations.

The types of warranty include:

- cash;
- bank guarantee form;
- debt instruments;
- letters of credit;
- bonds guaranteed by financial institutions;
- deposits, bonds and other titles representing catchment;
- Treasury, Central Bank and other state bonds; and
- bonds or debentures of public or private companies and insurance policies.

Audits

Audits must be carried out every five years to report on compliance with the closure plan, updates and guarantees handed over. Audits are conducted by external auditors included in the Sernageomin Public Registry of External Auditors.

Tax benefits

Necessary expenses to produce income equivalent to the amount paid to comply with the closure plan, or the guaranteed amount, are considered deductions. The value added tax (VAT) charged on the purchase of goods or services to execute the closure plan is considered a tax credit.

Post-closure fund

A fund for post-closure monitoring and controlling measures must be created to ensure the maintenance of the site after the closure plan is completed. The fund is financed by contributions from each mining company (and may include donations). This contribution is equivalent to the present value of the total cost of the post-closure measures within the deadline established in the plan, including administrative costs and adjustments.
IV ENVIRONMENTAL AND SOCIAL CONSIDERATIONS

i Environmental, health and safety regulations

As regards safety standards and regulations, Chile has special regulations contained in its Labour Code and Law No. 16.744, which regulates social insurance against the risk of accidents at work and occupational diseases.

Relating to safety matters in the mining industry, both Sernageomin and the General Labour Bureau are competent through regional offices, along with the Ministry of Health, represented by regional ministerial secretaries throughout the country. Sernageomin is also responsible for supervising the compliance of mining companies with the law on such matters and for implementing an online information system for monitoring the status of requests or reports made by mining companies.

ii Environmental compliance

In compliance with environmental regulations, the legislator has created an environmental management tool called the System of Environmental Impact Assessment (SEIA), the management of which is based on the environmental assessment of projects adjusted to meet the regulations currently in place, which state that this tool is administrated by the Environmental Assessment Service (SEA).

The rules that apply to this environmental management tool are the following:

a Law No. 19.300, the Environmental Act;
b Law No. 20.417, which creates the Ministry, the Assessment Service and the Superintendence of the Environment;
c Law No. 19.880, on the Basis of the Administrative Procedures that regulate the Acts of the State Administration’s Bodies;
d DFL No. 1-19653, which sets the Consolidated, Coordinated and Systematised Text of Law No. 18.575, the Constitutional Organic Law on General Principles of the State Administration;
e Supreme Decree No. 95 of 2001 by the Ministry of General Affairs, on the Regulation System of Environmental Impact Assessment;
f Supreme Decree No. 40 of 2012 by the Ministry of Environment, on the Regulation System of Environmental Impact Assessment; and
g Law No. 20.749, which creates the Environmental Courts.

Such regulations, specifically the first, establish the assumptions under which any person who attempts to develop a project (given the nature of this article, a mining project), must submit an environmental impact statement or environmental impact study. The environmental impact statement is the document describing an activity or project to be carried out, or the amendments to be introduced, provided under oath by the respective owner, the content of which enables the competent authority to assess whether the environmental impact conforms to current environmental standards. The Environmental Impact Study describes in detail the characteristics of a project or activity that is intended to be carried out or modified. Background checks must be provided for the prediction, identification and interpretation of its environmental impact and it must describe the actions to be carried out in order to prevent and minimise its significant adverse effects.

Notwithstanding the foregoing, it is the responsibility of each project or activity owner to avoid any element that could have an impact on the environment, in any of its phases,
as the Environmental Assessment Service, as system administrator, can decide if a specific project or activity must pass through the SEIA based on a request of appropriateness, that is, a request involving a decision on whether a project or activity, based on the information provided by the petitioner, must be submitted to the SEIA.

iii Third-party rights
Chile has approved ILO Convention 169, which establishes for the subscribing governments the following obligations:

\( a \) to consult the peoples concerned, through appropriate procedures whenever legislative or administrative measures may affect them directly;

\( b \) to establish means by which these peoples can freely participate in the decision-making process within the institutions responsible for policies and programmes concerning them; and

\( c \) to establish means for the complete development of those peoples’s institutions and initiatives.

Under the new indigenous institutional framework that Chile has promoted, within the consultation procedure and public participation with the SEA for the evaluation of projects, there is also a specific consultation with indigenous peoples whose regions are affected by a project. All communities and associations recognised under the framework of Indigenous Law No. 19.253 can participate.

In November 2013, Chile also approved Executive Order No. 66, which regulates the consultation of indigenous peoples, and it has been implemented since March 2014.

iv The Environmental Conservation Right
The Environmental Conservation Right was established through Law No. 20,930. Its purpose is to promote the participation of private entities in the conservation of the environment, as a complement to the state’s constant efforts regarding these matters.

Law No. 20,930 defines the environmental conservation right as ‘a right that consists in the aptitude for preserving the environmental heritage of a land or its attributes and characteristics’. It underlines that it shall be awarded ‘by a voluntary decision of the owner of the land in benefit of a specific person or legal entity’. This points to the fact, that the establishment of this right cannot be enforced, as it occurs, with land easement in specific cases.

The title-holder of this environmental conservation right may be any public or private person, or legal entity, that differs from the original owner.

The right is awarded by public deed, and signed by the landowner and the new title-holder. This form of contract must have, at minimum, one of the following conditions:

\( a \) it is forbidden or restricted for the land to be destined for the real estate business, commerce, tourism, industry and certain other purposes;

\( b \) there is an obligation to assume or hire services for maintenance, decontamination, repair and administration – or other services required for the rational use of the land; and

\( c \) there is an obligation to execute and supervise the management plan established in the contract for the proper and rational use of the natural resources of the land.
The creation of this right is of interest to every third-party private entity that wishes to promote conservation actions towards environmental heritage, such as the owner of the contracted land or the new title-holder, for the development of preservation activities.

V OPERATIONS, PROCESSING AND SALE OF MINERALS

There is no specific regulation regarding this issue: mining is considered a general industrial activity. With regards to the design and construction of mineral-processing plants, they are structured under general contractual agreements according to those commonly used in the international mining markets, such as EPC and EPCM contracts, for their design and construction.

Notwithstanding the foregoing, the Mining Code enables those that build such plants to apply for mining easements in their favour under the same terms that have previously been explained for mining concessions. Also, considering the nature of such plants and the impact they have on the environment, they are subject to the general rules and requirements for their evaluation and entrance into the SEA, according to what has previously been noted in Section IV, supra.

There is no special regulation for the commercialisation and sale of minerals, but standard international contractual arrangements such as the ‘off-take agreements’ are used.

i Foreign investment

Under Law No. 20,848 a new legal framework was set forth for foreign investments in Chile, replacing Executive Decree (DL) 600. It also creates new institutions responsible for the promotion and attraction of capital and direct investments from abroad.

The relevant aspects of the new law body are related to the concept of direct foreign investment and the definition of foreign investor, considered to be an individual or legal entity born or incorporated abroad, neither a resident nor domiciled in Chile, who transfers capital into the country under the terms indicated in the law.

In addition, the adoption of a national strategy was established for the development and promotion of foreign direct investment promoted by the President of the Republic.

Law No. 20,848 also creates a committee of ministers responsible for developing the national strategy, evaluation and implementation of matters related to foreign investment development and promotion, advising the President in such matters.

In terms of the creation of new institutions, a Foreign Investment Promotion Agency was created, replacing the former Foreign Investments Committee that existed under Executive Decree (DL) 600, appointing it responsible for the promotion and attraction of all kinds of capital and investments from abroad and the coordination of the actions needed to implement the development strategy.

All foreign investors qualified under the terms of Law No. 20,848 will have access to several protection regimes, including:

a guaranteeing access to the formal foreign exchange market and repatriation of capital and profits, in full agreement with the Central Bank foreign exchange authority;
b value added tax exemption to capital goods imports, under certain conditions; and
c no arbitrary discrimination guaranty with relation to local investors.

Notwithstanding the aforementioned, all investments entered the country through local bank entities, and notifications are sent in accordance with the terms established in Chapter
XIV ‘Chile’ of the Compendium of Foreign Exchange Regulations of the Central Bank of Chile. This is done in order to register foreign investors to protect their investments under Chilean legislation principles, and to allow them access to the formal exchange market with no discrimination regarding whether they are a national or foreign investor.

VI CHARGES

i Royalties

While it is not considered a ‘royalty’ per se, there is a flat tax on people who carry out mining exploitation and achieve mineral sales over a certain volume in Chile. This tax is progressive and is charged on the operating income (taxable net income less operating expenses) of a mining producer at rates ranging from zero (annual sales of less than 12,000 tons of fine copper or equivalent) to 4.5 per cent (annual sales of up to 50,000 tons of fine copper or equivalent). In the case of mining producers with annual sales of more than 50,000 tons of fine copper or equivalent, the tax applies to the ‘mining operating margin’ (the meaning of which is defined in Article 64-bis of the Law on Income Tax) from a rate of 5 per cent of a mining operational margin of below 35 per cent, gradually increasing up to 14 per cent if the mining operation margin exceeds 85 per cent. This is a tax that only applies to mining exploiters and not to mining explorers.

ii Taxes

Following amendments introduced by Law No. 20.780, in 2017, the shareholders or partners of enterprises subject to first category income tax must choose between the ‘attributed income’ or ‘semi-integrated’ systems depending on whether taxpayers wish distributions to be taxed on an accrual or a cash basis, respectively.

VAT

This tax is levied on sales and services at a rate of 19 per cent. The payment constitutes a tax credit for the payer (vendor or service provider) to be charged against VAT debits resulting from sales or services rendered by the taxpayer. VAT accumulated in the acquisition of fixed assets is fully refunded to the taxpayer if, within six months of the acquisition, the credit is not yet charged to debit.

For exporters, the VAT charged can be recovered after each export when they purchase goods or use services for their export activity, and they can apply for the refund of VAT credits accumulated to date.

In the event that the exporter is not yet producing, it is allowed to claim back VAT credits accumulated in the month following the month in which they were incurred, in which case an investment project with an expected date for the start of production and export must be presented to the authorities.

iii Duties

Municipal licence

Every company carrying out primary or extractive activities in exploitation cases involving a process developing products, such as slag separation work, milling or concentration of minerals, must pay an annual municipal licence fee to the municipality in which it conducts its commercial activities.
This licence is between 0.25 and 0.5 per cent of taxpayer equity, with an 8,000 UTM cap. This payment is an expense for purposes of determining income tax.

**Labour charges**

Every company in Chile must pay death and accident insurance, with a fee capped at 3.4 per cent of the taxable income of workers. The percentage is divided into a base rate of 0.95 per cent and a variable depending on the kind of activity and the business risk.

**VII OUTLOOK AND TRENDS**

The state-owned company CODELCO has begun procedures to assimilate into its operations the Chuquicamata underground mining deposit, which encompasses a structural and strategic project representing an important part of the future of CODELCO. It will transform the world’s largest open pit mine into a giant underground operation that will allow the exploitation of resources located underneath the current site. In the private sector, Antofagasta Minerals – the largest private Chilean mining company – merged Minera El Tesoro and Minera Esperanza, both belonging to the holding, into a new company called Minera Centinela. Through Minera Centinela, Antofagasta Minerals’ group will take maximum advantage of the mining district located in the Antofagasta region, making it one of the country’s largest mining companies.

In January 2016, the Chilean government announced the first measures to be implemented in the short term under the new policy and governance of lithium brines. The set of measures, based on proposals submitted by the National Lithium Commission, essentially aim at:

- establishing a new regulatory framework;
- defining operating conditions and establishing a link with local communities;
- strengthening coordination between the two major public actors for the exploration and exploitation of the resource: CODELCO and The National Production Development Corporation; and
- allocating resources for innovation in this field for full expansion.
Chapter 6

COLOMBIA

José Vicente Zapata, Daniel Fajardo and María Alejandra Cabrera

I OVERVIEW

Colombia is a country with a strong mining tradition, inasmuch as indigenous and afro-descendant communities located in rural areas depend on small-scale mining. The Colombian mining industry goes from simple stone and gravel extraction, to sophisticated coal, emerald, nickel and gold. In total, the Colombian mining industry extracts around 211 minerals throughout the national territory, ranking as one of the most important producers of nickel in South America, of coal in Latin America and the second-largest producer of emeralds in the world. Nevertheless, the mining industry in Colombia is undergoing a rough period caused by different judicial and administrative decisions that have created an environment of legal instability and uncertainty for foreign investment, with the result that foreign companies affected by these decisions filed lawsuits against the state.

According to the National Mining Agency, in 2016, Colombia produced approximately 90.511 million tons of coal, mostly in the departments of Guajira, Cesar, Cundinamarca, Boyacá and Norte de Santander. This represents a 5.8 per cent recovery with respect to the previous year, and establishes a record figure for the country in coal production.

Mining in Colombia is developed at different levels, with different production and environmental management standards. Small-scale mining, for example, is the largest when it comes to production units, and, although still deficient in relation to overall performance, it is still significant in terms of employment generation and in some cases in terms of its capacity to add value to the extracted mineral. Medium-scale production projects are characterised by their higher knowledge of the resources and reserves, their planning strategies and their higher level of compliance with labour and mining health and safety standards. On the other hand, large-scale projects are executed under the best technical, economic, environmental and social conditions, which are very important for the country’s economy not only for their capacity to generate income, but also for their social and regional impact (i.e., opencast mining projects).

Although the growth and promotion of the mining industry has been controversial from the onset, the mining sector has grown at an average rate of 4.5 per cent annually over

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the past decade and its GDP share is 6.92 per cent.\(^3\) Notwithstanding the foregoing, the needs of a changing mining sector come with some challenges and issues of coordination between mining and environmental authorities, as well as the recent drop in mineral prices, lower levels of foreign investment, high levels of informality, multiple denominations for mining, illegal mining, judicial decisions that create legal instability, social unrest in the regions and the delay in mining and environmental proceedings, among others, all of which pose a challenge to the state’s ability to strengthen and grow the industry.

### II LEGAL FRAMEWORK

The regulatory framework for mining in Colombia comprises different regulations corresponding to different categories ranging from constitutional to mainly technical norms, which regulate the day-to-day mining operations.

The Colombian Constitution of 1991\(^4\) provides that the subsoil and the non-renewable resources are state property, while also allowing for individuals to acquire rights over those resources. Additionally, in accordance with Article 334 of the Constitution, it is the state’s responsibility to intervene in the use, production, operation, exploitation and distribution of the minerals obtained from the soil and subsoil, which directly translates into a specific regulation for the mining industry, which allows individuals to develop these activities.

Undoubtedly, the main regulation in force is the Mining Code issued through Law 685 of 2001 (Mining Code), which seeks to regulate the legal relationships between the state and individuals at all stages of mining (i.e., exploration, construction and assembly, exploitation, processing, transport and marketing of minerals in the soil or subsoil).

Aside from the existing regulations, the Ministry of Mining and Energy, through its Vice Ministry of Mines, issues government policies in relation to the management of the mining sector, which seek to formulate, adopt, articulate and coordinate policies and plans for the sector. Other relevant functions intended to improve the overall performance of the sector are developed by other entities subscribed to the ministry as follows.

The National Mining Agency (ANM), created through Decree 4134 of 2011, is in charge of executing the title and registration processes, technically assisting the different projects and promoting and observing the obligations arising from the mining concessions.

The Mining-Energetic Planning Unit (UPME) is in charge of the comprehensive and permanent planning of the sector, of providing indexes of the development of the sector and responsible, and for the production and circulation of information required by the different stakeholders of the sector and by the entities in developing new policies for the sector.

The Colombian Geological Service (SGC) is in charge of scientific research for the potential resources of the Colombian subsoil in accordance with the policies of the Ministry of Mines and Energy.

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\(^4\) Articles 332 and 334, Colombian Political Constitution.
III MINING RIGHTS AND REQUIRED LICENCES AND PERMITS

i Title

Mining regulations in Colombia follow the principle that, notwithstanding grandfathered rights, the subsoil and all mineral resources located therein are owned by the state and as a result may only be exploited with prior authorisation in the form of a mining title issued by the competent authority (to date, the ANM).

The Mining Code defines mining titles as concession agreements that grant the licensee a personal, exclusive and temporary right to explore and exploit minerals in the subsoil and within the contracted area. In addition, the concession agreement grants the licensee the right to acquire ownership rights of the extracted minerals in exchange for royalties. Mining titles are granted for a maximum period of 30 years, renewable for another 30 years, counted from the date of registration of the mining title before the National Mining Registry. The Mining Code is emphatic on the fact that mining titles grant rights only for the exploration and exploitation of minerals in the subsoil and thus, any right or title of the surface where mining operations are to be conducted must be negotiated and acquired by the licensee.

Pursuant to the Mining Code, duly registered mining titles (i.e., the rights and obligations under the concession contract) at the National Mining Registry can be totally or partially assigned to a third party. For this purpose, the assignor must file a prior notice informing the ANM about its intention to transfer its rights, as well as about the corresponding assignment agreement. Upon filing, the ANM has a 45-business-day term to accept or object the assignment. Should the ANM not issue a motivated resolution within this term, the assignment will be understood as accepted and the assignment agreement will be registered in the Mining Register.

The Colombian state, and in particular the ANM, may declare the caducity and termination of a mining title at any time for any of the following causes:

a. the dissolution of the entity holding the title, except for in cases where the entity ceases to exist due to a merger deriving from a takeover;

b. a financial inability that seriously affects the performance of contractual obligations;

c. the lack of performance of works within the terms established in the Mining Code or the non-authorised suspension of such works for more than six continuous months;

d. the non-payment of the complete economic considerations on time;

e. the omission of a previous notice to the authority about the assignment of the mining title contract;

f. the non-payment of fines or the non-reinstatement of the bonds that that endorse the title;

g. the gross and repeated breach of regulations of technical order on mining exploration and exploitation, or of hygiene, security or labour provisions, or the annulment of necessary environmental authorisations for works and installations;

h. the infringement of provisions on excluded and restricted areas for mining;

i. the gross and repeated breach of any other obligation deriving from the concession contract; and

j. when the source of the exploited minerals comes from a place different to that of its extraction, causing the economic considerations related to such title to be destined for a different municipality of its origin.

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5 Bear in mind that if the entity has an open proceeding for its financial and legal reorganisation or restructuring, referred provision would not apply, pursuant to regulation set forth in Law 1116 of 2006.
ii Surface and mining rights

As the regulations stand, mining titles are granted by the ANM to legal entities or individuals, nationals or not, under a ‘first come, first served’ basis that, in other words, means that the first entity to apply for a free area is entitled to receive a mining title in the form of a mining concession agreement. Prior to awarding a mining title, the ANM must verify the compliance of the tender requirements set forth in the Mining Code that, in addition to the applicant’s economic and legal capacity are as follows:

a. identification of the requested area and extension and information about the land use restrictions applicable;
b. designation of the relevant minerals subject to exploration;
c. identification of the competent environmental authority;
d. identification of the ethnic groups settled within the area of influence of the requested area; and
e. indication of the terms of reference and guidelines applicable to exploration works, and the economic estimates derived from such terms and guidelines.

Foreign companies and individuals have the same rights as nationals. The main difference is that foreign companies shall constitute a branch in Colombia, except in cases where their activities do not exceed the term of one year.6 According to the External Regulatory Circular Letter DCIN-83 of the Central Bank, the branches of foreign companies are subject to the foreign exchange special regime that includes, among others, the obligation to channel resources by filing the corresponding foreign investment forms.

In addition, pursuant to the Mining Code,7 mining is considered as a public interest activity, which in practice gives the holder of a mining title the possibility of requesting expropriation and the imposition of easements over properties required for the development of the mining activities allowed.

iii Additional permits and licences

In addition to the environmental permits and licences explained below, a mining title-holder is required to contract a mining and environmental insurance policy, which must be in force during the entire project.

Pursuant to the Colombian insurance regulations (Law 1328 of 2009 and Decree 2555 of 2010), only those insurance companies authorised by the Finance Superintendency are allowed to issue insurance policies in Colombia. Thus, any insurance policy issued by a company not authorised in Colombia will not be deemed valid.

Mining title-holders are required to submit the annual mining basic form each January, with the corresponding information of the period January to December of the immediately preceding year. They must also submit the semi-annual mining basic form each July, with the corresponding information of the period January to June of the current year. In these forms they must indicate, inter alia: (1) construction and exploration activities status; (2) production and sales; (3) work programme; (4) employment and work conditions; and (5) environmental issues.

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6 Articles 18, 19 and 20, Law 685 of 2001.
iv Closure and remediation of mining projects

Aside from the insurance policy described above, in Colombia there are no specific regulations in connection with the closure and remediation of mines. Closure and remediation obligations are set out in the environmental licence and on a case-by-case basis, depending on the type of mine, mineral and location.

IV ENVIRONMENTAL AND SOCIAL CONSIDERATIONS

i Environmental, health and safety regulations

The Constitution defines Colombia as a social and democratic state and, within this scope, it recognises the environmental protection as a fundamental principle and collective right. The Constitution sets out the key elements that guide the country’s environmental management: environmental protection; commitment to sustainability and economic efficiency; fiscal control; citizen participation and respect for culture.

Law 99 of 1993 – the Environmental Law – established the Ministry of Environment (currently the Ministry of Environment and Sustainable Development (MESD)) and rearranged the public sector responsible for the environment and the natural resources.

The MESD, together with the President of Colombia, is the entity responsible for formulating environmental policy, considering this element as a central focus for economic and social development, growth and sustainability of the country.

The Colombian legal and institutional framework for environmental management supports global trends of sustainable development, a concept formalised in the Rio Declaration of 1992 and in numerous treaties to which the country has adhered, including the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal; the Rotterdam Convention for the implementation of a prior informed consent procedure for certain hazardous pesticides and chemicals in international trade; and the United Nations Convention on Biological Diversity, among others.

ii Environmental compliance

Projects and activities that may severely affect natural resources require environmental authorisation in the form of an environmental licence. In addition, any project or activity that requires the use or access to natural resources must obtain a specific environmental permit. In the case of mining, an environmental licence must be granted either by the Environmental Licence Agency or by a Regional Environmental Authority. Furthermore, when it comes to environmental authorisations, the main regulation is Decree 1076 of 2015, which, among other things, defines the environmental authority in charge of granting the environmental licence for mining projects based on the projected production.

Moreover, pursuant to Decree 1076 of 2015, the environmental licence in mining is only required for the construction and installation and exploitation phases, which means that in the exploration phase the mining operator must obtain the necessary and individual environmental permits depending on the natural resources to be used or affected.

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8 Articles 2.2.2.3.2.2 and 2.2.2.3.2.3, Decree 1076 of 2015.
iii  Third-party rights

In addition to the foregoing, two particular considerations regarding third-party rights must be indicated.

First, as a rule of constitutional and international recognition, projects and activities that may potentially affect cultural diversity must consult with all ethnic communities located within the area of influence prior to their execution. Prior consultation is a fundamental right that seeks to protect the cultural, social and economic integrity of ethnic groups and provide them with the right to participate in the decision-making process over measures or projects, works and activities to be carried out in their territories.

The process for prior consultation, regulated through Presidential Directive 10 of 2013 and Decree 2613 of 2013, is a joint activity to carried out between the representatives of the projects and the Ministry of Internal Affairs whenever the latter certifies the presence of ethnic communities located in the area of influence of a project or activity. In brief, the consultation process must follow these steps:

a  certification of the existence of ethnic communities in the specific territory – issued by the Ministry of Internal Affairs;
b  participation of the ethnic communities in the production of the environmental studies;
c  consultation hearing presided by the pertinent environmental authority;
d  declaration of agreement or disagreement regarding the impact assessment and protection measures proposed in the management plan;
e  making the decision public; and
f  monitoring of the decision.

If no agreement is reached, the existing regulation provides for an extended deadline for discussion. Should the parties not enter into an agreement after the extension, the disagreement will be formally stated as the result of the process, and the pertinent environmental authority will decide whether or not to issue an approval.

It is of outmost importance that the Constitutional Court, when deciding the tutela constitutional actions, has ruled that failure to undertake the consultation process results in the violation of fundamental rights and, as a result, has ordered the temporary suspension of the project or activity.10

On the other hand, during 2016, the Constitutional Court ruled that Article 37 of the Mining Code, which stated a prohibition for regional entities to restrict mining activities in their territory, is unconstitutional. In other words, this means that, to date, regional entities (e.g., the municipalities) are legally allowed and entitled to restrict or simply ban mining activities in their territory.11 Subsequently, the Constitutional Court decided that regional entities have the competence to regulate the use of the soil and to guarantee environmental protection, even if when exercising the said prerogative they end up prohibiting mining activity.12 As a corollary of the above, local authorities have the possibility of convening popular consultations, in which the inhabitants of the territories where mining projects are to be executed can vote on

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9 The ‘Acción de Tutela’ is a constitutional action with a special procedure that seeks for the protection of fundamental rights.
10 See www.urosario.edu.co/getattachment/340e1f11-842c-49d4-8341-6a6a0349dd27/Corte-Constitucional-ordena-suspension-del-proyec t/.
11 Constitutional Court of Colombia, Decision C-237 of 2016.
whether or not they agree with these projects, being able to veto them in the event of a negative voting result. Following this, several municipalities have chosen to hold popular consultations to determine whether they allow mining activities to be carried out in their territory or not, to the detriment of the mining industry, as already in 2017 five territories have chosen to prohibit these activities.

iv Additional considerations
Under Colombian law, given that the environment is subject to a special protection by the Colombian Constitution, both the legislator and the government are legally authorised to broaden existing regulations so as to protect the environment and guarantee the fundamental rights related to it, to the extent that acquired rights are not protected in relation to environmental issues.

The Constitutional Court ruled that, regarding environmental matters, there are no acquired rights, and declared the referred article to be unconstitutional. In 2011, the Colombian Congress established that mining activities could not be developed in the páramos (high, treeless plateaux).

Article 34 of the Mining Code established that it is not possible to carry out mining activities in areas declared by the Colombian government as areas of protection and development of renewable natural resources and environmentally protected areas (exclusion areas), such as the areas included in the national parks system, regional natural parks and forest reserves. Article 34 does not specifically mention páramo areas as exclusion areas. Article 34 of the Mining Code was later modified by Article 3 of Law 1382 of 2010, expressly including páramo areas among the areas protected by such Law. Law 1382 of 2010 was later declared to be unconstitutional.

The National Development Plan of 2011, which initially sought to protect acquired rights before February of 2010 and established that the protection and environmental authorisation could continue, but with no possibility of extension, was later also declared to be unconstitutional. As of the issuance of Decision C-035 of 2016, the Constitutional Court formally banned all mining activities within páramo areas, regardless of grandfathered rights that existed prior to February 2010.

V OPERATIONS PROCESSING AND SALE OF MINERALS

i Processing and operations
Pursuant to the Mining Code and applicable regulations, a typical mining project is divided in three main stages that take place upon completion of the previous stage as follows:

a Exploration for a period of three years from the registration of the mining title before the National Mining Registry. As indicated above, at this stage no environmental licence is required; however, activities must be conducted under certain specific parameters set out in the Environmental Guidelines issued by the Ministry of Mines and Energy. Should the title-holder decide to continue to the next stage and prior to the end of the
exploration phase, it must submit to the ANM a work programme, which must contain detailed information about the prospectively of the area as well as the works and economic expenditures committed for the next stage.

b Construction and assembly for a period of three years, which comprises the necessary works and infrastructure in order to initiate the exploitation of minerals. Prior to initiating construction and exploitation operations, the title-holder must obtain an environmental licence.

c Exploitation stage, which commences upon completion of the construction and assembly stage with a duration equivalent to the remainder of the initial term minus the two previous phases.

As the regulation stands, each of the phases of the mining project must take place continuously and therefore production may begin at the second stage only exceptionally.

ii Sale, import and export of extracted or processed minerals

Colombian regulations do not provide restrictions in connection with the sale, commercialisation or export of minerals that were extracted under a duly issued mining title. However, traders who buy and sell minerals on a regular basis in order to transform, benefit, distribute, intermediate, export or consume the minerals; mining processing plants and trading houses that buy to licensed miners, gold, silver, platinum, precious and semi-precious stones have the obligation to register in the Registry of Mining Traders (RUCOM).

iii Foreign investment

Foreign nationals are granted the same civil rights granted to any Colombian. Other than limitations under the Constitution or other laws, foreign nationals in Colombian territory are granted the same guarantees that Colombians have.

Foreign investors can undertake their investment, either personally or by the incorporation of a branch of a foreign company or by incorporating a Colombian company. The timing required for the incorporation of a subsidiary or a branch office is generally similar and is usually a two-to-three-week process.

In order to attract foreign investment, Colombia has implemented a policy of negotiation and ratification of international investment agreements, which includes bilateral investment treaties (BITs), as well as free trade agreements with chapters on investment and DTAs.

In order to protect foreign investment, Colombia is party to various international agreements: the Multilateral Investment Guarantee Agency; the International Centre for Settlement of Investment Disputes (ICSID); the Overseas Private Investment Corporation; and the Agreement of Cooperation for Emerging Markets. Colombia has entered into BITs with the following countries: Belgium; Chile; China; India; Japan; Peru; Switzerland; Spain and the United Kingdom.

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17 Article 100 Colombian Political Constitution.
18 Ibidem.
VI CHARGES

i Royalties

Companies committed to any production of renewable natural resources shall entail a royalty in favour of the state. Declaration, liquidation and payment of royalties must be made by mining operators in either monthly or quarterly periods, depending on the mineral exploited, for which a unique form has been designed by the ANM, elaborated according to the stipulations in Decrees 145 of 1995 and 600 of 1996, called ‘Form for Declaration of Production and Liquidation of Royalties, Compensation and other Fees for the Exploitation of Minerals’.19

Royalties must be paid over mine-head production based on the production volume and the type of extracted mineral. Royalties are independent from any tax payments.

<table>
<thead>
<tr>
<th>Material</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Construction minerals, limestone, plaster, clay and gravel</td>
<td>1%</td>
</tr>
<tr>
<td>Non-metallic minerals</td>
<td>3%</td>
</tr>
<tr>
<td>Metallic minerals</td>
<td>5%</td>
</tr>
<tr>
<td>Radioactive minerals</td>
<td>10%</td>
</tr>
<tr>
<td>Salt</td>
<td>12%</td>
</tr>
<tr>
<td>Platinum</td>
<td>5%</td>
</tr>
<tr>
<td>Alluvial gold</td>
<td>6%</td>
</tr>
<tr>
<td>Gold and silver</td>
<td>4%</td>
</tr>
<tr>
<td>Iron and copper</td>
<td>5%</td>
</tr>
<tr>
<td>Nickel</td>
<td>12%</td>
</tr>
<tr>
<td>Coal (exploitation of less than 3 million tons/year)</td>
<td>5%</td>
</tr>
<tr>
<td>Coal (exploitation of more than 3 million tons/year)</td>
<td>10%</td>
</tr>
</tbody>
</table>

ii Taxes

In Colombia, the mining industry is taxed under the general taxation regime at both a national and regional level (i.e., there are no special taxes, deductions or incentives dedicated exclusively to the mining sector). While at the national level taxes apply to all residents and with the same tariff, the tariff for regional taxes ranges from one region to another.

The applicable Colombian fiscal regime consists of a combination of the following taxes:

- corporate income tax (25 per cent tariff);
- corporate income tax for inequality (CREE) (8 per cent tariff);
- the CREE surtax (8 per cent tariff for 2017, and 9 per cent tariff for 2018);
- industry and commerce tax; and
- royalties.

In addition, all goods and services purchased locally are subject to 19 per cent VAT.

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iii Duties

Depending on the stage of the project (exploration or construction and assembling), concessionaires shall pay a surface canon. This fee must be calculated on an annual basis and is equivalent to one minimum legal daily wage per hectare if area is less than 2,000 hectares. If the area is between 2,000 and 5,000 hectares the amount will be two minimum legal daily wages per hectare. If the area is larger than 5,000 hectares, but smaller than 10,000, the fees will be three minimum legal daily wages per hectare.

iv Other fees

In addition, if a party establishes an easement for exploration or exploitation of mining activities, it must pay the owner of the land a compensation for the lien created in its land. Similarly, if a party needs to expropriate a land in order to carry mining exploitation activities under a concession contract, it must pay prior and fair compensation to the owner.

Finally, after the settlement of the concession contract, the holder of the mining rights must pay all the incurred costs in order to adapt the land for those activities. The mining environmental policy will secure the relevant obligations during contract performance.

Under Law 685 of 2001 and Resolution 388 of 2014, the title-holder must furnish a mining and environmental insurance policy. During the exploration phase, the insured amount must be 5 per cent of the value of the planned annual exploration expenditures. For the construction phase, the insured value must be 5 per cent of the planned investment for assembly and construction. During the exploitation phase, the insurance policy will have to cover 10 per cent of the result of multiplying the estimated annual production by the mine pit price of the extracted mineral, as established by the Colombian government.

VII OUTLOOK AND TRENDS

According to the Report of the Ministry of Mines and Energy of April 2016, between 2010 and 2014, the exploration and exploitation of nickel, gold and coal grew because of rising international mineral prices and changes to the mining legislation. Additionally, between 2010 and 2015 this industry contributed an average of 2.2 per cent to the GDP; 19.6 per cent of the exportations; and 16 per cent of the foreign investment. The aforementioned demonstrates the significant contribution to the public finances.

Notwithstanding the above, as of the issuance of Decision C-035 of 2016, which formally banned all mining activities within páramo areas, Decision C-192 of 2016, which restated the view of the Constitutional Court according to which there are no acquired rights in environmental matters, and Decision T-445 of 2016, which allows territorial entities to hold...
popular consultations and decide whether mining activities are allowed in these territories or not, the outlook for mining in Colombia is still uncertain. In addition, with the announcement of several mining companies’ intention to enter into DRMs at the different international arbitration courts with Colombia, the prospect for foreign investment is uncertain.
I  OVERVIEW

Mining represents a critical sector for the Democratic Republic of the Congo’s (DRC’s) development. According to the World Bank, the mining sector has dominated the Congolese economy since the early 1910s.

This domination is unsurprising, given that the country is incredibly rich in minerals. For example, the Katanga Copper Belt’s cobalt reserves total an astounding 5 million metric tons, making it the world’s largest known cobalt deposit. The DRC also possesses the largest known diamond deposits and the largest gold deposits in the world. Its copper reserves also make this region the second richest copper region in the world, with 70 million metric tons of copper, surpassed only by Chile. Other significant mineral resources in the DRC include tin, tantalum, and tungsten.

Since peace has returned to the DRC, successive governments have faced significant challenges in their effort to (re)establish both industrial production and a legal framework for this key sector.

After several years of discussion, the current Congolese Mining Code was enacted by the Congolese Congress in 2002, replacing outdated mining legislation. This resulted in both an increase in foreign direct investments and a steady increase in copper production in the years prior to the global financial crisis of 2008. Despite this crisis, more than one million metric tons of copper were transported in 2014, up from 9,000 tons in 2003, the year a peace agreement officially ended Africa’s deadliest civil war.

II  LEGAL FRAMEWORK

The current Congolese Mining Code was enacted by the Congolese Congress on 11 July 2002 (Mining Code). The implementing measures of the Mining Code are set forth in the Mining Regulations of 26 March 2003 (Mining Regulations).

The DRC is a member of several international organisations, including the World Trade Organisation, the World Bank Group, the Multilateral Investment Agency, and the International Centre for Settlement of Investment Disputes (ICSID). The DRC has also ratified the 1958 New York Convention on the recognition of foreign arbitral awards.

1 Aimery de Schoutheete is a senior partner and Thibaut Hollanders heads up the Kinshasa office of Liedekerke Wolters Waelbroeck Kirkpatrick SCRL.
3 Decree No. 038/2003 of 26 March 2003 on mining regulation.
In addition, the DRC voluntarily adhered to the Extractive Industries Transparency Initiative criteria, and has entered into several bilateral investment treaties as well as into a convention for the avoidance of double taxation with Belgium.

Additionally, with the stringent UK Bribery Act and US Foreign Corrupt Practices Act in force, it is essential for any company doing business in the DRC to seek professional commercial and legal guidance to mitigate business and regulatory risks. Section 1502 of the US Dodd-Frank Wall Street Reform Act and the EU Regulation regarding conflict minerals are also relevant for businesses active in the DRC. Depending on the type of mineral traded (tin, tungsten, tantalum and gold), these laws impose extensive supply-chain due diligence obligations on both upstream and downstream companies.

At the regional level, in July 2012 the DRC joined the Organisation for the Harmonisation of Business Law in Africa (OHADA). OHADA law can only benefit further investment by providing companies doing business in the DRC with a single, modern, flexible and more reliable business law framework, which already applies in 17 OHADA Member States and which supersedes previous or subsequent national legislation. OHADA law is of particular interest to mining companies, as it primarily covers commercial, corporate, loan-guarantee, accounting and arbitration law. OHADA law entered into force in the DRC on 12 September 2012. In addition, a one-stop shop for business start-ups (Guichet Unique) was instituted and shows encouraging development.

Congolese law, which is based on civil law and closely modelled on Belgian law, in particular, will remain applicable in areas not governed by OHADA law. It will thus be of paramount importance to understand the myriad applicable pieces of legislation to properly navigate the remaining bureaucratic, legal, and especially, cultural and linguistic hurdles.

The Mining Cadastre receives applications for mining rights, grants mining rights and keeps records of mining rights, among other functions. Moreover, the DRC has created a national transparency initiative committee with respect to the management of extractive industries in the DRC. Any regulation is issued by the Ministry of Mines, which supervises mining activities at national level. At the highest level, the President of the DRC is empowered to enforce the mining regulations and to classify mineral substances as reserved mineral substances, if applicable.

III MINING RIGHTS AND REQUIRED LICENCES AND PERMITS

Introduction

Underground minerals belong exclusively to the state. However, any private party may be authorised by the state to engage in mining activities (from exploration to exploitation and distribution), provided that specific objectives of eligibility, priority and capacity criteria set forth in the Mining Code are met. The mining permits available in the DRC are the following: research permits, exploitation permits (including small-scale mines) and tailing exploitation permits. Specific legislation regarding ‘artisanal mining’ also exists.

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4 Decree No. 068/2003 of 3 April 2003 relating to the creation, organisation and functioning of the mining cadaster, or ‘CAMI’.

5 Decree No. 05/160 relating to the creation, organisation and functioning of the national committee of the initiative for transparency in the management of extractive industries in DRC, in abbreviation ‘CN-ITIE/ RDC’.
Companies that wish to develop mining activities in the DRC are required either to incorporate a Congolese company or to elect domicile with a ‘mining agent’ as a condition of eligibility to obtain an exploitation permit. In addition, in order to be eligible for a mining permit, companies are obliged to either form a joint-venture with a state-owned company (such as Gécamines) that already holds the necessary permits, or freely assign a mandatory 5 per cent stake of its share capital to the DRC.

ii Surface and mining rights

Any person wishing to engage in prospecting or reconnaissance activities must make a prior declaration to the Mining Cadastre and seek a prospecting permit. This prospecting permit entails no priority whatsoever in relation with potential future exploration or exploitation rights.

An exploration permit may be granted to any eligible private company for a period of four years, renewable twice for two-year periods, with respect to gemstones, and for a period of five years, renewable twice for the same duration, with respect to any other mineral substances. To be eligible for an exploration permit, the company must demonstrate a minimum financial capacity of 10 times the total amount of the yearly surface rights payable for the area covered by the exploration permit. The surface rights approximately amount to US$0.03 per hectare for the first two years of the first validity period, US$0.31 per hectare for the remaining duration of the first validity period, US$0.51 per hectare for the second validity period and US$1.46 per hectare for the third validity period. In addition, the company will have to submit a rehabilitation and mitigation plan before starting any research activity. There are specific obligations to maintain the permit, including the requirement to start exploration works within six months after the delivery of the permit.

Should the holder of research permits demonstrate through a feasibility study the existence of an economically workable ore deposit (these include tailings, for which specific permits exist), as well as financial capacity sufficient for the development, construction and exploitation of a mine, the Minister of Mines may grant an exploitation permit for a duration of 30 years, renewable for successive periods of 15 years. The exploitation permit may be refused by the Minister of Mines only for specific reasons, which are exhaustively listed in the Mining Code. Obtaining an exploitation permit obliges the operator to transfer to the state a free carry participation of 5 per cent of the operator’s share capital. In practice, however, operators that are engaged in joint-ventures with state-owned permit-holders such as Gécamines are not required to transfer 5 per cent of their share capital to the state.

In addition to exploration and exploitation permits, the Mining Code also contains specific provisions with respect to artisanal or small-to-very small-scale mining rights, as well as quarry rights. Quarry rights relate to construction materials rather than mineral substances.

The timeline for obtaining an exploration or exploitation permit is as follows.

The Mining Cadastre has 10 working days to examine the request and to take a decision. Following this, the Directorate of Mines must conduct a technical investigation. The office in charge of the protection of the environment examines the environmental impact study and the environment management plan. These reviews must be conducted within a period of time set forth in the Mining Code for each type of request (typically, for exploitation permits, within 30 working days for the Mining Cadastre, 60 working days for the Mining Directorate and 180 working days for the environmental investigation). Should any of the aforementioned authorities fail to take a decision within the required time frame imposed by the Mining Code, the mining permit will be considered granted.
When a favourable decision is taken, the Mining Cadastre will then grant the mining permit to the applicant, provided that the relevant surface rights have been paid for within 30 business days.

All mining rights are conveyable under the Mining Code. A specific right of ‘amodiation’ (comparable to a long lease agreement) also entitles the holder of an exploitation permit to transfer all or part of such rights under a rental scheme. Exploitation permits can also be mortgaged. Finally, while mining rights are delivered only for specified mineral substances, permits can be extended to additional minerals through specific procedures.

iii Additional permits and licences
Processors of mineral substances who do not hold mining rights and whose activities are limited to processing activities must obtain a specific licence in this respect pursuant to the Mining Code.

iv Closure and remediation of mining projects
The holder of a research permit will also have to submit a rehabilitation plan for the site after its closure in order to be eligible for an exploitation permit. The closure of a research or exploitation centre must be promptly notified to the Mining Administration.6

The holder of the mining rights is required to obtain a financial guarantee in an amount sufficient to carry out environmental rehabilitation. The conditions under which such guarantee must be set up are detailed in Annex II to the Mining Regulation.

IV ENVIRONMENTAL AND LABOUR CONSIDERATIONS

i Environmental, health and safety regulations
The Mining Code and the Mining Regulations contain several environmental and health and safety regulations. Environmental regulations are by far the most detailed.

While most health and safety regulations are contained in the Congolese Labour Code, and are therefore not specific to the mining sector, the Mining Regulations do contain specific safety directives regarding the use of explosives.

In order to conduct mining operations, an Environmental Exploitation Permit from the Ministry of the Environment is mandatory, in addition to the environmental obligations arising from the Mining Code.

ii Environmental compliance
Environmental compliance obligations exist at every stage of a mining project:

a The holder of an exploration permit must apply for the approval of a mitigation and rehabilitation plan in which the measures taken to limit and remedy environmental damage caused by exploration works are described.

b Any person applying for an exploitation permit is required to submit an environmental impact study and a project environmental management plan, which must contain a description of the ‘greenfield’ ecosystem and of the measures envisaged to limit and remedy harm caused to the environment throughout the duration of the project.

6 Article 218 of the Mining Code.
In order to be granted an environmental exploitation permit, the holder of a mining right is required to submit an environmental impact study and an environment management plan to the Ministry of the Environment for approval.7

As mentioned above, rehabilitation costs must be covered by a financial guarantee to be set up in accordance with the Mining Regulations.

iii Third-party rights

Under the Mining Code, occupants of the land covered by a mining permit have a right to be indemnified when their activities (such as agriculture) are affected by a mining project, in accordance with the conditions set out in the Mining Code.

Other rights include an obligation for the operator to consult with local authorities.

Additional provisions of the Mining Code are intended to ensure the conservation of any archaeological findings that occur over the course of the project.

iv Additional considerations

Generally speaking, the DRC’s infrastructure is either outdated or non-existent. In order to develop and maintain activities and personnel, mining operators are therefore frequently required to participate in local development, for instance by funding roadworks, hospitals, schools, etc.

V OPERATIONS, PROCESSING AND SALE OF MINERALS

i Processing and operations

The Mining Code authorises a permit-holder obtaining any further licences or permits to install and operate processing plants inside the perimeter of the concerned permit.

There are no specific restrictions on the import of equipment and machinery, or on the use of foreign labour and services, save for certain tax measures pursuant to the Mining Code.

Expatriate labour may be hired, but the Mining Code provides that, assuming equal qualifications, priority must be given to the local labour force for the performance of mining operations.

ii Sale, import and export of extracted or processed minerals

Sale and processing of mineral substances is unrestricted under the Mining Code: the exploitation permit-holder is free to sell the products to the customers of his or her choice, at freely negotiated prices.

However, there is one exception to this principle. The export of raw minerals for processing abroad is subject to authorisation by the Ministry of Mines. The permit-holder must prove that it is not possible to process the minerals in the DRC at a reasonable cost, and is required to explain how the authorisation to export the minerals concerned will benefit the DRC.

7 Article 21 of the Law No 11-009 dated 9 July 2011 pertaining to general principles related to Environmental Protection.
iii Foreign investment

Generally, there are no legal restrictions on foreign investment in the mining sector, and currency exchange provisions are quite liberal.

There are, however, some basic obligations with which operators must comply. The DRC adopted new Exchange Control Regulations on 25 March 2014, in force since 24 September 2014. Their main characteristics are as follows:

a the exportation or importation of funds equal to or above US$10,000 is subject to a licence called ‘Modèle RC’ issued by the Central Bank as an approved intermediary; certain documents justifying the transfer will need to be be provided;

b subject to the relevant tax being paid, the filing of the Modèle RC form and the delivery of other supporting documents required by the central bank, commercial banks in the DRC are authorised to transfer dividends, capital gains, interest, principal, fees and commissions on foreign loans outside of the DRC. There is no exchange control restriction on the transfers abroad of profit by a foreign company;

c there is a restriction for the payment in cash of amounts above or equal to US$10,000;

d repatriation of incomes is within 60 days;

e transactions are paid for in local currency, unless otherwise agreed; and

f taxes are paid in local currency.

The Mining Code contains certain guarantees offered by the DRC to mining operators, such as the rule of law, recognition of rights of ownership, etc. Under the Mining Code, ICSID arbitration is encouraged under some circumstances.

VI CHARGES

The tax and customs regime applicable to DRC mining companies is exhaustively set forth in the Mining Code. The regime is investor-friendly, as the rates applicable under the general tax regime are substantially reduced, and some operations are even tax exempt. In addition, this advantageous tax and customs regime is applicable to affiliates and subcontractors of mining companies.

The main taxes levied on mining companies include the following: surface taxes and rights, corporate income taxes, royalties, taxes on dividends and interest rates, and taxes on wages.

The value added tax (VAT) regime entered into force on 1 January 2012. Since then, import of goods is subject to VAT at a rate of 16 per cent. The tax base equals the cost, insurance and freight value plus any (customs) duties and taxes (with the exception of VAT itself). Import of goods is deemed to take place when the goods cross the border of the DRC, but VAT is only due upon the declaration for release of the goods.

In July 2016, the Congolese government suspended value added tax on imports for mining companies as a means to support these companies during a period when commodity prices were at their lowest.

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8 Article 220 et seq. of the Mining Code.
9 Ordinance-A ct No. 10/001 of 20 August 2010 relating to the introduction of VAT.
10 Decree 16/028 of 22 July 2016 suspending value added tax on imports for mining companies.
This suspension expired in July 2017 and following the expiry, key players in the DRC mining sector reached out to the government in a bid to reinstate the suspension. The Minister of Finance has since instructed the financial authorities to suspend, once again, the collection of this tax for mining companies.

i Royalties
Royalties (i.e., specific mining tax) are due on the revenue generated by the sale of all commercial products, reduced by some specific costs (e.g., transport, analyses, insurance and marketing). Royalties are due starting from the exploitation phase of the project and amount to 0.5 per cent for iron or ferrous metals, 2 per cent for non-ferrous metals, 2.5 per cent for precious metals, 4 per cent for gemstones, 1 per cent for industrial minerals and 0 per cent for common construction materials.

Although mining royalties are deductible expenses for the determination of the corporate income tax, they are due regardless of the mining company’s profitability.

Finally, the holder of a mining permit benefits from a tax credit amounting to one third of the royalties paid on the products sold to a processing entity established on the DRC territory.

ii Taxes
The corporate income tax rate is set at 30 per cent of turnover, as compared with 35 per cent under the DRC’s common regime. However, the DRC tax authority (DGI) recently announced that mining companies are exonerated from paying the minimum corporate income tax, in accordance with the new interpretation of the exhaustive and preferable tax regime provided under the Mining Code. It was stated, however, that this new exemption should not take retroactive effect.

Specific taxes, such as taxes on rental revenues, real estate contributions (for surfaces falling outside of the scope of the mining surface taxes or rights) and taxes on vehicles and roads are subject to the standard or common tax regime.

The tax rate on expatriate remunerations only amounts to 10 per cent, while the ius commune tax rate is set at 25 per cent.

The withholding tax rate payable on dividends is set at 20 per cent of the gross amount. Note that dividends paid to an ‘active’ shareholder of a company other than a company by shares are not subject to withholding tax. A shareholder of a company is considered as ‘active’ if it is involved in the day-to-day management of the company, in other words, if it effectively and regularly contributes by its work and performance of services to increasing the value of the company.

In principle, withholding tax on interest is levied at the ordinary rate of 20 per cent on the gross amount.

However, interest paid in respect of loans granted from abroad in foreign currency is not subject to withholding tax provided that the interest rate and other loan conditions are at least as favourable as the ones that the company could obtain from unaffiliated companies.
iii Duties

The customs regime applicable to mining companies includes some exemptions, particularly for temporary (for up to 18 months) imports, furniture imported by expatriates, etc. In addition, various preferential rates on imports apply to mining companies. These rates increase as the project progresses as following:

\[ \begin{align*}
 a & : 2 \text{ per cent for all goods and products strictly for mining use, which are imported before exploitation of the mine has commenced;} \\
 b & : 5 \text{ per cent for all goods and products strictly for mining use, which are imported after exploitation of the mine has commenced;} \\
 c & : 3 \text{ per cent for fuel, lubricants, reagents and consumer goods, which are destined for mining activities throughout the duration of the project.}
\end{align*} \]

The preferential rates of 2 per cent and 5 per cent only apply to goods that appear on the list that the holder of the mining licence must submit to the Congolese authorities, which must be approved by a joint Decree issued by the Ministry of Mines and the Ministry of Finance.

iv Other fees

Any holder of mining permits (namely, research and exploitation permits) is subject to a surface right, the rate of which also increases as the project progresses (see above).

VII OUTLOOK AND TRENDS

In early 2013, the Congolese government initiated a review of the 2002 Mining Code. The fact that some international institutions, such as the Carter Centre and the World Bank, have pointed out several flaws in the 2002 Mining Code has undoubtedly influenced the Congolese government’s decision to initiate such a major review of the Code. According to the latest version of the prospective new Code’s explanatory statement, amongst other points, the new Mining Code aims to:

\[ \begin{align*}
 a & : \text{enhance the government’s control over the mining sector;} \\
 b & : \text{increase the state revenues generated by mining activities;} \\
 c & : \text{further regulate elements related to the social and environmental responsibility of mining corporations;} \\
 d & : \text{incorporate the latest changes in the Congolese administrative context, for instance the introduction of VAT in the Congolese tax regime.}
\end{align*} \]

In 2015, the Congolese government decided to suspend the review of the 2002 Mining Code, presumably due to the turmoil that the contemplated amendments would cause for the mining industry. However, in May 2017, the new DRC government announced that it would pursue the review of the 2002 Mining Code.

Further, mining companies looking to invest in the DRC must note the adoption of Act No. 17/001 of 8 February 2017 establishing the rules applicable to subcontracting in the private sector and its implications (the Subcontracting Act). These implications include the following (among others):

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11 Article 225 et seq. of the Mining Code.
activities can only be subcontracted to Congolese-owned companies promoted by Congolese nationals (with strictly limited exceptions); all companies established on Congolese national territory must put in place, internally, a policy of training that should allow Congolese nationals to acquire the technical know-how and the qualifications necessary to accomplish certain activities; and companies may not subcontract more than 40 per cent of the value of a contract.

In this respect whereas local content requirements were already imposed to subcontracting activities in the mining sector by a ministerial decree, the Subcontracting Act’s implementation measures may impose a new obligation to companies active in the mining sector.

From a political point of view, the uncertainty regarding the presidential elections is harmful for the Congolese business climate. However, the recent establishment of a government of national unity may stimulate the DRC’s economy. Minerals, ores and metals such as copper and cobalt, both used notably in electronic product manufacturing, constitute the foundation of the Congolese economy. From an economic point of view, the low metal prices and rather opaque Chinese demand perspectives significantly affect the local market.

The adverse economic conditions are taking a high toll on several local mining companies, which are frequently managed primarily for the benefit of foreign shareholders, to the detriment of the companies themselves.
Chapter 8

ECUADOR

Rodrigo Borja Calisto

I OVERVIEW

Mining, especially large-scale mining, is an emerging industry in Ecuador. In 2009 the Mining Law was passed, after the approval of the 2008 Constitution and the temporary Mining Constitutional Mandate that suspended any new granting of mining concessions, and the expiration of several of the concessions in Ecuador (owing to the lack of activities and environmental impact studies).

Since 2009, under the Mining Law Ecuador has faced a new legal framework and enthusiasm for the large-scale mining industry, supported by the government of the former President Rafael Correa, through the commencement of the two negotiation processes for the mining exploitation agreements for the two strategic projects in Ecuador (two out of five strategic projects), Mirador (Ecuacorriente-Chinese) and Fruta del Norte (Lundin Gold Inc.-Canadian).

The previous government strongly supported the mining industry in Ecuador, during which period the two contracts mentioned above were signed and several of the legal and regulatory reforms that will be explained later in this chapter were made.

The whole of Ecuador is rich in terms of mining. For several years now, top-level enterprises have surveyed the country and discovered gold and copper reservoirs in Azuay, Zamora Chinchipe, Morona Santiago, Imbabura and other provinces. Ecuador has granted mining concessions to private companies. Some of those projects are under exploration and other are coming into the exploitation phase.

In that line, the state has decided to auction and tender the concession of new mining areas to enterprises that would warrant the best exploration and exploitation practices, considering also experience, financial and technical capacity and the environmental proposal of the bidders. Such bidders would have the following competitive advantages:

- high mineral-recovery rate;
- low land-clearing ratio (mineral closeness to surface);
- access to water;
- sufficient electric power at low cost;
- modern road, port and airport infrastructure;
- monetary stability;
- tax stability and incentives; and
- accelerated depreciation of the machinery.

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1 Rodrigo Borja Calisto is a partner at Lexim Abogados.
2 The other strategic projects are Loma Larga-INV Minerals, Rio Blanco-Junefield and Panantza San Carlos-Ecuacorriente.)
Ecuador

The Constitution considers as strategic sectors, among others, energy in all its forms; telecommunications; non-renewable natural resources and those belonging to the state’s inalienable and imprescriptible heritage, but may exceptionally be delegated to a private party. The mineral substances belong to the state, but mining concessionaires have the exclusive right to prospect, explore, exploit, benefit, smelt, refine, market and dispose of all mineral substances that may exist and may be obtained in the mining concession area, becoming a beneficiary of the economic returns obtained from said processes.

The Constitution divides the powers of the government into five branches: the legislative branch, assigned to the National Assembly; the executive branch, headed by the President of the Republic; the judicial branch, headed by the National Court of Justice; and the newly defined branches: the electoral branch, managed by the National Electoral Council; the Electoral Contentious Tribunal; and the transparency and social control branch, represented by six entities, the General State Comptroller, the Banks Superintendency, the Telecommunications Superintendency, the Companies, Securities and Insurance Superintendency, the Ombudsman and the Citizen Participation and Social Control Council.

In terms of rights, the Constitution is an example of the development of new constitutional theories worldwide. For instance, it acknowledges the rights to a good standard of living, free communication, free information, decent housing, healthcare, labour; it also determines groups that should receive priority rights (for example, indigenous people, disabled people and the elderly) as well as the rights of the different nationalities and peoples that coexist in Ecuador. Additionally, it considers nature as a rights holder.

II LEGAL FRAMEWORK

According to the Mining Law its regulations and directives, in harmony with the constitutional principles mentioned above, all mineral substances are state-owned and can be delegated to private parties through metallic mining concessions (there are also mining concessions for metallic, non-metallic and construction materials but in this analysis we will focus on the metallic concessions), which can be obtained through public tender or auction processes.

The public auction processes are for those mining areas that the state decides to delegate to a private party and that have not been subject to prior concession processes, while the process of public tender of mining concessions applies to those concessions that have been expired or have been returned or reverted to the state. There is an exception for public tender or auction processes, which is the right of the national mining company or the foreign state companies or their subsidiaries, which can acquire mining concessions directly from the state.

It is important to mention that, according to the Constitution, the state will constitute public enterprises for the management of strategic sectors and the sustainable use of natural resources; and, exceptionally, may delegate these activities to the private sector. The public mining company ENAMI EP given its fairly recent creation (January 2009) owns some mining concessions, but none of them are in the exploitation phase, and that the large mining projects under the exploration or the exploitation phases are entirely within private investors, national or foreign.

Once the mining concession for metallic minerals is granted, it is divided into two lengthy periods: exploration and exploitation. The exploration period is divided into three sub-periods: (1) initial exploration (up to four years); (2) advanced exploration (up to four
years); and (3) economic evaluation (two years renewable for two more years). In addition, mining concessions are divided into large-scale concessions, medium-sized mining and small-scale mining, as per the following conditions:

<table>
<thead>
<tr>
<th>Type</th>
<th>Volume (in metric tonnes)</th>
<th>Royalties</th>
<th>Annual patents</th>
<th>Labour profit-sharing</th>
<th>Contract need</th>
</tr>
</thead>
<tbody>
<tr>
<td>Small</td>
<td>300 tm. underground or 1000 tm. open pit</td>
<td>3 per cent</td>
<td>2 per cent minimum wage</td>
<td>10 per cent workers, 5 per cent state</td>
<td>No</td>
</tr>
<tr>
<td>Medium</td>
<td>301–1000 tm. underground or 1001–2000 tm. open pit</td>
<td>4 per cent</td>
<td>2.5 per cent, 5 per cent and 10 per cent per mining phase 1</td>
<td>10 per cent workers, 5 per cent state</td>
<td>No</td>
</tr>
<tr>
<td>Large Scale</td>
<td>300 tm. underground or 1000 tm. open pit</td>
<td>5–8 per cent (Au, Ag, Cu)</td>
<td>2.5 per cent, 5 per cent and 10 per cent per mining phase</td>
<td>12 per cent workers, 3 per cent state</td>
<td>Yes, services or exploitation contract</td>
</tr>
</tbody>
</table>

Mining activities are mainly regulated by the Ministry of Mines, the Mining Regulation and Control Agency (ARCOM), the Ministry of Environment and the Water Secretariat (SENAGUA).

The Ministry of Mines is the governmental body in charge of exercising the rectory of the public policies of the geological mining area, as well as granting, administering and extinguishing the mining rights. The ARCOM is the technical and administrative body responsible for the exercise of the state's power to supervise, audit, intervene and control the mining activity phases carried out by all the mining actors. The Ministry of Environment is in charge of designing environmental policies and coordinating strategies, projects and programmes for the care of ecosystems and the sustainable use of natural resources. It also approves environmental studies and issues the respective environmental permits. The SENAGUA is the entity in charge of exercising the rectory to guarantee the fair and equitable access to water, in quality and quantity, through policies, strategies and plans that allow an integrated management of the water resources, and it also issues authorisations and permits for access, use and benefit of water.

With regards to the international treaties, Ecuador has executed several double taxation and investment treaties with, among others, the following countries: USA, Korea, China, Spain, Uruguay, the Andean Community of Nations, France, Chile, Germany, Canada, Belgium, Switzerland, Italy, Romania, Mexico, Argentina, Brazil, Singapore, Switzerland, Great Britain and Sweden. Unfortunately, the National Assembly approved the denouncing of the following bilateral investment treaties (BITs); China, Chile, Venezuela, The Netherlands, Switzerland, Canada, Argentina, The United States, Spain, Peru, Bolivia and Italy. The government plans to renegotiate these BITs with such countries.

### III MINING RIGHTS AND REQUIRED LICENCES AND PERMITS

#### i Title

As mentioned in Section II, the state has legal title over all the mineral substances and deposits and the preference is to exploit such natural resources through the state-owned companies, but up until now no state-owned companies have taken part in exploiting (or are near to the exploitation phase).

3 Source: State General Attorney webpage.
In addition to the public tender and auction processes mentioned above, the mining concession titles can be transferred between private parties, with previous written consent granted by the Ministry of Mines. Also, the mining concessions can be the subject of agreements, such as an irrevocable promise to transfer; assignment as security of the mining rights; property such as buildings; beneficiation, smelting and refinery plants.

In 2016, the Ministry of Mines launched the mining concessions public tender and auction processes after more than eight years in planning, a period in which neither existed. Within this process, several national and international companies demonstrated their interest in acquiring mining concessions (almost 500 petitions, around 280 granted up to date) and an investment commitment for the following four years of US$470 million.

**Surface and mining rights**

Under Ecuadorian legislation, mining rights are independent from the surface rights. The mining rights belong to the state and can be delegated to private investors.

The Constitution recognises and guarantees the right to property to public, private, community, state, associative, cooperative or mixed entities. Having said that, mining concessionaires or mining rights titleholders have the right to acquire, buy, rent, lease or lend the surface lands required for the development of the mining projects or related infrastructure.

The Mining Law declares the mining industry to be of public utility. Thus, any easements deemed necessary may be agreed with the landowners or imposed by ARCOM for the same term of the mining concession or mining rights within the framework and limits of the law.4

Mining concessions are granted for a term of up to 25 years, which term may be renewed for equal periods provided that, prior to its expiration, the mining concessionaire has presented a written petition to the Ministry of Mines to that end and favourable reports have previously been obtained from ARCOM and the Ministry of Environment.

The mining concessions are divided into two phases: the exploration phase and the exploitation phase. (See Section II for details.) In order for the Ministry of Mines to process the phase change application, the mining concessionaire shall have complied with the minimum operational and investment requirements in the mining concession area during the relevant phase. If the mining concessionaire does not apply for the commencement of the subsequent mining phase, the Ministry of Mines shall declare the termination of the mining concession.

The minimum operational and investment requirements mentioned in the previous paragraph are the annual exploration and investment reports regarding the exploration activities and investments made in the mining concession area during the previous year and an investment plan for the current year. In the event that a mining concessionaire does not comply with the exploration and investment plan, the expiration of the mining concession may be avoided by paying economic compensation equivalent to the amount of the investments not made, provided that investments equivalent to at least 80 per cent have been made.

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4 Article 15. Public utility. Mining operations in all phases, both within and outside of the mining concession, are declared to be of public utility. Thus, any easements deemed necessary may be created within the framework and limits of this Law, taking into account the prohibition and exception set out in article 407 of the Constitution of the Republic of Ecuador.
**Additional permits and licences**

The main permits and licences are the environmental permit or licence granted by the Ministry of Environment and the SENAGUA permits (human consumption, industrial usage and others).

There are several other permits required to develop the mining activities under each of the phases and periods, among others: explosives use, special labour shifts, fire department, construction permits from ARCOM and the municipalities, etc.

**Closure and remediation of mining projects**

The mining concessionaire and other mining rights titleholders (beneficiation plants, smelting and refining plants) should include in their environmental impact studies of the closure plan its activities, incorporated in the environmental management plan and their respective warranty. The closure plan will be reviewed and updated periodically in the annual programmes and environmental budgets, and in the environmental compliance audits, with information on investments, estimates of closing costs, activities for the closure or partial or total abandonment of mining operations and the rehabilitation of affected areas.

Within two years prior to the scheduled completion of the project, the mining concessionaire or mining rights titleholder shall submit to the National Environmental Authority for its approval the definitive closure plan including definitive recovery of the sector or area, a plan for verification of compliance, the social impact and compensation plan and the guarantees updated and specified in the applicable environmental regulations.

**IV ENVIRONMENTAL AND SOCIAL CONSIDERATIONS**

**i Environmental, health and safety regulations**

The Mining Activities Health and Safety Regulations establishes the standards for the application of the Mining Law, in order to ensure the safety and health at work in all phases of the mining activity and includes the general guidelines to prevent the labour risks under the mining special regimes (artisanal, small-scale, medium and large-scale).

The provisions contained in the 121 ILO Convention, Decision 584 of the Andean Community – Andean Instrument for Safety and Health at Work, and Resolution 957 of the CAN – Regulation of the Andean Instrument of Safety and Health at Work must be observed and complied with.

With regards to the specific internal regulations that the mining companies are required to have duly approved we can mention the following.

**Internal work regulations duly approved by the Ministry of Labour**

Internal occupational health and safety regulations are duly approved by the Ministry of Labour, which shall contain a health and safety management system.

**Environmental compliance**

The mining rights titleholders or mining concessionaires shall prepare and submit environmental studies or documents to prevent, mitigate, monitor and repair the environmental and social impacts of their activities prior to the initiation of activities, studies or documents that shall be approved by the competent environmental authority, with the awarding of the respective environmental licence.
The Mining Activities Environmental Regulations establishes the requirements and procedures for the application of the environmental permits.

For the small-scale mining regime, the environmental permit should be granted for simultaneous exploration and exploitation activities, requiring specific and simplified environmental studies.

For the medium- and large-scale mining regimes, within the initial exploration period the approval of an environmental file will be required; for the advanced exploration period, an environmental declaration will be required; while for the exploitation phase and subsequent phases will require environmental impact studies, which will be changed or updated depending on the results. On the basis of these instruments, the corresponding environmental licences shall be issued.

Once the mining rights titleholders or mining concessionaires satisfactorily comply with the requirements of the applicable law, the approval of the documents, studies and environmental licences must be granted at the latest within six months of its submission. If they fail to do so within that period, it shall be understood that there is no opposition or impediment to the beginning of mining activities.6

The mining activities before the respective environmental regulatory approval require the presentation of certain financial guarantees established in the applicable mining environmental regulations.

The mining rights titleholders or mining concessionaires are required to submit, the year after the environmental licence has been issued, an environmental audit of compliance to enable the inspection body to monitor, overlook and verify the compliance with environmental management plans and environmental regulations applicable. Following this, environmental compliance audits will be presented every two years.

Third-party rights

The Constitution recognises collective rights and guarantees communities and indigenous nationalities the right to be consulted in a prior, free and informed way, within a reasonable time, of any plans and programmes for prospection, exploitation and commercialisation of non-renewable natural resources that are located within their lands and that may affect them environmentally or culturally. This also includes the right to participate in the benefits that these projects generate and to receive compensation for the social, cultural and environmental damages caused to the people.

The consultation to be carried out by the competent authorities shall be mandatory and accomplished in a timely manner. If the consent of the consulted communities is not obtained, the state shall proceed according to the Constitution and the law. In this sense the Mining Law establishes that the consultation process is intended to promote the sustainable development of the mining activities, safeguarding the rational utilisation of mining resources, the respect for the environment, the social participation in environmental matters and the development of communities located in the areas of influence of a mining project.

5 Environmental File describes in a general way, the applicable legal framework, the main activities of the projects, works or activities that according to the national environmental categorisation, are considered of low impact; it also describes its environment in the physical, biotic and socio-economic aspects and proposes measures through an environmental management plan to prevent, mitigate and minimise the possible environmental impact.

6 Article 78 of the Mining Law.
In the event that, following a consultation process, there is a majority opposition within the respective community, the decision regarding whether or not to develop the project shall be taken by the Ministry of Mines.

Under the Mining Activities Environmental Regulations the mechanisms for social participation will be defined considering the level of impact and environmental risk predicted for the mining activity and the level of conflict identified, as detailed below:

a Projects of low impact and environmental risk: The promoter of the mining right must apply the mechanisms of social participation established in the applicable environmental regulations and submit to the competent environmental authority the respective report and supporting documents.

b Medium impact and environmental risk projects: The social participation process will be carried out by the promoter of the mining right subject to the guidelines established by the competent environmental authority and the environmental regulations. If necessary and at the discretion of the competent environmental authority, the consultation process may be carried out by assigning one or more socio-environmental facilitators, in accordance with the environmental regulations.

c High impact projects and environmental risk: The competent environmental authority will carry out the social participation process in coordination with the promoter of the mining right, for which the authority will assign one or more socio-environmental facilitators in compliance with the established in the applicable regulations.

V OPERATIONS, PROCESSING AND SALE OF MINERALS

i Processing and operations

With respect to the import of equipment and machinery, there are no general restrictions, except for some specific goods that have special custom duties or restrictions, mainly to protect the national providers. In Ecuador there is a lack of local providers to provide goods for the mining industry, so almost all of the mining equipment and machinery has to be imported.

As per the right to exploit, benefit, smelt, refine, market and dispose of all mineral substances obtained within the mining concession area, the mining rights titleholders have the right to freely sell the minerals.

Under the Mining Law, the mining concessionaires have the right to install and operate beneficiation, smelting and refinery plants by virtue of their concessions without the need to apply for the authorisation from the Ministry of Mines, provided that such plant is only intended to process minerals from the mining concessionaire’s concession. The processing of minerals from the third party’s concessions requires the respective authorisation. The mining concessionaires may freely market their products inside or outside Ecuador with no restrictions. However, in the case of gold from small-scale and artisanal mining, the Central Bank of Ecuador will market it directly or through public and private economic agents previously authorised by the Bank.

With regards to foreign workers, the mining concessionaires are required to employ not less than 80 per cent Ecuadorian personnel for the development of the mining activities and shall preferably engage workers resident in the locations and areas near to their mining projects. As for the remaining percentage, specialised Ecuadorian technical personnel shall be preferred; in the event there are none, foreign personnel may be engaged, who must comply with Ecuadorian legislation.
ii Sale, import and export of extracted or processed minerals

As part of the government plan to denounce the BITs, the National Assembly approved the Production, Commerce and Investments Organic Code that contains and recognises several investors' rights such as:

- a freedom of production and marketing of lawful, socially desirable and environmentally sustainable goods and services, as well as free pricing, with the exception of those goods and services whose production and commercialisation are regulated by the law;
- b access to administrative procedures and control actions established by the state to avoid any speculative practices or private monopoly or oligopoly, or abuse of market dominance and other practices of unfair competition;
- c freedom to import and export goods and services with the exception of those limits established by current regulations and in accordance with the international agreements to which Ecuador is a party;
- d free transfer abroad, in foreign currency, of periodic profits or profits derived from registered foreign investment, once the obligations concerning employee participation, relevant tax obligations and other corresponding legal obligations have been fulfilled;
- e non-discriminatory treatment; and
- f the right to own property.

Foreign investment

The Production, Commerce and Investments Organic Code allows the investors to execute an investment protection contract that sets the conditions for the treatment of its investment and incentives granted thereto, and consequently creates a safer environment for the investor. These contracts have a term equal to the mining concession or the mining exploitation agreement term and its extensions. Also for medium and large-scale metallic minerals mining projects it can grant legal (mining legislation) and tax stability. The requirements to execute the investment protection contract are an investment amount exceeding US$100 million, and a technical report issued by the competent ministry.

VI CHARGES

Below is a brief overview of the charges levied against the mining industry:

- a royalties (metallic concessions); and
  - 3 per cent for small-scale mining;
  - 4 per cent for medium-scale mining;
  - 5–8 per cent for large-scale mining (for gold, silver and copper);
- b the main taxes applicable to the mining industry are the following:
  - income tax (22 per cent);
  - VAT (12 per cent);
  - capital outflow tax (5 per cent);
  - windfall tax (70 per cent over the base price calculated in accordance with the formula and after four-year tax holiday since the date of recovery of the initial investment);
  - labour profit sharing (see chart in Section II); and
  - sovereign adjustment (this is not a tax per se, but it is an economic compensation to the state to fulfil the 50/50 profit distribution among the concessionaire and the state).
Duties
The applicable import duties depends on each of the imported goods and the availability of such goods in Ecuador and the restrictions that the government wants to impose over certain goods in order to protect the local industry.

VII OUTLOOK AND TRENDS

From the date of issuance of the current Mining Law, 29 January 2009, which replaced the previous Mining Law of 1991, and its General Regulations issued on 16 November 2009, Ecuador has seen the interest of international mining companies in developing large-scale mining projects in our country. As a result of the negotiation processes of the exploitation mining agreements and the lessons learned from them, the Ecuadorian state proceeded to carry out certain legal and regulatory reforms, which were approved in July 2013, February, September and December of 2014, December 2015 and April 2016. In the reforms to the Mining Law the following changes were made to the mining regime:

a. simplification of procedures and permits;
b. greater control of illegal mining activity; including a maximum 8 per cent royalty (5 per cent minimum and 8 per cent maximum) for metallic minerals;
c. establishment of a due process in the cases of caducity of mining rights and the right to remedy or comply with the non-compliance;
d. clarity regarding the ownership of certain assets;
e. creation of the medium scale as a mining category, with more favourable economic conditions and without the obligation to enter into an mining exploitation agreement with the state;
f. payment of the windfall tax and sovereign adjustment after the recovery of the initial investments;
g. inclusion of formulas to calculate and pay the sovereign adjustment;
h. reimbursement of VAT paid as of 1 January 2018; and
i. legal and tax stability for medium and large-scale metallic mining with the execution of the investment protection agreement.

There have been efforts by the government to improve the investment climate in the country, especially for the mining sector, through reforms that try to provide security to the investors by fixing floors and ceilings, formulae of calculation to avoid any subjective parameters negotiation, legal and tax stability, among others.
I OVERVIEW

With an area of 245,857 square kilometres, the Republic of Guinea (Guinea) is comparable in size to the United Kingdom and its mining resources are considered to be among the most important in the world. Guinea is thought to have the largest reserves of bauxite in the world; it holds two untapped world-class high-grade iron deposits in the Simandou and Nimba mountain ranges and benefits from substantial reserves of gold and diamonds.

Despite the fact that a number of these deposits were discovered decades ago, Guinea has often been considered a prime example of the ‘resources curse’ affecting resource-rich developing countries. Indeed, while Guinea is already one of the world’s top bauxite producers and the mining sector is already key to the Guinean economy, Guinea was ranked only 148th of 191 nations in terms of GDP in 2016 and 183rd out of 188 nations in the 2016 United Nations Human Development Report. In addition, the agricultural sector still provides employment and income to the bulk of the population.

Production of bauxite is mainly from the mines at Sangaredi, Kindia and Fria and is relatively low considering the proven reserves. Guinea’s key iron deposits are still in the exploration or development phase.

However, Guinea intends to triple its current bauxite production of nearly 20 million tonnes a year by approximately 2020 as a result of the significant recent and ongoing investments in the bauxite sector, in particular in the prefectures of Boffa and Boké.

In the past decades, Guinea’s iron ore projects have also attracted the attention of some of the world’s largest mining companies. However, the financing of integrated iron ore mines, rail and port projects remains a challenge for the government of Guinea and mining developers, especially in a period where the iron ore price is low. As a result, the development of those projects in the southern part of Guinea has been slow.

The main reasons generally put forward to explain why Guinea’s mining potential has not been fulfilled over the past decades are, in addition to commodity price volatility, underdeveloped infrastructure, power supply constraints, lack of local development, political instability and an investment climate perceived as weak.
Similarly to a number of other African countries, Guinea’s legal regime governing mining has been significantly amended over the past two decades, with successive moves to tackle these issues, attract foreign investors and promote transparency and good governance.

II LEGAL FRAMEWORK

Guinea declared independence from France on 2 October 1958 with Ahmed Sékou Touré as President. In the 26 years of his presidency (1958–1984), the country suffered from diplomatic isolation and was largely closed to international investment. The development of the mining sector was managed by the state, and the involvement of foreign companies was limited and negotiated on a case-by-case basis without the benefit of a general legal framework for the sector. The Ministry of Mines was only set up in 1981.

Between 1984 and 2008, Guinea was ruled by General Lansana Conté, a period during which the country sought to open itself to foreign investment.

In this context, the first mining code was adopted by Order No. 076/PRG/86 of 21 March 1986 (the 1986 Mining Code). Inspired by the desire to accelerate economic development, the 1986 Mining Code attempted to create a more favourable environment for foreign investment and to reduce the state’s involvement in the mining sector.

The adoption of the 1986 Mining Code was supported by the World Bank and the International Monetary Fund (IMF). This was part of a wider effort by these organisations to reduce investment risk and uncertainties and improve the deteriorating financial situation of certain developing countries under structural adjustment programmes.

This 148-article long 1986 Mining Code, inspired by the French Mining Code, set up three types of mining title (exploration permit, exploitation permit and concession, a long-term mining title covering both exploration and exploitation works) and provided for specific rights and obligations in relation to each of these.

At the same time as the 1986 Mining Code, Guinea adopted an investment code by Order No. 001/PRG/87 of 3 January 1987, which also aimed to reopen the Guinean economy to the private sector, guarantee equal rights for foreign and national investors, and provide for the freedom to transfer capital and repatriate profits and protection against nationalisation.

The 1986 Mining Code has often been highlighted as an example of the first generation of mining policies characterising the economic liberalisation of the 1980s, described collectively in the 1992 World Bank document ‘Strategy for Mining in Africa’.

The 1986 Mining Code was regarded positively by investors but did not lead to the expected surge in investments, as a result of continued uncertainty regarding state participation in the mining sector, among other reasons.

As a consequence, a new 186-article long Mining Code was enacted by Law No. L/95/036/CTRN of 30 June 1995 (the 1995 Mining Code) with a view to:

a promoting further transparency and limiting the discretionary powers of the state and providing greater clarity on state participation;

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4 Article 13 of the 1986 Mining Code provided that the state had an option to acquire an unspecified interest in any company holding an exploitation permit or concession.

5 In particular, Article 167.2 provided that ‘due to the degree of investment required, the state does not take free shares in the capital of a company [producing bauxite or iron ore]’. 
simplifying and clarifying permission procedures, in particular, establishing a new
department – the Centre for Mining Promotion and Development (CPDM), financed
by the World Bank and the IMF and intended as a ‘one-stop shop’ for investors;
guaranteeing certain rights to investors (e.g., the right to dispose freely of mineral
substances and freedom to import goods and services);
providing for more detailed tax provisions and making the fiscal regime more attractive
to investors;6 and
providing for more detailed environmental obligations, including a requirement that
all operations comply with the Environment Code that was adopted in 1987.

The 1995 Mining Code fit into the pattern of the second generation of African mining
codes introduced in the early to mid-1990s, which continued the trend of liberalisation
and privatisation with recognition of the need for enhanced social and environmental
requirements.

The 1995 Mining Code was also positively received by investors and led, in conjunction
with increasing commodity prices (in particular for iron ore and gold), to increased foreign
investments into the sector. However, the 1995 Mining Code was also criticised for a number
of reasons, including a failure to pass the necessary secondary legislation referred to in the
1995 Mining Code (including with respect to a model form mining convention).

In 2008, the army seized power in a military coup led by Moussa Dadis Camara, which
led to two years of social unrest and economic instability. A number of commissions were also
set up to revise the 1995 Mining Code in 2008 and 2009.

In January 2010, General Sékouba Konaté assumed power as interim President.
Guinea set up a transitional parliament by Order No. 001/PRG/CNDD/SGPRG/2010 of
9 February 2010, but on 21 December 2010, the long-time opposition leader, Alpha Condé,
was inaugurated as the country’s first democratically elected president since independence. It
was the height of the commodities boom and a reform of the mining sector was a key element
of Alpha Condé’s electoral campaign.

The 1995 Mining Code underwent profound review and a new code was approved by
the National Transitional Council by Law No. L/2011/006/CNT of 9 September 2011 (the
2011 Mining Code). With its 221 articles, the 2011 Mining Code was intended to be the
cornerstone of Guinea’s reform of the mining sector, raising the contribution of the mining
sector to the government’s revenue, promoting Guinea’s economic and social development
and enhancing its attractiveness by improving transparency.

The 2011 Mining Code introduced a number of key changes, in particular:
the state’s entitlement to a 15 per cent free carried interest in exploitation projects
relating to iron ore, bauxite and gold (which was the most publicised change);
the requirement for minimum investment obligations for the issuance of concessions;
a prohibition for mining conventions to derogate from the terms of this new code;
the requirement for holders of exploitation permits and concessions to enter into
‘development agreements’ with the local community around their area of operations;
detailed environmental and rehabilitation obligations;

6 In particular, the 1995 Mining Code included a number of tax exemptions and a stabilisation regime
whereby ‘companies [that] have signed a mining agreement are entitled to the stabilisation of the tax and
customs regulations in effect at the date of signing the mining agreement and throughout the term of such
agreement’.
the introduction of a new tax regime, including amendment of the surface royalty and extraction tax;

a number of transparency and anti-corruption initiatives, including:

- the introduction of ‘know your client’-type disclosure requirements;
- an obligation to enter into a code of good conduct providing, *inter alia*, for compliance with the principles of the Extractive Industries Transparency Initiative, to which Guinea adhered in 2005 and acceded in 2007;
- an obligation to file an annual anti-corruption plan detailing, *inter alia*, actions undertaken to prevent corruption; and
- an undertaking to publish all mining titles and conventions on the internet; and

the setting up of a National Mining Commission, comprising a Strategic Committee and a Technical Committee, in charge of supervising the activities of the CPDM.

Guinea also launched, by Presidential Decree D/2012/045/PRG/SGG, a review process managed by the Strategic and Technical Committees with a view to renegotiating and harmonising mining conventions with the 2011 Mining Code, which was completed in April 2016.

By the time the 2011 Mining Code was published and entered into force, commodity prices had declined and the 2011 Mining Code was criticised for being influenced by ‘resource nationalism’. As a consequence, Guinea amended the 2011 Mining Code by Law No. L/2013/053/CNT of 8 April 2013 (the 2011 Mining Code as amended in 2013, ‘the Mining Code’), with a view to introducing:

- decreased maximum area limitations for exploration permits;
- reduced investment thresholds for the issuance of a mining concession;
- reduced royalty and tax rates and increased stabilisation periods for certain tax rates from 10 to 15 years; and
- increased flexibility in relation to the transfer of the infrastructure’s ownership to the state and applicability of this new code to existing mining conventions.

Law No. L/2013/053/CNT was promulgated by Presidential Decree No. D/2013/075/PRG/SGG dated 17 April 2013. It was published in the Official Gazette and entered into force in June 2013.

Further regulations were then adopted to implement the Mining Code, including four decrees adopted in January 2004, namely: (1) Decree D/2014/012 on the management of the authorisations and mining rights; (2) Decree D/2014/013 on the implementation of the financial provisions of the Mining Code; (3) Decree D/2014/014 on environmental and social impact assessment for mining operations; and (4) Decree D/2014/015 adopting a model form mining agreement. Order A/2016/5002/MMG/SGG adopted on 1 September 2016 specified a new cadastral procedure. To the best of our knowledge, at the time of writing these texts are still due to be published in the Official Gazette. In practice, the relevant Guinean authorities operate on the basis that these implementing regulations are in effect (indeed, a number of these decrees explicitly provide that they came into effect immediately upon signature).

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7 Some mining conventions are available on the website of the Technical Committee at www.contratsminiersguinee.org.
Guinea

Decree D/2015/007/PRG/SGG dated 14 January 2015 also finally puts in place a system for an accelerated management and monitoring of the files for the development of integrating mining projects with investments of US$1 billion or more.

III MINING RIGHTS AND REQUIRED LICENCES AND PERMITS

i Title

Article 3 of the Mining Code states that mineral substances within the territory of Guinea are the property of the state and cannot be subject to private appropriation except as provided for by the Mining Code.

The Mining Code provides for a separation between ownership of minerals while they are in the ground and ownership of minerals once extracted. A private party that holds a mining right granted under the Mining Code acquires ownership of any minerals it extracts pursuant to that mining right.

ii Surface and mining rights

Articles 17 et seq. set out three types of mining titles with the following key rights and obligations.

### Key rights and obligations

<table>
<thead>
<tr>
<th>Exploration permit</th>
<th>Exploitation permit</th>
<th>Concession</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Purpose</strong></td>
<td>Exclusive right to explore</td>
<td>Exclusive right to carry out all kinds of mining operations</td>
</tr>
<tr>
<td><strong>Maximum initial term</strong></td>
<td>Three years</td>
<td>15 years</td>
</tr>
<tr>
<td><strong>Maximum area</strong></td>
<td>500 km² (bauxite and iron ore)</td>
<td>100 km² (other)</td>
</tr>
<tr>
<td><strong>Maximum number</strong></td>
<td>Three (for each of bauxite and iron ore)</td>
<td>Five (other)</td>
</tr>
<tr>
<td><strong>Key requirements</strong></td>
<td>• The permit will specify a minimum work programme, including minimum expenditure per km² to be set out in implementing regulations.*</td>
<td>• Development work must begin within one year following the grant of permit or concession.</td>
</tr>
<tr>
<td></td>
<td>• Exploratory work must begin within six months following the grant of the permit.</td>
<td>• A penalty of 10 million Guinean francs per month for an exploitation permit, and US$2 million per month for a concession, is due for the first three months of delay if work has not begun within this time.†</td>
</tr>
<tr>
<td></td>
<td>• An environmental impact notice must be filed before works commence; this must take place no later than six months after the grant of the permit.</td>
<td>• Obligation to fund an environmental rehabilitation trust account to guarantee the rehabilitation and closure of the mining site.‡</td>
</tr>
<tr>
<td><strong>State participation</strong></td>
<td>N/A</td>
<td>Non-contributing, carried interest of 15 per cent for iron ore, bauxite and gold upon grant of the title and up to a further 20 per cent interest on terms to be agreed with the titleholder</td>
</tr>
<tr>
<td><strong>Transferability</strong></td>
<td>No</td>
<td>Yes – subject to approval of Minister of Mines and an environmental, and health and safety audit</td>
</tr>
</tbody>
</table>

*The 2014 Decree D/2014/012 on the management of the authorisations and mining rights (see above) sets the minimum expenditure at US$500 per square kilometre per year and provides that expenditure incurred abroad will be taken into account up to a certain amount, which will be set out in a joint order of the Ministries of Mines and Finance.

†This amount will increase by 10 per cent per month from the fourth month of delay until the 12th month of delay.

‡The terms of this account will be detailed by a joint order of the Ministers of Mines, Environment and Finance.
**Guinea**

**Application process**

<table>
<thead>
<tr>
<th></th>
<th>Exploration permit</th>
<th>Exploitation permit</th>
<th>Concession</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Conditions for grant</strong></td>
<td>Sufficient financial and technical capabilities*</td>
<td>N/A</td>
<td>Requires an investment of at least US$1 billion in relation to iron ore and bauxite or US$500 million in relation to gold and certain other substances.</td>
</tr>
<tr>
<td></td>
<td>N/A</td>
<td>Guinean-registered entities</td>
<td></td>
</tr>
<tr>
<td></td>
<td>If exploration works have been undertaken by the state, the state may seek reimbursement on the basis of an assessment by an independent auditor.</td>
<td>If the exploitation permit or concession is granted to someone other than the entity that made the discovery, a fair compensation must be paid to the latter in order to cover the exploration costs that have been incurred.</td>
<td></td>
</tr>
<tr>
<td><strong>Process for grant</strong></td>
<td>If no deposit has been identified, awarded on a first come, first served basis.</td>
<td>If an exploration permit is in place, application must be filed no later than three months before the end of its term.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>If a deposit has been discovered, based on competitive tendering process.</td>
<td>If there is no exploration permit, or the holder of the relevant exploration permit does not apply, based on competitive tendering process.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Granted by an order of the Minister of Mines upon recommendation of the CPDM following approval of the Technical Committee.</td>
<td>Granted by ministerial decree upon recommendation of the Minister of Mines following approval by the National Mining Commission.</td>
<td></td>
</tr>
</tbody>
</table>
| **Key documents for grant** | A feasibility study including:  
• Work and expenditure commitments deemed acceptable.  
• Environmental impact notice to be filed before the start of the works and no later than six months after the date of award. | * The definition of 'financial and technical capabilities' will be set out in a presidential decree. The Management Decree defines 'financial and technical capabilities' as the 'minimum professional, technical and financial requirements that are deemed to be necessary by the awarding authority', based on the deposit in question and the mining title requested.  
† The process to be followed to enter into local development agreements with local communities will be set out in a joint ministerial order. | |

**Renewal process**

<table>
<thead>
<tr>
<th></th>
<th>Exploration permit</th>
<th>Exploitation permit</th>
<th>Concession</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of renewals</td>
<td>Two</td>
<td>Unlimited</td>
<td>Unlimited</td>
</tr>
<tr>
<td>Term of renewals</td>
<td>Two years</td>
<td>Five years</td>
<td>10 years</td>
</tr>
<tr>
<td>Time for applying for renewals</td>
<td>Three months before end of term.</td>
<td>Six months before end of term</td>
<td></td>
</tr>
<tr>
<td>Extensions</td>
<td>May be granted for a term not exceeding one year if a feasibility study is not completed by the end of the second renewal for justified reasons.</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>Relinquishment</td>
<td>50 per cent on each renewal.</td>
<td>N/A</td>
<td></td>
</tr>
</tbody>
</table>

In addition to the foregoing, Article 18 of the Mining Code provides that mining agreements will be entered into with holders of concessions and exploitation permits on the basis of a model form mining agreement to be set out in a decree. Mining agreements are intended
to supplement the provisions of the Mining Code. Although mining agreements are to be ratified by the legislature, as was the case under the 1995 Mining Code, the Mining Code provides that mining agreements may not deviate from the terms of the Mining Code.

### iii Additional permits and licences

The Mining Code provides in a number of different articles that mining companies operating in Guinea must comply with all applicable Guinean mining laws and regulations. Articles 120, 143 and 144 state that specific authorisations are required for certain operations, including land-clearing, building of communication transmission lines or infrastructure and disposal of non-recycled waste. In practice, numerous additional permits and approvals are required for mining projects. It is therefore advisable for operators to implement a strict compliance methodology in order to secure and maintain the required permits and approvals from the relevant authorities.

### iv Closure and remediation of mining projects

According to Article 131, mine closure must be notified 12 months in advance and a closure plan must be filed six months before the date of closure in order to:

- eliminate health and safety risks;
- rehabilitate the site to a condition acceptable to the local community; and
- restore vegetation with similar characteristics to that in the surrounding area.

Following a rehabilitation inspection by the Ministries of Mines and the Environment, a notice of discharge will be issued. This notice will discharge the titleholder from all obligations in relation to the mining title. Should the site fail this inspection, rehabilitation works will be carried out by the administration at the expense of the titleholder.

### IV ENVIRONMENTAL AND SOCIAL CONSIDERATIONS

#### i Environmental, health and safety regulations

Article 7 provides that title-holders must comply with, *inter alia*, applicable provisions of the Public Health Code, the Environment Code, the Water Code, the Employment Code, the Wildlife Code, the Livestock Code, the Real Estate Code, the Forestry Code, the Pastoral Code and the Local Communities Code.

Article 145 also provides that titleholders must apply whichever are the highest standards applicable in Guinea or those followed by titleholders in their other operations.

#### ii Environmental compliance

Article 142 provides that the environment must be protected in accordance with the provisions of the Environment Code or ‘international best practices in this area’.

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8 The 1995 Mining Code also provided that mining agreements were to be concluded and concessions were to be awarded for the exploration and exploitation of bauxite and iron ore, which were considered as ‘substances of special interest’.
iii Third-party rights

Articles 115 et seq set out specific provisions relating to the protection of the rights of existing titleholders. Article 118 allows the Minister of Mines to create a buffer zone within a title area to protect an adjoining title.

The Mining Code contains specific provisions that protect the rights of persons with rights to land over which mining titles are granted. Articles 123 and 124 state that:

a the grant of a mining right does not extinguish a pre-existing property right and any mining right is subject to the consent of the landowner;

b titleholders must provide reasonable and adequate compensation to the legitimate occupants of land;

c the state will assist in procuring the necessary consent from the landowner, if any; and

d if such consent cannot be obtained, the state may impose easements or expropriation and set an appropriate level of compensation.

Specific rules govern the resettlement plan to be implemented for populations that are displaced due to mining activities.

iv Additional considerations

Local content

Article 130 provides that a ‘contribution to local development’ must be paid by titleholders from the date of first commercial production. This contribution is set at 0.5 per cent of the turnover for bauxite and iron ore and one per cent in relation to other substances.

Article 107 also provides that:

a titleholders and related contractors must give preference to Guinean companies, provided that they offer comparable prices, quantities, qualities and delivery schedules; and

b in any case, the proportion of small and medium-sized businesses owned or controlled by Guineans must be progressively increased towards the following minimum thresholds:

<table>
<thead>
<tr>
<th>Exploration</th>
<th>Development</th>
<th>Exploitation</th>
</tr>
</thead>
<tbody>
<tr>
<td>10 per cent</td>
<td>20 per cent</td>
<td>Year 1–5</td>
</tr>
<tr>
<td></td>
<td></td>
<td>15 per cent</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Year 6–10</td>
</tr>
<tr>
<td></td>
<td></td>
<td>25 per cent</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Year 11–15</td>
</tr>
<tr>
<td></td>
<td></td>
<td>30 per cent</td>
</tr>
</tbody>
</table>

Titleholders must submit an annual report to the Minister of Mines on the use of small and medium-sized businesses owned or controlled by Guineans detailing their progress towards achieving the thresholds set out above.

Employment

Articles 108 and 109 set out various obligations regarding employment:

a fixed-term work permits for foreigners in the mining sector must be approved by the mining administration and may be renewed only once;

b titleholders and their contractors are required to:

• exclusively employ Guineans for all unskilled positions; and
• submit a training and development programme that encourages as much as possible the transfer of technology and skills to Guinean businesses and staff; and
titleholders:
• may employ a ‘reasonable number’ of expatriate workers only;
• must give preference to employing Guinean managers with the required skills; and
• must employ a set percentage of Guinean nationals depending on the type of position and stage of the project:

<table>
<thead>
<tr>
<th></th>
<th>Exploration</th>
<th>Development</th>
<th>Exploitation</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Year 1–5</td>
<td>Year 6–10</td>
<td>Year 11–15</td>
</tr>
<tr>
<td>Senior managers</td>
<td>33 per cent</td>
<td>20 per cent</td>
<td>60 per cent</td>
</tr>
<tr>
<td>Managers</td>
<td>50 per cent</td>
<td>30 per cent</td>
<td>80 per cent</td>
</tr>
<tr>
<td>Qualified workers</td>
<td>66 per cent</td>
<td>40 per cent</td>
<td>80 per cent</td>
</tr>
<tr>
<td>Unskilled workers</td>
<td>100 per cent</td>
<td>100 per cent</td>
<td>100 per cent</td>
</tr>
</tbody>
</table>

The Mining Code also states that:

a as of the date of first commercial production, the assistant managing director of the titleholder must be a Guinean national;

b after five years of the date of first commercial production, the managing director of the title-holding entity must be a Guinean national; and

c titleholders must file an annual report on measures taken for employing Guineans.

V OPERATIONS, PROCESSING AND SALE OF MINERALS

i Processing and operations
While titleholders are free to export raw materials from Guinea before they are processed, Article 139 states that titleholders are strongly encouraged to establish facilities in Guinea for the conditioning, treatment, refining and processing of extracted minerals.

If any infrastructure is required, Article 121 stipulates that its construction will be carried out directly by the state or within the framework of a public-private partnership. Furthermore, regardless of how the project is financed, transport infrastructure must be transferred to the state at no cost after a grace period of five years from the date the title-holder has reached a ‘fair return on investment’.

ii Sale, import and export of extracted or processed minerals
Law No. L/2013/053/CNT of 8 April 2013 introduced a right of pre-emption by the state over 50 per cent of the production of a title-holder if it sold minerals at a price below arm’s length price for a continuous period of over three months.

The taxable income of the titleholder may also be readjusted in such a case.

iii Foreign investment
Article 184 requires titleholders to ‘repatriate all export proceeds resulting from sales of mineral substances on accounts of the central bank of Guinea, opened abroad with reputable financial institutions’.

As noted by a number of practitioners, the drafting and practical implications of this article are unclear and will need to be considered by investors when structuring mining operations.
It shall also be noted that executives from the Ministry of Mines are entitled to inspect any document, statement of account and supporting document obtained or prepared by titleholders.

VI TAX AND CHARGES

Articles 159 et seq set out a number of specific taxes, in addition to those provided for by the General Tax Code, as well as tax exemptions, which derogate from the General Tax Code. In particular, the Mining Code states that:

a the corporate tax rate for mining companies has been set at 30 per cent instead of 35 per cent under the General Tax Code;

b titleholders can opt to defer the amortisation of fixed assets purchased during the exploration and development phases from the start of the exploitation phase, subject to prior approval by the Director General of Taxation; and

c the stabilisation of certain tax terms is guaranteed to titleholders that have signed a mining agreement for up to 15 years from the date the concession is granted.

i Royalties

Titleholders must pay an annual surface royalty in accordance with the table below:

<table>
<thead>
<tr>
<th></th>
<th>Surface royalty US$ per km</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Award</td>
</tr>
<tr>
<td>Exploration permit</td>
<td>10</td>
</tr>
<tr>
<td>Exploitation permit</td>
<td>75</td>
</tr>
<tr>
<td>Concession</td>
<td>150</td>
</tr>
</tbody>
</table>

ii Taxes

Extraction tax

An extraction tax deductible from taxable profit is payable in accordance with the table below:

<table>
<thead>
<tr>
<th></th>
<th>Rate</th>
<th>Basis</th>
</tr>
</thead>
<tbody>
<tr>
<td>Iron ore</td>
<td>3 per cent</td>
<td>Price of iron ore on the basis of Platts China Iron Fines CFR 62 per cent minus the transport costs, as measured by Baltic Exchange Capesize Index Route C3-Tahara/Qingdao</td>
</tr>
<tr>
<td>Bauxite</td>
<td>0.075 per cent</td>
<td>Three–month LME seller price</td>
</tr>
<tr>
<td>Gold</td>
<td>5 per cent</td>
<td>London PM fixing</td>
</tr>
</tbody>
</table>

Export tax

An export tax is payable where ore is exported without first being processed in Guinea. The rates are 2 per cent on iron ore and 0.075 per cent for bauxite, on the same basis as for the extraction tax.

iii Duties

Provided that lists of relevant materials and equipment are filed with the Ministries of Mines and Finance prior to each phase, the Mining Code sets up a specific regime for titleholders, including:
an exemption from customs duties during the exploration and development phases; and

flat rates of 5 per cent on materials and equipment required to process ore in Guinea and 6.5 per cent on materials and equipment required to extract ore.9

iv Other fees and taxes

The issuances, renewals, extensions and transfers of mining titles are subject to the payment of registration fees, which are to be set out by implementing regulations.

Finally, Article 91 details the capital gains tax applicable to direct and indirect transfers of mining titles, as summarised below.

<table>
<thead>
<tr>
<th></th>
<th>Rate</th>
<th>Basis</th>
</tr>
</thead>
<tbody>
<tr>
<td>Transfer of exploitation permit or concession</td>
<td>35 per cent</td>
<td>Difference between price and net book value of the title</td>
</tr>
<tr>
<td>Transfer of shares of a title-holder</td>
<td>35 per cent</td>
<td>Difference between price and net book value of the shares</td>
</tr>
<tr>
<td>Indirect change of control or influence of a title-holder within 12 months</td>
<td>35 per cent</td>
<td>Difference between price and net book value of the shares</td>
</tr>
</tbody>
</table>

VII PRIOR MINING TITLES AND TRANSITIONAL PROVISIONS

The Mining Code provides for a number of transitional provisions regarding titles existing at, and mining conventions entered into before, its date of entry into force. In particular, it does not affect the ownership and validity of existing mining titles, but it applies in full to mining titles that are not covered by a mining agreement.

Also, its application to mining agreements entered into before its entry into force had to come in gradually via amendment agreements to be entered into with titleholders within 24 months following the publication of the Mining Code. These amendment agreements had to cover three types of provisions:

a provisions dealing with transfers of interest, capital gains tax, environment, relationship with local communities and health and safety, which shall not be negotiable and shall apply immediately from the date of entry into force of the amendment agreements;

b provisions relating to training, employment and support to Guinean businesses, which shall not be negotiable and shall apply progressively over a period not exceeding eight years; and

c other provisions, including in relation to tax and state participation, which shall give rise to negotiations between the title-holder and the government.

VIII OUTLOOK

The success of the new Mining Code in achieving its aim of balancing investment promotion and sustainable economic and social development will largely depend on its practical implementation. Although a number of implementing regulations have been passed, some of

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9 Such materials and equipment will also be exempt from value added tax (VAT) during the exploration and development phases (title-holders are subject to VAT under the General Tax Code during the exploitation phase and input VAT can in principle be deducted from output VAT due).
them remain outstanding or unpublished. Nevertheless, the recent achievement of financial close on two important projects may indicate a positive trend in the development of the sector in Guinea.
I OVERVIEW

Since the implementation of Law No. 2014-138 dated 24 March 2014 establishing the new Mining Code (the Code), the Ivory Coast has been shaped by a constant desire to acquire and retain the substantial political and economic stability that in turn provide the perfect environment for the mining sector to grow in.

At the political level, a referendum was held in October 2016 in order to decide whether to adopt a new constitution and enter into the Ivory Coast Third Republic. Despite a weak turnout, 93.42 per cent of the voters chose to adopt the new Constitution. Likewise, the last legislative elections unfolded peacefully in November 2016 and provided a neat parliamentary majority for President Ouattara, re-elected in 2015.

This political stability is accompanied by a dynamic economy. Since 2012, the Ivory Coast has enjoyed strong GDP growth and is one of the most stable economies in West Africa. Despite difficult climatic conditions impacting the agricultural sector (accounting for 28 per cent of the GDP in 2016), GDP growth remained strong in 2016 at 8.8 per cent. Growth expectations have, however, been revised downwards for 2017 owing to a decrease in cacao prices (around 35 per cent according to the IMF) and should revolve around 8.5 per cent.

Despite this positive context, 2017 started with various social movements across the country with strikes organised by public employees and also mining employees, at Randgold Resources, reclaiming wage increases and improved working conditions. This social instability can be explained by the fact that the strong economic growth enjoyed by the country since 2012 is struggling to trickle down to the population and especially to the poorest. That is why the government launched a National Development Plan for 2016–20 aiming to reduce the poverty rate (46 per cent in 2016) and allow the country to reach emergence and a middle-class economy.

Before undertaking an analysis of the mining legislation and its impact on the sector, an overview of the current status and context of the mining sector in the Ivory Coast is essential in order to evaluate its future prospects. The economic boost currently contemplated by the country since 2012 is supported by President Ouattara’s government’s strategic plan to promote the mining sector to being the country’s main source of economic and social development, which in turn depends on Ivory Coast’s capacity to attract international mining companies. The legal framework enacted following the adoption of the new Mining Code

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Ivory Coast

aims to establish a balance between the interests of investors and the state, while complying with international local content requirements, as well as considering social and environmental parameters.

In 2014, the government’s ambition was to increase the mining sector share in GDP from 1 per cent to 5 per cent in 2020. Although this objective was not achieved in 2016, the mining sector is steadily growing. Sales revenues of the mining sector have increased by 1 per cent compared to 2015 while profits increased by 16.5 per cent from 2015 to 2016. The mining sector now employs directly 8,291 individuals. This is a 25 per cent increase compared to 2015.

Overall, the Ivory Coast is in possession of large untapped resources with an estimated two-thirds of the territory covered with mineral resources. The Ivory Coast is currently exploiting nickel, bauxite, manganese, diamonds and gold but the country also has considerable reserves in steel, iron ore and coltan.

Gold mining remains at the forefront of the sector. Gold production reached 25 tonnes in 2016 and is expected to increase toward 30 tonnes per year from 2017 to 2020. These optimistic previsions rely on the upcoming exploitation of two mines for which permits were delivered at the end of 2016. One of them is operated by the Australian Perseus Mining at Sissingué and should start production in March 2018. The other one is located at Afémá and is operated by Global Gold Production.

These two mines are to be added to the four gold mines already in exploitation. The South African Randgold Resources exploits the biggest gold mine of the country at Tongon which produced height tonnes in 2016 that is, 32 per cent of Ivory Coast’s annual gold production. The company plans on investing in its mine in order to expand its life expectancy while continuing exploration in Mankaro and Boundiali. Likewise, the Canadian Endeavour Mining is planning to invest around 200 billion West African CFA francs in its two gold mines at Agbaou and Ity where a new discovery in September 2016 has the potential to expand the mine’s life by 10 years. Newcrest Mining, a major player in Ivory Coast, operates the Bonikro gold mine. Last but not least, the Ivorian State controls SODEMI, the state-owned mining company, which holds shares in various mining companies and also directly owns a number of mining titles and mining projects in the Ivory Coast.

The mining sector initiated diversification of the exploitation in 2016 and in 2017. The Ivorian government delivered an exploitation permit for bauxite to an Ivorian society, Lagune Exploration Afrique. It should be the first exploitation of bauxite in the country. Furthermore, the first nickel mine entered into exploitation in July 2017. After obtaining an exploitation permit in November 2016, the subsidiary CMB, from the Greek Company IC Nickel, plans to extract at least one billion tonnes of nickel per year. To attain this objective, the company should invest around 130 billion West African CFA francs.

II LEGAL FRAMEWORK

The Ivorian legal system has been strongly influenced by the French civil law tradition of codifying the law. Under the current Third Republic regime and the Fourth Constitution, the prerogatives of the executive power, although within the framework of a presidential regime, have been restricted. Within the entire national territory, justice is delivered by the Court of Cassation, the State Council, the Courts of Appeal, the High Courts and their separate sections.
The main laws applicable to mining activities are the Code, the decree implementing the Code dated 25 June 2014, the Environment Code and the Labour Code. Additional regulation must also be scrutinised, such as the order on surface royalty dated 26 March 2014 and proportional taxes in the mining sector.

The Ivory Coast’s economy is highly integrated within the West African region. It is a Member State of the Organisation for the Harmonisation of African Business Law (OHADA) and of the West African Economic and Monetary Union (WAEMU), which enacted a mining code in 2003 (the WAEMU Mining Code). The WAEMU Mining Code governs any mining operation related to the prospection, exploration, exploitation, detention, traffic, transport, treatment, trade and transformation of minerals within the WAEMU Member States’ territories. Each Member State must, in theory, comply with it. The Ivory Coast is also a member of the Economic Community of West African States (ECOWAS), which enacted a directive on the harmonisation of guiding principles and policies in the mining sector in 2009, the main objectives of which are to harmonise mining laws in the region, to improve transparency and to protect the environment and local communities. The Code is, for the most part, compliant with these two organisations.

At the international level, the Ivory Coast has made good progress in terms of transparency. It joined the Kimberley Process Certification Scheme in 2013, aiming at stopping the traffic of conflict diamonds. As a direct consequence, the embargo on diamond exports from the Ivory Coast was lifted by the UN Security Council on 29 April 2014. The Ivory Coast also joined the Extractive Industries Transparency Initiative (EITI) in 2006 and has created an agency with a similar agenda at national level. Since May 2013, it has been considered to be complying with the EITI principles.

According to the Code, the main regulatory bodies in the Ivory Coast are the President of the Republic and the Ministry of Industry and Mines (the Ministry), the department in charge of implementing mining policy.

These authorities require, inter alia, mining operators to provide reports and keep various documents available, depending on the nature of the permit issued. The main reporting requirements are in respect of statistics on performance, employment, advancement of exploitation and exploration operations.

III MINING RIGHTS AND REQUIRED LICENCES AND PERMITS

i Title

The Code reaffirms the sovereign ownership of the Ivorian state of the underground natural resources located within its territory, including territorial waters and the continental shelf up to the Ivory Coast’s international border. Subject to the provisions of the Code, the state may, however, grant a mining title (i.e., a permit or authorisation allowing an Ivorian or foreign company to undertake mining activities in the Ivory Coast).

ii Surface and mining rights

Mining substances are divided into two categories: quarry substances and ore substances. Focusing on ore substances, activities covered by the Code can be split into three standard phases: prospection, exploration and exploitation. Contrary to prospection and exploration activities, the legal framework for mining exploitation has been divided into two main regimes based on the type of deposit and the importance of the facilities involved. More specifically, the authorisation regime applies to semi-industrial and artisanal exploitation of
Ivory Coast

Ivory Coast

ore (as well as to industrial or artisanal exploitation of quarry substances), whereas the permit regime applies to regular exploration activities and exploitation of ore. This chapter mainly focuses on the permit regime.

**Exploration permit**

**Attached rights**
The exploration permit grants an exclusive right to explore within a perimeter, which cannot exceed 400 square kilometres, as well as to dispose of the products extracted during these operations. Such disposal is, however, subject to a prior declaration to the Ministry and the payment of the applicable mining duties.

In addition, the permit holder is automatically entitled to request and obtain an exploitation permit at any time during the exploration period provided that it has carried out all its obligations and that a feasibility study has proven the existence of one or several deposits within the perimeter of the permit.

As to its legal nature, the exploration permit is a moveable and indivisible right that may not be farmed out, pledged or mortgaged.

**Conditions and procedure for granting**

As described below, requirements and standards for eligibility are quite high and may exclude companies with limited experience, financial or technical capacities.

First, the applicant must be a national natural person or a legal person established under Ivorian law, thus excluding other investment vehicles such as branches. A 20 million West African CFA francs minimum share capital is required for such legal entities, compared to one million West African CFA francs under the former Mining Code, which constitutes a drawback in the eyes of investors.

Second, in order to be eligible, any applicant for an exploration permit must meet specific technical and financial criteria. For instance, the applicant must have undertaken two exploration projects in the past 10 years and have recruited a technical manager with at least seven years’ experience in exploration works. Furthermore, the applicant must have sufficient financial resources to provide for the exploration costs by paying a deposit into a bank account at a first-ranked financial institution in the Ivory Coast. A minimum exploration budget of 1.6 million West African CFA francs per square metres is also required for the first four years.

As to the procedure, the permit is officially granted by decree. The holder must then start the exploration works within six months of that date.

**Duration and renewal**
The duration of the validity has been extended from three to four years and is renewable twice for successive periods of three years, which constitutes an increase of one year from the previous Code. The holder of the permit must apply for a renewal at least three months before its expiry and such renewal is automatically granted if the applicant has fulfilled all its obligations. Exceptionally, an additional renewal for a maximum of two years may be granted if such request is due to a delay in finalising the feasibility study.

In principle, after each renewal, the size of the perimeter is reduced by one-quarter; however, the holder of the permit may keep the entire perimeter subject to the payment of an option right and the proof that works will be completed over the entire perimeter.
Assignment and transfer
The exploration permit can be assigned or transferred upon obtaining approval from the Minister, which is automatically granted if the applicant has fulfilled all its obligations pursuant to the Code.

Relinquishment
The holder of the exploration permit may be allowed, without penalty, to relinquish the rights granted by the exploration permit on all or part of the perimeter of the permit. Such relinquishment must be approved by the Administration of Mines and is subject to full payment of the amounts due at the time of the relinquishment and the fulfilment of its obligations relating to the environment.

Withdrawal of permit
The exploration permit may be withdrawn, without compensation and following an unsuccessful 60 days' formal notice if the permit holder does not comply with all of its obligations and commitments, such as providing proof of the constitution of the banking reserve, payment of taxes, royalties and duties, not carrying out exploitation activities within the exploration perimeter, or delaying or suspending the exploration works for more than six months.

Exploitation permit
Attached rights
The holder of an exploitation permit has an exclusive right to exploit the deposits within the limits of its perimeter, as well as the right to transport or to arrange the transport of the extracted ore, the right to trade with the ore on the internal or external markets and to export it. It is also allowed to establish the necessary facilities to condition, treat, refine and transform the ore.

Contrary to exploration permits, exploitation permits are indivisible, immoveable rights that may be mortgaged upon approval of the Minister of Mines and Industry.

Conditions for granting and procedure
The Code requires the exploitation permit holder to establish a company under Ivorian law, the sole purpose of which is to exploit the deposit located within the perimeter. The permit will then be transferred to this exploitation company.

The holder of the exploitation permit must prove within six months of delivery of the permit that its staff includes experienced engineers, mining geologist teams and a technical manager meeting the same requirements as for the exploration stage, and that it has paid a deposit into a bank account of a first-ranked financial institution in the Ivory Coast. The time limit to start the development works has been reduced from two years to one year compared with the former Code.

The Administration of Mines may put out to tender perimeters not attributed and on which works have revealed the existence of potential mining assets.

Mining convention
A mining convention must be signed between the state and the holder of the exploitation permit within 60 days of delivery of the permit.
The convention’s main purpose is to stabilise the tax and customs regime applicable to
the exploitation operations; however, the Code does not limit its purpose, and other essential
rights, obligations and conditions may be incorporated into the convention. A template
convention may be provided by the state. The decree implementing the Code further provides
for the main obligations to be included in the mining convention, in particular the rights and
obligations of the title-holder and the undertakings of the state. In any case, the convention
cannot derogate from the provisions of the Code and the decree implementing the Code.

The mining convention has an initial duration of 12 years, renewable for successive
periods of a maximum of 10 years. The fact that the duration of the convention does
not mirror the duration applicable to exploitation permits as described below may create
difficulties that should be carefully assessed and anticipated by the parties.

State participation

In exchange for the exploitation permit, the state is allowed to obtain a 10 per cent free-carry
and non-dilutable participation in the share capital of the operating company. Any additional
participation of the state in the company’s operating share capital (which cannot exceed 15
per cent of the share capital) may be negotiated at market conditions.

Such percentage does, however, not include participation from state-owned companies.
Any participation of SODEMI in the share capital may, therefore, indirectly increase the
control of these on the operating company.

Duration and renewal

The exploitation permit is granted for the lifetime of the mine as indicated in the feasibility
study, with a maximum duration of 20 years. It can be renewed for successive periods of a
maximum of 10 years. Applications for renewal are made under the same conditions as for
exploration permits.

In the event of persisting adverse market conditions or a force majeure event, the holder
of the exploitation permit may request to postpone or suspend the mine exploitation works,
extending, if approved, the duration of the permit for a maximum of two years, which may
be renewed only once.

Assignment and transfer

Assignment and transfer are made under the same conditions as for exploration permits.

Relinquishment

The holder of the exploitation permit may be allowed, without penalties, to relinquish the
rights granted by the exploitation permit on all or in part of the perimeter of the permit. Such
relinquishment is approved by the Administration of Mines and is subject to full payment
of the amounts due at the time of the relinquishment and the fulfilment of its obligation
relating to the environment and the rehabilitation of sites (see Section IV, infra).

Withdrawal

The exploitation permit may be withdrawn, without compensation and following an
unsuccessful 60 days’ formal notice if the exploitation permit holder did not comply with
its obligations and commitments. In particular, it may be withdrawn if the exploitation
company does not provide proof of the payment of the deposit into the bank account in due course or if it has delayed or suspended the exploitation works without authorisation, or did not pay the relevant duties, royalties or taxes.

iii Additional permits and licences
The holder of a mining title remains subject to specific laws and regulations governing, in particular, environmental protection, construction, hazardous or unsanitary buildings or facilities and the protection of the forestry heritage.

iv Closure and remediation of mining projects
Any applicant for an exploitation permit must submit a closing and rehabilitation plan for the mine to the administration. Such a plan is approved by the administrations for mines and for the environment. The content of such a plan is further detailed in Section IV, infra.

Furthermore, at the beginning of the exploitation, an escrow account for the rehabilitation of the environment must be opened with a first-ranked financial institution in the Ivory Coast. This account aims at covering the costs related to the environmental rehabilitation plan at the end of the exploitation operation. Funds in this account are recorded as costs when determining the tax base for business profits tax.

v Additional consideration
A main innovation of the Code is the extensive list of criminal and administrative sanctions attached to any infringement of obligations or requirements included in the Code. Criminal sanctions include a prison term of up to five years and fines of up to 50 million West African CFA francs. Administrative sanctions cover, in particular, annulment of the permit, closing of the exploitation perimeter or confiscating materials used to commit the infraction.

IV ENVIRONMENTAL AND SOCIAL CONSIDERATIONS
i Environmental, health and safety regulations
Before starting exploration or exploitation operations, the holder of the mining title must develop a specific set of rules related to health and safety. During the operations, it must guarantee the safety of persons and goods related to the mining project by taking several measures, the details of which are provided by the decree implementing the Code. Any accidents occurring during mining activities must be reported in writing to the Minister of Mines, and any relevant measures must be taken to avoid future accidents of the same kind.

ii Compliance with environmental guidelines
A permit holder must conduct mining operations in a way that ensures protection of the environment, the exploited sites’ rehabilitation, and the conservation of forest resources. In this respect, it must submit an environmental and social impact assessment (ESIA) for the administration to approve. The ESIA must include an environmental and social management plan comprising a site rehabilitation plan as well as addressing provisional costs.

The rehabilitation plan must take into account several aspects such as the cleaning of the site, the dismantling and removal of mining installations, the post-rehabilitation surveillance of the site, and suggestions on how the site could be reconverted. Such operations must start during the exploitation period and not only at the end of operations.
After the closure of the mine, any exploitation permit holder remains liable under civil law for damages and accidents on the site that could be caused by the former installations during the five years following closure.

Mining activities also fall within the scope of the Environment Code, which notably requires investors to provide an environmental report assessing the environmental impact of the project.

iii Third-party rights

Some protected areas, such as closed properties, places of worship or cultural sites, cannot be subject to mining activities without the prior consent of the owners, occupants and concerned communities, as well as authorisation from the Minister of Mines.

In addition, the Code follows modern African mining legislation, which increasingly aims at protecting the rights of local populations. The Code guarantees a right to a fair indemnity for the land’s occupants and legal owners in the event of occupation of the land. Such indemnity will be paid following the signing, under the supervision of the mining administration, of a memorandum of understanding by the exploitation companies, the occupants and the legal owners. The use of land required for mining activities and works completed on such land may be declared as being in the public interest upon satisfaction of conditions provided under the applicable law.

iv Additional considerations

Exploitation permit holders must elaborate a community development plan jointly with local communities and administrative authorities and constitute a development fund for the benefit of villages identified as ‘affected localities’ by the ESIA. This fund is annually credited and will be used to realise socioeconomic development projects, the amount involved being deductible from the profit tax base. They must also instigate and conduct training for Ivorian small and medium-sized enterprises in order to increase their participation in the mining sector.

To enhance transparency, the Code prevents any member of the government, or public servant of any kind who has been involved in the mining administration, from obtaining financial benefits directly or indirectly from mining companies, and this extends to the five years following the end of their duties. Furthermore, they have to declare any interests held in the mining sector in the period before they exercised public functions and declare themselves non-competent to participate in a decision process that could affect such interests.

The holder of a mining title must comply with the Equator and EITI principles and report to the national office of the EITI all mining revenues and social contributions paid to the state. In 2011, the Ivorian Council for EITI released a report showing that the government had received over US$394 million in taxes, fees and royalties from the oil, gas and mining sectors during the 2011 fiscal year. In 2012, the amount declared to the EITI rose to US$1 billion, namely due to the increase of oil and gas prices and the inclusion of customs duties and employee contributions as from 2012.
V OPERATIONS, PROCESSING AND SALE OF MINERALS

i Processing and operations

The Code does not contain detailed provisions on the processing and transformation of the extracted ore. It merely provides that the holder of an exploitation permit has the right to transport the extracted mining substances to the storage and treatment location, and the right to establish the necessary facilities to condition, treat, refine and transform the ore.

Subcontractors of the holder of the exploitation permit must be approved by the administration. Modalities of such approval are set out in the decree implementing the Code. Permit holders must, in any case, give preference to local subcontractors subject to them providing equivalent services in terms of quality, prices and quantities. As to local employees, the permit holder must recruit local personnel as a matter of priority and develop and finance a training plan to help increase the employability of Ivorians.²

ii Sale, import and export of extracted or processed minerals

As stated above, the holder of an exploitation permit has the right to market the ore on the internal or external markets, and to export it.

More specifically, a gold exploitation permit allows the permit holder to market the ore and to proceed with any transaction dealing with crude gold or gold material. A crude diamond exploitation permit grants the same rights as for gold, provided that the Kimberley Certification Process Scheme is duly followed.

iii Foreign investment

The Code provides for various foreign investment-related rights granted to mining title-holders. They are allowed to open and operate accounts in local or foreign currencies in the Ivory Coast, to collect abroad all funds acquired or borrowed abroad, excluding revenues from the sale of their production (which must be repatriated in the Ivory Coast), and to transfer abroad dividends and income from the capital invested as well as from the income deriving from the liquidation or realisation of their assets.

The guarantee of free conversion from the national currency to foreign currencies and vice versa is governed by international treaties applicable in the franc zone and the WAEMU. For instance, WAEMU Rule No. 09/2010/CM/UEMOA on the external financial relations of the WAEMU Member States requires that any foreign exchange transaction, movement of funds, and payments between a WAEMU member and a non-WAEMU country must be carried out through the Central Bank of West African States (the BCEAO), post offices or authorised agents.

In terms of investment protection, the Ivory Coast has ratified the Convention on the Settlement of Investment Disputes between States and Nationals of other States as well as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In addition, the Code provides for the possibility of including an arbitration clause in mining conventions.

² Such preferences for Ivorian companies and employees may, however, be considered as violating the WAEMU Treaty and the WAEMU Mining Code, which expressly provides that Member States’ mining laws and regulations have to favour the free circulation of persons and the free provision of goods and services originating from the entire WAEMU area.
In view of the limited number of bilateral investment treaties ratified by the Ivory Coast, investors should ensure that the mining convention includes a well-drafted arbitration provision.

VI CHARGES

i Royalties
Order No. 2014-148 dated 26 March 2014 on surface royalties and proportional taxes, ratified by Law No. 2014-854 dated 22 December 2014, requires holders of mining titles to pay annual surface royalties assessed by square kilometres or hectares, which vary depending on the phase of the project (prospection, exploration or exploitation) from 1,000 West African CFA francs per square kilometre per year for the prospection phase, to 250,000 West African CFA francs per square kilometre per year for the exploitation phase. The royalty must be paid 60 days before the anniversary of the mining title.

ii Taxes
In addition to corporate income tax and other royalties and taxes required under the General Tax Code, the permit holder is subject to an ad valorem tax and the calculation is based on the turnover after the deduction of transportation costs (free on board price) and refining costs.

The rate of the ad valorem tax for gold exploitation varies depending on the price of the ounce of gold – from 3 per cent when the ounce is below US$1,000 to 6 per cent if the ounce is above US$2,000. The rate for other substances is fixed between 1 per cent and 5 per cent. The tax is payable quarterly.

iii Duties
Order No. 96-600 dated 9 August 1996 sets out several fixed duties. The main fixed duties are those payable for the award of exploitation permits (one million West African CFA francs) and their renewal (two million West African CFA francs). Fixed duties for the issuance of an exploration permit amount to 500,000 West African CFA francs.

There are additional fixed duties in the event of renewal, sale, transfer, farming out, mortgage or relinquishment of mining titles and authorisations. Other fixed duties will be set out in the relevant decrees.

iv Tax incentives
Stabilisation of tax and customs regime
As mentioned previously, both the Code and the mining convention guarantee the stability of the tax and customs regimes during the exploitation phase.

Exemptions
The Code provides for a total exemption from corporate income tax and from the annual minimum tax during the first five years following the beginning of commercial production. The Code also provides for other exemptions to the benefit of exploitation permit holders relating to customs duties, including VAT, on various imported materials.
VII OUTLOOK AND TRENDS

The long-awaited decree implementing the Code was published in August 2014, and contains provisions that generally follow the Code’s investor-friendly orientation. Some restrictive provisions, however, have been included, for instance, the approval of the Ministry is required to perform any majority-stake acquisition in the permit holder’s share capital. Grey areas also remain, such as the conditions for withdrawal of permits that may occur in the event of any breach of the legislation, according to Article 187 of the Code, relating to administrative sanctions. More recently, Decree No.002/MIM/CAB dated 11 January 2016 was enacted to set out the procedures for the award and renewal of mining titles and authorisations, as well as general dispositions regarding the handling and sale of gold.

Trends in the Ivory Coast mining industry point to positive outcomes. In April 2017, BMI Research reported that the mining sector in the country will experience the fastest mining value growth rate across the continent. From 2017 to 2021, they have estimated an annual value growth of 15.6 per cent in the Ivorian mining industry. This growth will be supported by solid infrastructures development and by the strong incentives provided by the implementation of the new Code.

With investments from major gold players such as Randgold Resources and Endeavour Mining planning to increase the life expectancy of their mine and the Australian Newcrest Mining multiplying partnerships in order to find new resources, gold mining should remain the principal driver of the mining sector in the next few years. The English Amara Mining, bought by Perseus Mining in April 2016, discovered a gold deposit in Yaoure with an estimated 70.5 tonnes of gold and has invested more than 200 billion West African CFA francs in its development.

However, the success of the gold industry has a significant disadvantage: illegal gold panning is becoming more and more of an issue slowing the industry down. If policies were implemented to fight the problem (seizures, granting traditional permits), they ended up being quite inefficient. For instance, 142 sites, closed illegally in 2015, have been reoccupied in 2016, while 47 others have been created. Likewise, in 2016, the company La Mancha had to face the occupation of a site for which it was simply awaiting its permit to be granted.

The mining sector also has to contend with the slowdown of the manganese field. Prices have decreased, along with demand in the last few years, strongly impacting companies such as Dharni Shampa or the Société Minière du Littoral. Both are struggling to produce and to export their production. Only 200,000 tonnes of manganese were produced in 2016, whereas the production reached 263,000 tonnes in 2015.

Despite that, the future of the mining sector should remain bright. Investment should be boosted by the decision of the US to lift its decade-old economic sanctions against the Ivory Coast in 2016. This should encourage investors to trust the potential of the new political and economic stability and invest in infrastructures supporting the mining industry.

Finally, the Ivorian authorities’ objective is to raise the Ivory Coast’s economy up to the level of an emerging economy by 2020. This aim is currently being furthered by large investment in infrastructure and power projects, which are likely to have a positive impact on the mining industry. The reform of the mining sector’s legal framework was an instrumental step in this direction and reflects President Ouattara’s ambition to transform the mining sector into one of the pillars of the Ivorian economy, along with cocoa and coffee production.
Chapter 11

MEXICO

Alberto M Vázquez and Rubén Federico García

I OVERVIEW

Mexico is the largest silver producer in the world. Silver is produced by Mexico’s primary and secondary silver mines as a by-product of base metal and gold operations. According to the World Bank, Mexico is the second largest economy in Latin America.

Mexico has a long history of mining (going back more than 500 years). The attitude of the government to any mining project generally depends on the area in which it might be located; in the northern and central parts of Mexico, the mining industry is in general terms very well established, whereas there is less activity in the south.

Exploration for mineral resources involves a high degree of risk. The cost of conducting exploration programmes may be substantial and the likelihood of success is difficult to assess. The prices of metals greatly affect the value of mining companies and the potential value of their properties and investments, which in Mexico are generally dependent on the equity markets as their sole source of operating capital.

II LEGAL FRAMEWORK

On 28 April 2005, Mexico’s Mining Law was amended to simplify the regulation of mining concessions through the merging of the exploration and exploitation regimes into one single regime; this amendment came into full force and effect on 1 January 2006.

A mining concession is an authorisation granted by the federal government. It is a unilateral administrative act whereby a specific activity is authorised to be carried out under particular rules or over public assets. By means of a concession, certain rights may be exercised during a specified period by an individual or a private legal entity. The general economic interests of Mexico prevail over the private interests of such individual or private legal entity.2

Upon the granting of a concession, the government is no longer involved in the carrying out of the granted activity, which will be performed by an individual or private legal entity. The main activity that the government performs with respect to granted concessions is to verify that the concessionaire complies with the obligations set out in the respective laws.

By means of a mining concession, the Federal Executive (through the Ministry of Economy) confers the right to explore, exploit and process concessible minerals or other substances located within an allotted area to either:

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A mining concession may be revoked or cancelled by the government in the case of non-compliance with the obligations set out in the applicable legal provisions. Mining concessions have a term of 50 years from the date on which the relevant title is recorded in the Public Registry of Mining. It is important to note that the Constitution acknowledges, on the one hand, the source from which private property over surface land arises, and on the other, the exclusive right of the government to concede rights for the exploitation, use and utilisation of mineral resources located within Mexican territory. Article 27 of the Constitution sets out the following:

- ownership of the lands and waters within the boundaries of the national territory is vested originally in the nation, which has had, and has, the right to transfer title thereof to private persons, thereby constituting private property; and
- private property shall not be expropriated except for reasons of public interest and subject to payment of indemnity.

Therefore, the nation is the original owner of all the lands and waters located within Mexican territory, and it is only when the nation transfers title thereof to private persons that ‘private property’ appears. The third paragraph of Article 27 of the Constitution also states that:

The Nation shall at all times have the right to impose on private property such limitations as the public interest may demand, as well as the right to regulate, for the benefit of society, the utilisation of natural resources susceptible of appropriation [...].

As such, the nation may impose certain limitations on private property in order to protect the public interest, which will always take precedence over private interests. Therefore, if mining activities are considered to be matters of a public nature and of public policy, and as having preferential rights over almost any other use or utilisation of the land,3 not being included exploration and exploitation of hydrocarbons and distribution of electric energy)4 the state may validly establish any mining activity on private property, in consideration that such creates various benefits to the community where the industry is established. The state (represented by the federal government) also has the right to regulate the utilisation of mineral elements and resources of a nature different to those of the components of the ground.

Article 27 of the Constitution also sets out the concept of differentiation between private property, and the use and utilisation of natural resources such as mineral resources:

It corresponds to the Nation, the direct domain of all natural resources of the continental platform and submarine shelves of the islands; of all minerals or substances which in veins, layers, masses or beds constitute deposits whose nature is different from the components of the ground, such as the minerals from which metals and metalloids used in industry are extracted; the deposits of precious metals and metalloids used in industry.

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4 Amendments to the Mining Law published in the Official Daily of the Federation on 11 August 2014.
stones, rock salt and the salines formed directly by marine waters; the products derived from the
decomposition of the rocks, when their exploitation requires underground works; the mineral or
organic deposits of materials capable of being utilised as fertilisers [...]

The domain of the Nation is inalienable and imprescriptible, and the exploitation, the use
or utilisation of the resources concerned (minerals), by individuals or entities organised in accordance
with Mexican laws may only be carried out by means of concessions granted by the Federal Executive
in accordance with the rules and conditions set out in the law. The legal provisions relative to works
of exploitation of the minerals and substances to which paragraph four refers, shall regulate the
execution and proof of works carried out or to be carried out from their effective date, independently
of the date of issuance of the concessions, and the non-observance thereof shall cause their cancellation.

There is a clear constitutional differentiation between:

a surface land (ground) that may constitute private property when title has been
transferred to private persons (either individuals or legal entities); and
b the right to use, utilise and dispose of mineral resources located within the Mexican
territory, which may only be carried out by individuals or private legal entities through
the granting of concessions for such purposes by the Mexican government.

As such, a landowner owns not only the surface of its property, but also (with some limitations),
in principle, the matter located under the land, as long as no minerals or substances different
from the components of the ground exist. In cases where such minerals or substances exist,
they belong to the nation, which alone is authorised to grant one or more concessions for their
exploration and exploitation. In view of this, the exploration, exploitation and beneficiation
of minerals or substances in veins, layers, masses or beds that constitute deposits of a nature
different to those of the components of the ground are subject to the concession regime
established in Article 27 of the Constitution. The Mining Law regulates Article 27 of the
Constitution in the area of mining and is applicable throughout Mexico.

While the Mining Law is the key legislation governing mining activities in Mexico,
other relevant legislation includes:

a the Regulations to the Mining Law (published in the Official Daily of the Federation
on 2 February 1999);
b the Federal Law of Waters (published in the Official Daily of the Federation on
1 December 1992);
c the Federal Labour Law (published in the Official Daily of the Federation on
1 April 1970);
d the Federal Law of Fire Arms and Explosives (published in the Official Daily of the
Federation on 11 January 1972);
e the General Law on Ecological Balance and Environmental Protection (published in
the Official Daily of the Federation on 28 January 1988) and relevant Regulations;
f the Federal Law on Metrology and Standards (published in the Official Daily of the
Federation on 1 July 1992); and
g Federal Law of Environmental Responsibilities (published in the Official Daily of the
Federation on 7 June 2013).

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5 Mining Law and Regulations of Mexico, Fausto C. Miranda and John C. Lacy, p. 23; first edition 1992/1993,
Rocky Mountain Mineral Law Foundation.
Only the federal government is authorised to carry out exploration and exploitation of any radioactive mineral that may be found in Mexican territory.

There is no limit as to any participation of foreign investment in the Mexican mining industry. Foreign investors may participate in 100 per cent of the capital stock of Mexican mining companies without the obligation to comply with any formalities other than those relevant for incorporating a company in Mexico.

III MINING RIGHTS AND REQUIRED LICENCES AND PERMITS

i Title

Under Mexican law, mineral resources belong to the nation, and a mining concession grants rights to mine rather than rights over the surface land where the concession is located.

A party wishing to apply for a concession must first verify that the concession is not located within a conservation area that is subject to special environmental authorisations. An application for a concession must be filed with the mining agency or mining delegation located closest to the area to which the mining application relates. Once an application has been filed, the applicant and its mining expert may enter the land where the concession is located to carry out surveys and other exploratory work. These works must be filed with the relevant mining authorities within 60 calendar days of the date of the application.

In certain, very specific cases, mining concessions may also be granted through public auctions.

As from 12 August 2014, for the issuance of titles of mining concessions the Ministry of Economy must obtain from the competent authorities in the area of hydrocarbons, information to verify if within the area covered by the application of the mining concession, any activity of exploration and extraction of petroleum and other hydrocarbons or of public service of transmission and distribution of electric energy is carried out.

Should the existence of any activity referred to above exists, then the Ministry of Energy must carry out a technical study in order to determine the possibility of the coexistence of both activities and thereafter may grant, modify or deny the mining concession.

Based on the technical study, the ministries of Economy and of Energy will (should such be the case) establish the respective rules for both activities to coexist.6

ii Surface and mining rights

Mining concessions may only be granted to Mexican individuals domiciled in Mexico, or companies incorporated and validly existing under the laws of Mexico whose objects are the exploration and exploitation of minerals.

Holders of mining concessions must comply with various obligations, including the payment of certain mining duties calculated per concession based on the number of hectares of the concession and the number of years the concession has been in effect. Failure to pay the mining duties may lead to cancellation of the concession.

Holders of mining concessions must carry out and provide proof of assessment works in accordance with the terms and conditions set out in the Mining Law and its Regulations. The Regulations to the Mining Law establish minimum amounts that must be spent or invested on exploration and exploitation activities. A report must be filed in May of each

6 Amendments to the Mining Law published in the Official Daily of the Federation on 11 August 2014.
year regarding the assessment works carried out in the preceding year. The mining authorities may impose a fine on the mining concession holder if one or more proof of assessment works reports is not filed on time.

Concessions may be mainly cancelled in the following circumstances:

a for using the mining concession to carry out the exploitation of minerals or substances not subject to the Mining Law;
b for failing to perform and prove the assessment works contemplated in the terms and conditions set out in the Mining Law and its Regulations;
c for failing to pay the mining duties or the discovery premium or economic consideration, when applicable;
d by a waiver of rights filed by the title-holder or at the request of the title-holder, as substitution of the mining title, due to a reduction of the surface area covered by the concession or unification of two or more lots;
e through a decision by a competent court in Mexico;
f for grouping concessions covering non-adjointing mining properties for the purposes of proving assessment works, when said concessions do not either constitute a mining or mining-metallurgical unit from the technical and management standpoint; and
g in order for the holder of a mining concession to lose its legal capacity to be such holder.

In order to clearly understand the difference between surface owners and holders of mining concessions located within Mexico, it is necessary to understand the reasons why, according to Mexican law, the mining concession itself does not grant to its holder any right over the surface land where the concession is located, and why ownership of real property itself does not grant to the owner the right to explore or to exploit the mineral resources that may exist therein.

In the following, we review the relevant concepts within the Mining Law that regulate the rights granted by mining concessions to their holders with respect to surface land; and the main characteristics of each of the legal mechanisms that the Mining Law provides for access, possession, occupation and even ownership of surface land that might be considered essential for the performance of mining works.

The different burdens of or limitations to surface land that may be requested by a mining concessionaire under the Mining Law are expropriation, temporary occupation and creation of easement.

**Expropriation**

In general terms, expropriation is the administrative act whereby the federal government unilaterally imposes on individuals or private legal entities the transfer of their assets for compliance with a matter of public interest, in consideration of an indemnity.\(^7\)
Expropriation also covers the administrative procedure of public law by means of which the federal government, unilaterally and in the exercise of its sovereignty, legally proceeds, in particular, against an owner or possessor for the constrained acquisition or transfer of an asset due to public interest causes and by means of a fair indemnification.\(^8\)

The expropriation procedure may exceptionally be initiated by an individual or private legal entity (in this case, the holder of a mining concession), when legitimised to do so by virtue of the Mining Law, which expressly authorises the concessionaire to do so.

According to the Mining Law, expropriation enables the Federal Executive, upon request of the holder or assignee of a mining concession and subject to payment of the respective indemnification, to authorise in a presidential decree the mandatory transfer of land essential to the miner for the carrying out of exploration, exploitation and beneficiation, as well as for the deposit of dumps, tailings, dross and slag.

**Temporary occupation**

Temporary occupation is the administrative act whereby the Ministry of Economy (as a legal entity of the Federal Executive), upon request of the holder or assignee of a mining concession and by means of an annual indemnification at the expense of the latter, authorises, for a certain period of time, the temporary use of land that is essential to carry out exploration, exploitation or beneficiation works, as well as for the deposit of dumps, tailings, dross and slag.

Whereas in the case of an expropriation the ownership of the surface land is transferred to the mining concessionaire, in the case of a temporary occupation the owner of the surface always retains the ownership of the land in question, and is only dispossessed from the use and occupation of the same during a certain period of time, in consideration of a fixed amount of money to be received every year from the holder of the mining concession, who in turn is authorised to carry out the mining activities. Thus, upon the conclusion of the temporary occupation, the material and legal possession of said land must be returned to the surface owner.

**Easement**

In general terms an easement is a lien created over a real estate property in the benefit of another property of a different owner.

Sometimes the easement consists of granting a third party the right to perform certain acts implying a use of the land, and in other instances it may consist of partially preventing the owner of the land from exercising its own rights.\(^9\)

The general content of the easement, as to the benefit or utilisation of the land by the holder of the mining concession, and the limitation or restriction in the domain of the servient tenement’s owner, gives ground to several kinds of easements that may be created depending on the benefit or utilisation pursued.

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For the purposes of the Mining Law, an easement may be requested on land where the mining concession is located, or on adjacent land with respect to which access is required; or otherwise, to provide a mining concession with services (e.g., water and electricity supply) required for the performance of the works related to the concession on such land.

Other mechanisms
In addition to the aforementioned legal mechanisms, which are acknowledged as rights of the holder of a titled mining concession, a prior right to gain access to the surface land covering the mining claim also exists: once an application to obtain a mining concession has been admitted for study, and provided that other legal requirements are met, the mining authorities shall issue an ‘identification certificate’, valid for a 60-day term, in order for a mining expert to prepare survey works on the land where the lot is located.

The identification certificate contains a warning (as provided for in the Regulations to the Mining Law, and in accordance with Article 57, Paragraph II of the Mining Law) to the effect that any person without mining rights that prevents or hinders the survey works on the lot that forms the subject matter of the application shall be fined an amount of between 10 and 2,000 times the general minimum wage in effect in the Federal District.

Mining concession holders are entitled to access surface land, notwithstanding that such land is private, ejido or communal property.

An ejido property is land that has been provided to a population or that is incorporated into the ejido regime. Ejido properties are classified as:

- a land for human settlement;
- b parcelled land; and
- c land of common use.

In the case of a private property, the Mining Law sets out the steps to be followed to obtain a limitation or burden thereon.

In cases where the property to be accessed belongs to an ejido or agrarian community, the application must be filed before the mining authorities. Once the file is complete and the legal requirements are met, the file must be transferred to the Ministry of the Agrarian Reform to continue the process in accordance with Articles 93 to 97 of the Agrarian Law (and any other related and applicable articles).

The Ejidatarios’ Meeting is the ejido body with the authority to classify such land within the total surface of the land corresponding to the ejido; likewise, it is entitled to approve the execution of agreements with the purpose of granting the use of common-use land to third parties.

The rights on land of common use are considered as granted in equal parts to each holder of a share in common lands (ejidatario or ejidataria), unless otherwise determined by the Ejidatarios’ Meeting based on special circumstances.

The government is authorised to affect ejido or communal properties, but only in circumstances where the public interest is superior to the social interest of the ejido or of the community (as in the case of mining), and provided no other alternative land to cover such needs exists.

Burden or limitation of ejido property
The public interest causes provided by the Mining Law for an ejido or communal property to be expropriated for mining include:
a the creation and extension of industrial development areas;
b the exploitation of natural resources owned by the nation and the installation of
beneficiation plants related to such exploitation; and
c other causes provided by the Expropriation Law and by other laws.

The Agrarian Law acknowledges the importance of the mining industry, and also the public
interest in the exploitation of minerals located in the subsoil.

The Ministry of the Agrarian Reform is the authority competent to notify an
expropriation to the Ejido Commission. Such notification shall be made:
a through an official communication;
b through a publication in the Official Daily of the Federation; and

c through a publication in the official newspaper of the corresponding state.

In addition, the Agrarian Ministry shall request opinions from the governor of the
corresponding state, the Mixed Agrarian Commission of the entity where the lands are
located and the official (governmental) bank operating with the ejido.

It is also necessary to conduct an inspection visit to determine the veracity of the data
included in the corresponding application for expropriation.

**Possibility to freely negotiate**

There are great advantages and benefits in the fact that, in Mexico, the concessionaire is
entitled to approach the owner of the surface land where the concession is located, and to
freely negotiate and agree on the terms and conditions under which said concessionaire may:
a obtain free access to the surface covering the mining concession for the performance of
mining works;
b occupy, use and possess (totally or partially) the surface land necessary to carry out said
works, or to establish those facilities considered important for its operations; and

c acquire said surface land, totally or partially, through any contractual mechanisms of a
private nature.

The contractual means available for such purposes vary according to the applicable Mexican
laws; therefore, we mention only those considered the most important, or more frequently
used, in mining:
a lease agreements;
b commodatum contracts;
c private agreements for the occupation and use of the surface land, or any other similar
purposes; and
d purchase agreements.

The form of the contract or agreement is not as relevant as its main purpose and the clear
determination of the rights and obligations acquired by each of the parties executing the
same.

From the practical standpoint, it is always advisable that the negotiations and execution
of contracts or agreements be made with the owners of the surface land in the first stages
of either the exploration works or the mining project itself given that, in our experience,
some mining companies working in Mexico have faced serious problems and delays with non-existing agreements, or when trying to obtain such authorisation and consent in the advanced stages of a project.

Furthermore, a lack of negotiations resulting in the execution of a contract or agreement with the owner of the surface land may not only cause serious problems and delays in the work programme, but may also incur costly additional expenses and excessive lengths of time spent trying to find a solution to the problem.

It should also be noted that resolutions issued by the Mexican authorities upon conclusion of expropriation, temporary occupation or creation of easement are not final; the person considering him or herself as harmed by virtue of a resolution may file a revision remedy in terms of Article 83 (and other related and applicable articles) of the Federal Law of Administrative Procedure10 or, if applicable, contest via an amparo proceeding, a judicial proceeding aimed at protecting the individual guarantees contemplated by the Constitution.

Those conflicts arising from the interpretation, execution or compliance with contracts or agreements entered into by private parties (as in the case of a mining concessionaire and the owner (or owners) of the surface land) shall be submitted to the competent Mexican courts or, when permitted and agreed upon by the parties, definitively settled by arbitration or through any of the alternative dispute resolution means.

Should an administrative procedure declare that the requirements established in the Mining Law, its Regulations and other applicable legal provisions have been followed, and that the indemnification is within the prevailing values set out in the respective appraisal and is actually paid, the revision remedy or the constitutional protection shall not be granted. In such case, the expropriation, temporary occupation or creation of easement shall be final, binding and enforceable.

### iii Additional permits and licences

#### Explosives permits

The Federal Law of Fire Arms and Explosives (LFAE) administers the purchase, storage and use of explosives in the mining industry; such Law is administered by the Ministry of National Defence and is considered to be of national security.

Mining companies usually do not use explosives until the advanced exploration stages. They must obtain an explosives permit before purchasing any explosive, and must also comply with all the requirements of the LFAE, including the construction of special warehouses to store explosives and purchasing explosives only from authorised distributors that are duly recorded by the Ministry of National Defence. One person will be responsible for the explosives used by the company, and they must also be recorded by the Ministry.

#### Water concessions

Mining companies usually buy water from concessionaires of the area where the exploration works are being carried out at an early exploration stage.

As the construction or exploitation stage approaches, mining companies must obtain concessions from the National Water Commission or purchase concessions previously granted by such authority.

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10 Published in the Official Daily of the Federation on 4 August 1994, amended on 19 May 2000.
The National Water Commission has a policy of not granting any new concessions; therefore, mining companies must negotiate with holders of water concessions that have been previously granted.

Finally, under the Mining Law, mining concessionaires may use water obtained directly from the mine.

iv Closure and remediation of mining projects

Environmental impact authorisations (EIAs) are granted on a case-by-case basis, and contain a section devoted to the closure and rehabilitation plan of the mine; such plan is approved by the environmental authority prior to commencing exploitation activities. There is no need to provide financial guarantees to cover all or a substantial part of the plan’s costs. The authority may carry out audits as it considers convenient to verify compliance with the obligations included in each EIA.

IV ENVIRONMENTAL AND SOCIAL CONSIDERATIONS

i Environmental, health and safety regulations

The development projects and prospects of companies in Mexico are subject to Mexican federal, state and municipal environmental laws, regulations and Official Mexican Standards (NOMs) for the protection of the environment.

The main environmental legislation applicable to mining projects is the General Law of Ecological Balance and Environmental Protection (LGEEPA), of federal jurisdiction, and its Regulations in Environmental Impact Matters (REIA), which are enforced by the Federal Bureau of Environmental Protection (PROFEPA). Such authority monitors company compliance with environmental legislation and enforces Mexican environmental laws, regulations and NOMs.

If warranted, the PROFEPA may initiate administrative proceedings against companies that violate environmental laws; in the most extreme cases, such proceedings may result in the temporary or permanent closure of non-complying facilities; the revocation of licences, authorisations and permits; and other sanctions such as fines that can rise up to 3,116,500 pesos. As such, under Article 28 of the LGEEPA, and the REIA, an EIA must be obtained prior to the initiation of mining exploration and exploitation activities.

Only in certain exceptions referred to in Article 31 of the LGEEPA, when all the environmental impacts of an activity are regulated by a NOM, a partial urban development plan or an ecological ordinance territory programme, or in the case of constructions inside industrial parks that have already been approved, the Secretariat of the Environment and Natural Resources (SEMARNAT) can authorise certain activities without the need to present an environmental impact statement (EIS). In such cases, a preventive report (PR) will have to be presented instead for evaluation prior to the initiation of the exploration and exploitation activities, or the processing of minerals.

NOM-120-SEMARNAT-2011 regulates the environmental protection measures in place for direct mining exploration activities in specific areas (agricultural, farming or virgin areas of dry climates, etc.), and any mining project that complies with such NOM in the exploration phases will have to present a PR rather than an EIS.

Any individual that owns or holds real estate in Mexico that has suffered any kind of pollution must remediate such pollution; this provision is applicable at any stage of any mining project in Mexico.
Mexican environmental regulations have become increasingly stringent over the last decade. The entry into force of the North American Free Trade Agreement in 1999 made clear Mexico’s need to reach a balance between the elimination of barriers to international trade on one hand, and the preservation and protection of the environment on the other.

On 7 June 2013, the Federal Law of Environmental Responsibilities was published in the Official Daily of the Federation and became effective on 7 July 2013.

Under the referred Federal Law of Environmental Responsibilities, district courts may receive and in its case must follow up a liability action on damages to the environment for purposes of restoration or compensation (besides those actions already existing from the civil, administrative and criminal points of view); penalties under this action may rise up to 600,000 days of minimum wage in force in Mexico City on the date on which the sanction may be imposed.

ii Environmental compliance

Pursuant to the Federal Criminal Code, some crimes against the environment are sanctioned with prison sentences. In some cases, such crimes are prosecuted under a PROFEPA action.

iii Third-party rights

In general terms, mining concessions are granted to the first petitioner filing an application to obtain such mining concession over free land (under the terms set out in the Mining Law).

The only third-party rights that are recognised are the rights of the owners of the surface land over which mining concessions are located, and with whom mining concessionaires must negotiate.

We must also mention that if any free land (in terms of the Mining Law) is located within the area populated by an indigenous community (and which is different from an ejido or agrarian community), such indigenous community has a preferential right to become the mining concessionaire.

The right of first refusal is limited to the area covered by the land owned by such indigenous community.

In general terms, mining concessionaires only need to negotiate access agreements with the owners of the surface land over which their respective mining concessions are located.

No third party has the right to request, or ask in any manner whatsoever, for the closure of a process and the abandonment of any mining project, as environmental concerns are a matter of administrative law. However, on 30 August 2011, certain amendments to the Federal Civil Procedures Code were published in the Official Daily of the Federation. These amendments mainly consist in establishing three categories of collective actions, by means of which 30 or more people claiming injury resulting from environmental harm, among other things, have sufficient and legitimate interest in seeking through a civil procedure restitution, economic compensation or suspension of the activities from which the alleged injury derived.

iv Labour issues

The Federal Labour Law (FLL) establishes that employees work a maximum of 48 hours per week. If an employee exceeds the number of authorised labour hours per week, he or she is entitled to receive additional overtime payment.

Employers must register employees with the Mexican Institute of Social Security.
The employer must periodically deposit a sum equivalent to 2 per cent of each employee's salary into a banking account as a retirement fund. A housing fund of an amount equivalent to 3 per cent of the employees’ salary must also be paid by the employer.

Labour unions are recognised under the FLL in order to protect employees’ interests, and collective labour contracts are signed between the employer and the labour union; such contracts are reviewed every two years.

The FLL acknowledges three work shifts: day shift (eight hours), night shift (seven hours) and mixed shift (seven-and-a-half hours). Employees are entitled to one day of rest with full pay after six labour days.

The FLL establishes different daily wages for each category of service to be rendered, taking into consideration the respective geographical area where the services shall be provided. Annual revisions of the salary are also considered in the FLL.

Employees have the right to a yearly vacation, which is not to be less than six working days. For every year the employee continues to work for the employer, he or she will receive an additional two working days. After four years, an employee's vacation period will increase by only two working days for every additional five years he or she works for the employer.

Employees have the right to receive a vacation premium of at least 25 per cent of their salary during such vacation period.

Employees are entitled to participate in the earnings of their employees, based on the percentage determined by the National Commission for Workers' Participation in their Employers' Earnings.

V OPERATIONS, PROCESSING AND SALE OF MINERALS

i Processing and operations

Owners of processing plants in Mexico must process at least 10 per cent of their capacity from small mines.

In terms of foreign labour, there is no restriction on the employment of foreigners in positions of responsibility (such as management). There is, however, a requirement for a ratio of at least 10 Mexicans to one foreigner to be employed for technical labour.

ii Sale, import and export of extracted or processed minerals

The Customs Law and the Foreign Trade Law regulate the importation and exportation of goods. Depending on the type of commodity, there may be additional requisites in special laws or regulations.

The Customs Law provides the proceedings regarding foreign trade, such as the entry, exit, custody, storage, handling or holding of commodities. As a consequence, any person who performs such activities is subject to this Law, including importers and exporters, as well as their custom representatives, custom brokers, transporters and possessors of authorised tax warehouses.

The Foreign Trade Law provides the proceedings to be carried out before the importation of commodities, especially regarding the compliance with non-tariff regulations and restrictions.

Recently, foreign trade has become an issue of high importance to the Mexican government.
In order to avoid illegal practices, such as customs fraud or using Mexico as a base to export Asian products to the United States, penalties in such matters have become especially strict.

In July 1988, Mexico converted to the Harmonized Tariff Schedule for commodity classification and codification, making its import and export classification system compatible with those of most countries with which it commonly trades.

The Official Gazette published a new Customs Law on 15 December 1995, which became effective on 1 April 1996. The main purpose of the Law is not only to provide legal certainty, but also to promote investment and exports and to comply with the international commitments acquired by Mexico. One of its noteworthy features is the incorporation of a number of tax rules and operational authorisations on specific international operations.

A new General Import and Export Tax Law became effective on 1 July 2007. The most significant changes relate to adjustments made by the Customs Council in terms of subheading classification.

The Mexican government continues to apply a policy of gradual elimination of import restrictions. In prior years, import permits (licences) had to be obtained for most products from the Ministry of Economy. At present, licences are required for only approximately 1 per cent of items or classifications in the customs tariff.

Regarding the clearance of commodities, the most important actions are:

a presenting any commodity before the customs authorities with a customs declaration;
b activating the mechanism of automatic selection;
c the customs inspection; and

d the disposition of the goods.

Importers and exporters of commodities must file a customs declaration before the customs authorities. Such declarations shall include several annexes such as the commercial invoice of the commodity, documents evidencing compliance of non-tariff regulations and restrictions (such as capacities, permits and NOMs), as well as those that allow the identification, review and control of the commodity, and documents regarding its origin, either to obtain the benefits of free trade agreements or to prove that the commodity does not originate from a country that performs dumping.

In order to import commodities, it is necessary to register before the General Customs Administration. In the event of importing a commodity that is sensitive for national production, importers need an additional registration called a ‘Sectorial Registry’ registration. Sometimes (e.g., in cases of temporary importation), registration is not necessary.

Tax benefits that are granted by free trade agreements represent the possibility to reduce or be exempted from tariffs according to the particular tariff preferential treatment schedule of each agreement. Despite this, such agreements do not represent the chance to avoid paying other taxes derived from the importation and exportation itself.

The Customs Law provides a list of goods that are exempted from paying duties on foreign trade. Such goods include those exempted due to international treaties, or because of their import for national defence or public safety purposes. Regarding other kinds of taxes derived from the import, the possibility to obtain an exemption for each kind of good should be revised separately.

General import or export taxes are calculated considering the customs value of the commodity. In most importations, the customs value is based on the price that was paid or
the one that should be paid for the commodity, according to the commercial invoice (the settlement value). If other expenses caused during the importation increase such value, it would attract cost, insurance and freight rules.

In the event that there is no value, or if the price that has been or should be paid for commodities cannot be considered as the valuation base, one of the secondary methods derived from the Agreement on Custom Value of the World Trade Organization would be applicable.

Currently, there are no legal rules in force or industry codes applying export restrictions or duties.

iii Foreign investment

Most deals taking place involve Mexican mining companies in which foreign investment is involved. Although mining concessions may only be granted to Mexican individuals domiciled in Mexico, or companies incorporated in Mexico, such companies may be wholly owned by foreign investors; there are no restrictions as concerns foreign investment in Mexican mining companies. Mexican-incorporated mining companies must also be recorded with the Public Registry of Commerce of their corporate domicile and with the Public Registry of Mining.

Mexican companies with foreign shareholders must register with the National Registry of Foreign Investments of the Ministry of Economy and renew their registration on an annual basis.

VI CHARGES

Mexican Tax Laws are based on the facts that all Mexican residents as well as foreign residents doing activities within Mexican territory are obliged to pay taxes according to the approved rules.

Mining activities are considered as entrepreneurial activities including the extraction, preservation or transformation of raw materials. The net income obtained from such activities is taxable in the same way as other entrepreneurial activities.

In fact, a 30 per cent income tax is applicable on the net income obtained from entrepreneurial activities in case of companies and 35 per cent rate could apply in the case of individuals doing business activities. There are no special treatments to apply for mining activities or other fiscal stimulus except for those established for all taxpayers who comply with the established requirements.

General rules are explained as follows.

i Royalties

According to the Federal Law of Duties, it is established that individuals and societies that have obtained a concession, as well as those developing works linked with exploration or exploitation of minerals, are obliged to pay several items as follows:

a owners of concessions or assignments will be obliged to pay a biannual quote for each hectare, according to the period of validity of the concession or assignment;

b additionally, another royalty is imposed to the owners of concessions or assignments who stops exploration or exploitation for two continuous years within the first 11 years of validity;

c a 7.5 per cent rate will be applied to the taxable profit obtained. Such taxable profit will be determined subtracting any deductible expenses from the accruable revenue
resulting from the extractive activity. Both accruable revenue and deductible expenses will be relevant to the calculation under the Income Tax Law, with certain restrictions; and

d  Additionally, a royalty payment is payable under the Federal Law of Duties; the owners of concessions must pay an annual extraordinary mining duty of 0.5 per cent on the sale of gold, silver and platinum.

ii  Taxes

As previously described, corporations or individuals making mining activities are subject to pay Federal Taxes in the same way that any other business entities. Taxes on business activities are as follows:

Income tax

A 30 per cent tax rate is applied on the income obtained for entrepreneurial activities. Cost and expenses that are indispensable for the activity can be deducted complying with certain requirements, including:

a  to get the electronic invoices; and

b  to make payments to suppliers by bank systems (wide transfer, check, credit card, etc.)

Capital gains are considered as part of the taxed income obtained.

Fixed assets are deductible by depreciation considering a 12 per cent rate to be applied on machinery and equipment involved in mining activities. Nevertheless, certain assets must be deducted considering the authorised rate according to the kind of assets. The deductible amount is updated by inflation.

Interest is deductible on an accrued basis if obtained loans are invested into the main activity. Certain restrictions apply for loans received from related parties through a ‘thin capitalisation’ rule.

Exchange losses are considered as interest and must be deducted on accrued basis too.

Salaries and fringe benefits to the employees are considered a deductible expense. Nevertheless certain restrictions are imposed on payments that are exempt of tax for the employees.

Losses can be deducted within the 10 years following the year in which the loss occurs. The deductible amount is updated by inflation.

As a fiscal stimulus, it is granted that companies that received income lower than US$100 million in the previous year, can be subject to an accelerated depreciation applying a depreciation rate of 87 or 77 per cent.

In the case of individuals the same rules apply but the tax rate can reach 35 per cent.

Value added tax

Individuals or corporations are obliged to pay VAT at 16 per cent rate on the sale of goods, leasing and the rendering of services when such activities are made within Mexican territory.

A zero per cent tax rate is applied on certain activities such as exportation of goods and services (with certain restrictions), as well as the sale of food and patented medicine. A zero per cent tax rate is applied in sale of gold and jewellery with 80 per cent of gold in sales to business entities different than general public.

Certain goods are exempt from VAT such as land; home buildings and houses; books, magazines and newspaper; gold bullion with a 99 per cent of gold in sales to a general public;
The payment of VAT is made on monthly basis paying the VAT charged to the customers less VAT paid to the suppliers. Tax returns are definitive and independent of the tax returns for other months.

In the case of a favourable balance it is permitted to claim for a reimbursement from the Tax Authority.

**Payroll taxes**

Employers are obliged to withhold the income tax related to employees’ salaries. This amount could amount to 35 per cent and it is calculated with a progressive tariff.

Additionally it is required to withhold social security quotes and pay them to the Social Security Institute together with employers social security quotes, which can amount to 25 per cent of the salaries.

Employers are obliged to pay 5 per cent for housing fund plus 2 per cent for retirement fund.

For local purposes a payroll tax of between 2 and 3 per cent can be imposed depending on the place of business.

**Withholding taxes on payments abroad**

A general tax rate of 25 per cent is imposed on payments made to foreign residents for certain services, royalties and other kind of payments.

Interest paid abroad can be taxed at 4.9 per cent, 10 per cent, 15 per cent, 21 per cent or 35 per cent, depending on the terms and conditions of the loan and the characteristics of the creditor.

Certain reductions apply depending on whether or not a double taxation agreement exists.

**Dividends**

For domestic purposes a 10 per cent tax rate apply on payments made to individuals. Dividends paid to other corporations are exempt from withholdings.

In case of shareholders who are foreign residents a 10 percent tax rate applies on the amount of dividends paid. Notwithstanding, assuming that an agreement to avoid double taxation is in force between Mexico and the country where the shareholders reside, it is possible that a reduction of the tax rate could apply.

Dividend payments are exempt from withholdings when derived from profits obtained in 2013 or before.

In case that dividends cannot be identified with profits that have paid income tax in the company that distribute the dividends, the company will be obliged to pay tax at a 35 per cent tax rate, following certain rules.

Other taxes apply for certain operations such as purchasing of land and constructions but these are generally imposed by states and municipalities.

**Duties**

In general terms, mining concessionaires need only pay mining taxes (duties) that are of a federal nature as determined in the Federal Law of Duties, and depending on the date of issuance of the mining concession and the number of hectares of each concession.

The main concepts that produce duty payments are as follows:
a the recording before the Public Registry of Mining will produce a payment of $1,187;
b cancellation of recordings $593;
c recording of Mining Societies $2,374;
d recording of changes to by laws of Mining Societies $1,187;
e notarial notices $593;
f other notices $593; and
g review of documents $593.

VII OUTLOOK AND TRENDS

As a result of many changes to the mining industry in Mexico, the area covered by mining concessions has dramatically reduced from 30.6 million hectares to 27.5 million hectares.\textsuperscript{11} This is mainly a consequence of the new taxes imposed on the industry, which have led to Mexico becoming one of the most expensive countries in which to mine, and causing many mining projects that were previously economically viable to no longer be considered as such.

This increase in taxation will also cause social programmes implemented by the mining companies to be drastically cut, resulting in the government having to create more social programmes for the benefit of regions.

The Mexican government may well have to review its policy, taking into the importance of the industry in the creation of jobs in rural areas, and reducing the taxes imposed to a more reasonable percentage.

On the other hand, a positive impact derived from the taxation is that the states and municipalities are now receiving economic benefits while having operating mines in their jurisdictions and, as a result, they have become more friendly to the industry.

Finally, it is important to consider the International Treaties entered into by Mexico on human rights, which are considered by the Mexican Mining Industry of utmost importance for the development of mining projects; while the Mining Industry in Mexico continues to develop its activities, NGO’s are claiming to defend human (indigenous) rights. Mexico is still evolving on matters related to human rights and mining projects must now also consider this area as important for the development of any project.

\textsuperscript{11} Source: Annual Report of the President of the United Mexican States; and ‘Abandonan concesiones mineras’, Reforma, 9 September 2014.
Chapter 12

MONGOLIA

Sebastian Rosholt

I OVERVIEW

Mongolia has a rich mineral endowment and contains major mineral deposits including gold, copper and molybdenum, fluorspar, coal, uranium and rare earths. Mongolia’s coal deposits are estimated at 160 billion tonnes and are some of the largest known deposits in the world, including Tavan Tolgoi. With the future of underground expansion of the Oyu Tolgoi mine now approved and financed, Mongolia’s contribution to global copper production is expected to increase significantly in the coming years.

Mongolia is heavily reliant on its mining sector, and according to figures released by the Mineral Resources and Petroleum Authority of Mongolia (MRPAM), for the first six months of 2016 the mining sector was responsible for 16.2 per cent of Mongolia’s total gross domestic product, 67.2 per cent of its industrial output, 72.7 per cent of total exports (and up to 85.4 per cent of its export earnings). Additionally, the mining sector is one of the country’s largest employers (direct and indirect) and accounted for 39 per cent of foreign direct investment.

Mongolia’s proximity to China, its biggest trading partner (responsible for 81.6 per cent of all Mongolian exports) and the world’s largest consumer of most minerals (including those that Mongolia produces), provides both opportunities and challenges for Mongolia, and its fortunes appear to be inextricably linked to the continued expansion of the world’s second largest economy for the foreseeable future.

II LEGAL FRAMEWORK

i Mining legislation

Mining activities in Mongolia are principally governed by the Minerals Law of Mongolia, (2006) (the Minerals Law). The Minerals Law provides a regulatory and administrative framework for the prospecting, reconnaissance, exploration and development of most types of mineral resources in Mongolia.

The Minerals Law does not regulate uranium, ‘common minerals’, petroleum products (conventional and unconventional), water or ‘artisanal mining’ or ‘micro mines’ (irrespective of the types of minerals mined), which are all regulated by their own separate laws.

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1 Sebastian Rosholt is a partner at Minter Ellison. The information in this chapter is correct as of 2016.
3 ‘Common minerals’ are building aggregates such as clay, sand and gravel.
4 Petroleum (upstream and downstream activities, conventional and non-conventional sources) are covered by the Law of Mongolia on Petroleum (2014).
The Minerals Law is supplemented by a variety of other laws and regulations including:

\( a \) the Law on Licensing of Mongolia (2001), which governs certain aspects of the mineral exploration and production licensing regime;

\( b \) the Subsoil Law of Mongolia (1988) (the Subsoil Law), which regulates the use and protection of subsoil, including in the construction of underground mining operations and facilities;

\( c \) the Environmental Protection Law of Mongolia (1995) (the EP Law), which sets out the administrative framework and general obligations relating to environmental matters; and

\( d \) the Environmental Impact Assessment Law of Mongolia (2012) (the EIA Law), which sets out the framework and obligations relating to measurement and reporting of the impact of projects on the environment.

ii Administration

The Minerals Law falls within the portfolio of responsibilities of the Ministry of Mining and Heavy Industry (MoMHI) but its implementation is the primary responsibility of MRPAM.

MRPAM is an independent implementing agency established by the government and is responsible for the development of policy and compilation of information relating to Mongolia’s resources and petroleum sector. The Mining Department and the Cadastre Department (CD) of MRPAM, are the main regulatory departments responsible for the day-to-day administration of the Minerals Law and issuing of licences. The CD is also responsible for the collection of licence fees, the processing of licence transfers and the registration of pledges.

Pursuant to the Amendments of 2014,\(^5\) some of MRPAM’s prior responsibilities have been moved into a separate governmental agency, the National Geology Office (NGO). This agency is responsible for, \textit{inter alia}, conducting various forms of geo-mapping, research and surveys and maintaining a geological database and register of minerals. For the time being, however, the NGO still operates as a department under MRPAM.

The State Specialised Inspection Agency (SSIA) is a centralised governmental agency responsible for inspections relating to mining operations, mine safety and environmental compliance.

The degree of government intervention and regulation in the resources sector in Mongolia is comparatively high, and bureaucratic processes can be fluid and subject to change without public notice. A comprehensive understanding of the legal framework for mining activities and a close working relationship with both MRPAM and CD can therefore assist in mitigating the uncertainties surrounding Mongolia’s bureaucracy.

III MINING RIGHTS AND REQUIRED LICENCES AND PERMITS

i Title

All minerals are owned by the state.\(^6\) State ownership of minerals has the important effect that the government, rather than private landholders, determines how mineral exploration and production is carried out. While the state is able to grant exploration and mining rights

\(^5\) Amendment Law to the Minerals Law dated 1 July 2014.

\(^6\) Article 5.1 of the Minerals Law.
within the framework provided by the Minerals Law, it is not able to convey title in, or over, minerals to private parties. Upon expiration, all of the rights under any licence will revert to the state.

ii Surface and mining rights

Mineral exploration and production may only be carried out under a licence validly issued by MRPAM to a Mongolian-registered legal entity. MRPAM is able to issue either exploration licences or mining licences.

Exploration licences

Subject to certain exceptions exploration licences are granted on a direct application, first come, first served, basis. However, where there has been state-funded exploration work conducted on the licence area, or the licence area forms part of a previously revoked or relinquished licence, then an exploration licence must be issued through a competitive tender process.

The maximum area of an exploration licence is 150,000 hectares, but for exploration licences that were granted before the Amendments took effect on 1 July 2014, the maximum area is 400,000 hectares. The government (upon the recommendation of the MoMHI), together with MRPAM, have the power to determine the coordinates of areas over which exploration licences may be granted.

An exploration licence applicant must submit an approved form to MRPAM containing prescribed information and supporting documentation including the following:

- a map of the proposed exploration area, including geographical coordinates of the relevant boundaries and name of the aimag (province) or soum (district) in which the exploration area is located;
- a notarised copy of the applicant’s State Registration Certificate;
- the service fee payment;
- a preliminary exploration work programme, which includes the type, scope and cost of proposed exploration activities; and
- information regarding the applicant’s technical competency to carry out the proposed work programme, including technical qualifications of key personnel.

MRPAM is required to make a determination on an application within 20 business days of lodgement. The Minerals Law sets out the grounds upon which an application may be rejected by MRPAM. Provided an application complies with the prescribed requirements

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7 Article 7.1 prescribes that the licence-holder must be a legal entity established under the laws of Mongolia; however, it does not prevent foreign investors from wholly owning that Mongolian entity.
8 Article 18.1 of the Minerals Law.
10 Article 20.1 of the Minerals Law.
11 Articles 9.1.11 and 11.1.25 of the Minerals Law.
12 Article 18.2 of the Minerals Law.
13 Article 19.2 of the Minerals Law.
14 Article 19.2.1 of the Minerals Law.
of the Minerals Law (including containing all prescribed information) then it will be automatically accepted by MRPAM. If the application is rejected by MRPAM, the applicant is not permitted to apply again in the future for the same exploration area.

Following a positive determination, MRPAM will refer the application to the governor of the relevant aimag for approval. The governor has 30 days to review the application and seek feedback from the citizen’s representative meeting of the relevant soum. Failure by the governor to respond to the application within the 30-day period is deemed to be acceptance.\(^{15}\)

Prior to the grant of an exploration licence by MRPAM, the applicant will be required to pay the first year’s licence fee upfront.\(^{16}\)

Upon grant, an exploration licence is valid for an initial term of three years with a right to renew for three subsequent three-year extensions (i.e., a maximum term of 12 years). Renewals are not automatic and in making any application for renewal, MRPAM must be satisfied that the applicant has complied with all of the terms and conditions of the exploration licence (including the payment of all licence fees).\(^{17}\)

An exploration licence grants the holder the exclusive right to access the land within the granted exploration area for the purposes of conducting mineral exploration activities (including the construction of temporary structures) in accordance with the provisions of the Minerals Law and the approved exploration work programme.\(^{18}\) Rights are also given to a licence-holder to traverse and pass over land that is owned or possessed by others to access the licence area, provided such access is approved by the relevant owner or possessor.\(^{19}\)

**Mining licences**

A mining licence may be obtained either by a licence-holder converting its existing exploration licence or through a public tender (in circumstances where a previous exploration licence-holder has not converted its exploration licence or it has otherwise been revoked or relinquished).\(^{20}\)

To convert an exploration licence to a mining licence, an applicant must submit an approved form to MRPAM containing the same prescribed information and supporting documentation\(^{21}\) as required in the initial exploration licence application and additionally:

- a map of the proposed mining area, including geographical coordinates of the relevant boundaries and the name of the aimag or soum in which the mining area is located;
- a mineral reserve estimate and results of exploration activities for the mining area, the Minerals Council’s conclusion on the mineral reserve estimate and MRPAM’s order to register the reserve;
- verification from the SSIA of the performance and satisfaction of environmental reclamation requirements under the environmental protection plan adopted for the exploration licence;

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15 Article 19.4 of the Minerals Law.
16 Article 19.6 of the Minerals Law.
17 Article 22 of the Minerals Law.
18 Article 21 of the Minerals Law.
19 For exploration licences and mining licences, Articles 21.1.6 and 27.1.9 of the Minerals Law, respectively.
20 Article 24 of the Minerals Law.
21 Article 25 of the Minerals Law.
a copy of the completed environmental impact assessment report and environmental management plan for the mining area; and

information regarding the applicant’s technical competency to carry out mining operations in the mining area, including technical qualifications of key personnel.

Unlike for exploration licences, a mining licence application may not be submitted through MRPAM’s online system and must be submitted directly to MRPAM in the approved form. As with an exploration licence application, MRPAM is required to make a decision on an application within 20 business days of lodgement and will be required to refer the application to the governor of the relevant aimag for approval. The applicant will also be required to pay the first year’s licence fee prior to obtaining grant of the mining licence.

A mining licence is granted by MRPAM for an initial term of 30 years. A mining licence may be renewed for two successive periods of 20 years each, based upon remaining reserves.

Within one year of the grant of a mining licence, the holder must prepare and submit a feasibility study for approval by MRPAM.

Mining operations

Mining operations can only be undertaken once MoMHI-appointed inspectors have reviewed and approved the following documents prepared by the licence-holder in relation to the licence area and once MoMHI has issued a mine commission act:

the feasibility study;

the mine plan;

the environmental impact assessment report;

the environmental protection plan;

time sales agreements and arrangements relating to the procurement and maintenance of plant and equipment;

time reports from the local environmental inspectorate that the mining licence-holder has fulfilled all of its environmental obligations; and

time agreements or approvals relating to land use, water and power.

Mine construction

Where a mine is constructed (underground or open pit), technical regulations prepared under Chapter 4 of the Subsoil Law impose a number of additional requirements on a mining licence-holder regarding procedures for the construction of underground facilities, mine safety and rehabilitation. Compliance with these requirements will also need to be verified by MoMHI-appointed inspectors before the commencement of mining operations.

Transfers and security

A licence-holder has the ability to transfer its licence; however, in order to transfer a licence, the holder also must transfer the following to the same transferee:

22 Article 26.3 of the Minerals Law.
23 Article 26.5 of the Minerals Law.
24 Article 27.1.7 of the Minerals Law.
a exploration licence: all records, reports and exploration data that relate to the licence area of the exploration licence; and

b mining licence: the mine together with all machinery and equipment used in it.

Under the Minerals Law, licences cannot be transferred on a standalone basis and may only be transferred with the accompanying ‘assets’ listed above.

Under the Minerals Law licences may be pledged along with their associated geological data, feasibility studies, exploration work reports and associated properties to a bank or a non-banking licensed financial organisation. Licence pledges must be registered with MRPAM in order to have legal effect.

### iii Additional permits and licences

The mining sector is highly regulated in Mongolia and in addition to obtaining licences, holders are required to obtain numerous permits and permissions in order to operate. Noteworthy permissions include the following.

#### Land use

Under the Land Law of Mongolia (2002) (the Land Law) foreign-invested entities are entitled to land use rights but may not own or possess land, unlike Mongolian citizens and non-foreign invested entities.

In addition to obtaining a minerals licence, in order to engage in mining and exploration activities a licence-holder must:

a conclude a land possession or use agreement with the local government authority of the relevant soum; and

b obtain a land use or possession certificate.

While the Law on Investment (2013) (the Investment Law) provides that land use rights may be granted, initially for up to 60 years, with an option to extend for up to 40 years, the Land Law provides that land can be used by a foreign invested company for a special purpose, conditions and period in accordance with the Land Law, but the period is to be determined by a decision of the government.

The government has in turn resolved that the land use period for a foreign invested entity that holds a mining licence for a strategic deposit would be 30 years. The government has not stipulated land use periods for other types of land use (i.e., other than for foreign invested companies).

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25 Article 49.2 of the Minerals Law.
26 Article 49.3 of the Minerals Law.
27 Article 51 of the Minerals Law.
28 The Minerals Law does not distinguish between locally registered and foreign banks. There are concerns that this right is restricted to Mongolian banks, although MRAM (now MRPAM) registers pledges in favour of foreign banks.
29 Article 12.1.1 of the Investment Law.
30 Article 44.5 of the Land Law.
31 Resolution No. 302 of 2009.
Notwithstanding potentially longer terms, in practice land usage rights are typically granted for periods of between three and five years. In some cases, the differences in length between the term of land use rights and mining rights can be a source of uncertainty.

**Border zone protection areas**

A border zone protection area covers any area within a 100-kilometre radius of any Mongolian border. Any licence-holder that conducts exploration or mining activities in such an area must first obtain an access permit from the General Border Protection Authority of Mongolia.

Access permits need to be re-obtained on an ongoing basis and can become an administrative burden for licence-holders. In addition, the Mongolian government may, at any time, on ‘national security grounds’ revoke or deny an access permit, which can potentially curtail mining operations for unknown periods of time.

**Water**

Under the Law on Water (2012) (the Water Law) a mine is considered a ‘water consumer’ and must obtain a water permit. The volume of water to be supplied per day under the permit will determine which entity should grant it:

- **a** fewer than 50 cubic metres: soum governor;
- **b** 50 to 100 cubic metres: aimag or capital environment office; and
- **c** more than 100 cubic metres: basin authority.

A permit, once issued, is valid for 10 years and subject to compliance with the terms of a water-use contract. It may be extended for further five-year periods from time to time.

In addition to a water permit, the licence-holder must enter into a water use contract either with the issuing authority of its water permit or another water supply organisation. The water use contract will set out the terms (including rights of termination and fees) to which the holder’s water usage is subject.

**Haulage**

In order to construct a road or railway track to transport minerals from the licence area, the licence-holder must obtain a permit approving the selected route issued by the Ministry of Road Transportation Construction and Urban Development (the Ministry).

If the minerals are to be transported across international borders then the haulage transporter will require a freight-forwarding certificate issued by the Department of Road Transport.

iv **Closure and remediation of mining projects**

Within one year of the grant of a mining licence, a holder must submit a feasibility study to MRPAM that must include details, and demonstrate the availability, of adequate capital for mine rehabilitation and closure.
Once constructed and operational a licence-holder must inform the MoMHI at least one year before the closure of a mine or concentrate plant, and must prepare for its closure in accordance with the conditions prescribed by the Regulation on Closure of a Mine (Regulation) joint resolution of the MoMHI and the Ministry of Environment and Green Development.

In addition, the Minerals Law prescribes that upon closure of a mine all necessary steps must be taken to reclaim the original environment, rehabilitate the mine area for public usage and remove all machinery, equipment and other moveable property from the mine area. Licence-holders are also required to employ, on a full-time basis, an employee who is in charge of liaising with and reporting to MRPAM on the progress of mine closure, reclamation and environmental rehabilitation.

IV ENVIRONMENTAL AND SOCIAL CONSIDERATIONS

i Environmental, health and safety regulations

In a mining context:

a environmental matters are regulated primarily through the EP Law, the Subsoil Law and the Minerals Law itself; and


These laws, together with a number of regulations and national standards, create an interlocking regulatory framework that prescribes minimum environmental, health and safety standards in Mongolia and enforces compliance with those standards.

Health and safety

In terms of the Labour Safety Law employers involved in the mining industry must employ a full-time occupational health and safety (OHS) officer who is responsible for monitoring internal OHS compliance. In terms of external monitoring and compliance, licence-holders must submit safety information to the SSIA and MRPAM annually, which has the power to conduct site inspections and may issue cessation notices where it finds serious OHS or safety breaches. In circumstances of serious or continuous breaches of mining safety regulations the SSIA may suspend a mining licence for up to two months to allow for remedial action. Where remediation does not take place within the suspension period, MRPAM may revoke the licence.

A licence-holder is responsible for ensuring the safety of its employees and ensuring that employee working conditions comply with minimum standards. Licence-holders must submit an annual safety report to the SSIA and MRPAM.

36 Article 45.1 of the Minerals Law.
37 Article 27.1.13 of the Minerals Law.
38 Article 66.3 of the Minerals Law. However, we note that Article 56 (which sets out the instances under which a licence may be revoked) does not provide for revocation of a licence arising as a result of OHS or safety breaches.
ii  Environmental compliance

**Environmental plan**

A licence-holder must adopt an environmental management plan (EMP) detailing measures to mitigate environmental contamination. For exploration licences, the governor of the soum in which the licence area is located must approve the EMP, and for mining licences, approval must be obtained from the Ministry of Environment and Tourism (MET). The licence-holder must provide annual reports on the implementation of the EMP to the Environment Monitoring Department of the relevant soum and aimag, (for exploration licences) or the MET (for mining licences).39

**Environmental impact assessment**

Prior to the grant of a mining licence, an environmental impact assessment identifying potential adverse environmental effects of the proposed mining operations and detailing measures to mitigate those effects must be prepared and approved by MET.40 Prior to the commencement of mining operations the MET must undertake an environmental impact general assessment and, if the MET determines it necessary, a detailed assessment must be completed on the project by a licensed technical specialist.

**Reclamation fund**

Each year, a licence-holder must deposit 50 per cent of the budget set aside in its EMP into a reclamation fund administered by the governor of the relevant soum or aimag in the case of an exploration licence, and MET in the case of a mining licence, to guarantee the performance of its obligations under the EMP.41 If a mining licence-holder breaches the obligation to deposit the necessary funds into the reclamation fund before starting the mining operation, the governor of the relevant soum has the right to suspend the holder’s operations.42 Upon closure of its mine, and provided it has met its obligations under the EMP and its environmental impact assessment, a licence-holder is entitled to be refunded any contributions made to the reclamation fund.43

Failure by the licence-holder to fulfil its environmental reclamation duties may result in cancellation of its licence.44

iii  Additional considerations

**Social considerations**

The Minerals Law requires that a mining licence-holder enters into a cooperation agreement with the local community in which its mining operations are situated, regulating environmental protection, mine exploitation, infrastructure development and job creation.45 In 2016, the Mongolian government has approved the form of cooperation agreement

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39 Articles 38 and 39 of the Minerals Law.
40 Article 39 of the Minerals Law.
41 Article 9.10 of the EIA Law and Articles 38.1.8 and 39.1.9 of the Minerals Law.
42 Articles 39.5 and 39.6 of the Minerals Law.
43 Articles 38.4 and 39.4 of the Minerals Law.
44 Article 56.1.5 of the Minerals Law.
45 Article 42.1 of the Minerals Law.
required to be entered into under the Minerals Law, which provides for the establishment of a cooperation committee, consisting of representatives of local citizens, the local governor’s office and the licence-holder, in order to execute and implement the cooperation agreement.

**Mineral deposits of strategic importance**

The Mongolian government may, with the approval of parliament, declare a mineral resource a ‘mineral deposit of strategic importance’ in circumstances where the deposit may impact the national security of the country or its economic and social development or where it has the potential to generate revenue in excess of 5 per cent of gross domestic product. Where such a declaration is made the government may, following negotiation with the affected licence-holder, take an equity stake in the deposit of up to 50 per cent where there has been state-funded exploration work conducted on the affected licence area or up to 34 per cent where there has been no state-funded exploration work.

The Minerals Law was amended on 18 February 2015 to allow the government to exchange state-owned equity in ‘strategic mines’ for royalties of up to 5 per cent of the sales price on minerals sold or used from those mines.

**Reserve areas and special purpose areas**

Under the Minerals Law the Mongolian government may declare areas to be either reserve areas or special purpose areas, which, in either case, prohibit exploration or mining operations from being conducted within the affected areas.

Where a previously issued licence wholly overlaps with a special purpose area, the licence will be revoked and the affected licence-holder must be reimbursed within one year of the decision to declare the area a special purpose area.

**Introduction of the Breach Law (2015)**

On 4 December 2015, the Mongolian Parliament passed the Breach Law (2015), which will come into effect from 1 July 2017. The Breach Law will regulate the administrative sanctions for individuals and corporate entities for violations of certain laws and administrative normative acts specified in the Breach Law. More than 220 laws have been amended to reflect the adoption of the Breach Law, including, relevantly, the Minerals Law, the Land Law, the EP Law and the Subsoil Law.

Most of the acts or omissions that previously constituted a breach under the Minerals Law are now sanctioned in terms of the Breach Law. The Breach Law has, however, also introduced additional acts or omissions that are considered violations of the Minerals Law:

- a breach of the requirements in relation to the proper use of the balance reserves of minerals; and
- exceeding the prescribed volume of waste and pollution during the extraction of minerals.

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47 Article 4.1.12 of the Minerals Law.
48 Articles 5.4 and 5.5 of the Minerals Law.
49 Articles 5.3 to 5.5 of the Minerals Law.
50 Article 14.4 of the Minerals Law.
51 Article 6.11 of the Breach Law.
The penalty amount for most of the violations has considerably decreased, except for the intentional reduction of extracted minerals or sales income by licence-holder, for which the penalty amount has been increased to 10 million togrogs.

V OPERATIONS, PROCESSING AND SALE OF MINERALS

i Processing and operations

Extraction
Under the Minerals Law, mining licence-holders are legally obliged to extract all of the minerals within the licence area,\(^{52}\) however, while the effect of this requirement may be to mandate the development of uneconomic deposits, in line with international commercial mining practices this provision is not strictly enforced.

Supply
Mining licence-holders must preferentially procure goods and services and hire subcontractors from business entities that are registered, and paying taxes, in Mongolia.\(^ {53}\)

Expatriate labour
A mining licence-holder must ensure that 90 per cent of its workforce and the workforce of any sub-contractor working at their mine comprises Mongolian nationals. Non-compliance with these quota requirements, by either the licence-holder itself or any of its sub-contractors, may result in the imposition of fines, which must be paid to the local soum in which its mine operates.\(^ {54}\)

ii Sale, import and export of extracted or processed minerals
Mining licence-holders are obliged to preferentially supply products that have been semi-developed, concentrated or mined from the mining licence site to processing facilities operating within Mongolia at market price.\(^ {55}\) Subject to the preferential supply obligation described above, a mining licence-holder has the right to export and sell mineral products recovered from its licence area in international markets and, generally, no additional export licence is required to do so.

iii Foreign investment
The Investment Law removed previous restrictions on foreign investment in the mining sector; however, the Investment Law requires that foreign state-owned enterprises that seek to acquire more than a 33 per cent shareholding in a Mongolian entity that operates in a ‘strategic sector’ (of which the mining sector is one) must first obtain permission from the Investment Agency.\(^ {56}\)

Under Chapter 2 of the Investment Law:

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52 Article 35.5 of the Minerals Law.
53 Article 35.9 of the Minerals Law.
54 Article 43 of the Minerals Law.
55 Article 35.11 of the Minerals Law.
56 Chapter 3 of the Investment Law.
disputes between an investor and the Mongolian government may be settled by foreign arbitration;

expropriation of an investor’s property is largely proscribed and in the limited instances where expropriation is permitted then an investor is entitled to ‘market rate’ compensation; and

subject to compliance with Mongolian law (including taxation law) investors have the right to freely repatriate their profits abroad (including in the form of dividends, principal and interest on loans, or otherwise).57

**Foreign-invested companies**

A Mongolian-incorporated entity that has a foreign shareholding of more than 25 per cent is deemed a foreign-invested company (FIC). A FIC must have a paid-in share capital of at least US$100,000 per shareholder.

**Stabilisation certificates**

Under the Investment Law, eligible investors may be issued with ‘stabilisation certificates’ by the Mongolian government, which stabilise the rates of mineral royalties, corporate income tax and value added tax, as well as customs duties for the duration of their validity.58 Notwithstanding the stabilised rates, if there are changes to any of those rates that would otherwise benefit the stabilisation certificate holder, then the Investment Law allows the holder to benefit from those changes.

Eligibility for stabilisation certificates and the duration of their validity (ranging from five to 18 years) is dependent on the quantum of the investment (qualifying thresholds for the mining sector start at 30 billion togrogs and range up to 500 billion togrogs), the sector into which the investment is made and the geographical region within Mongolia.59 Stabilisation certificates may not be transferred or otherwise encumbered.

**Investment agreements**

For qualifying investments the Investment Law allows an investor to enter into an investment agreement with the Mongolian government under which its investment environment can be further stabilised and in terms of which broader investor safeguards (i.e., in addition to the general rights of all investors provided for under Chapter 2 of the Investment Law and the ability to fix certain taxation rates) may be agreed between the parties. The Investment Law provides that all guarantees provided by the qualifying Investment Law, tax stabilisation and financial support can be provided for under an investment agreement.60 Currently, the monetary threshold for an investment agreement is at least 500 billion togrogs.61

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57 Unlike many other jurisdictions, there are no exchange control restrictions in Mongolia.
58 Article 14.1 of the Investment Law.
59 Article 16.2 of the Investment Law.
60 Article 20.4 of the Investment Law.
61 Article 20 of the Investment Law.
VI CHARGES

i Royalties

With regard to royalties the Minerals Law imposes the following obligations on mining licence-holders (irrespective of whether they are FICs):

a pay, quarterly, applicable royalties on minerals sold or used during the quarter of record;

b prepare and lodge a quarterly royalty report with the State Inspection Office (SIO) in accordance with the template adopted by the SIO;\(^\text{62}\)

c prepare and lodge a quarterly royalty report with the Tax Office in accordance with the template adopted by the Tax Office;\(^\text{63}\)

d prepare and lodge an annual royalty report with MRPAM and the Tax Office setting out certain prescribed information (including details of the quantity of product produced, value of product sold, operating expenses and royalty payments made);\(^\text{64}\) and

e prepare and lodge, on a quarterly basis, with the National Taxation Authority of Mongolia (in a form prescribed by it) certain prescribed information relating to the payment of royalties by the holder.\(^\text{65}\)

Royalties are not payable in respect of exploration licences.

Royalty rates

A flat royalty rate of 5 per cent of the sales price of all minerals (other than domestically sold coal, gold sold to the Bank of Mongolia (BOM) and common minerals) sold or used is payable. A portion of the royalty payment is allocated to the local government from where the minerals are produced and the balance of the royalty goes into the national treasury. The royalty rate for coal that is sold domestically within Mongolia, gold sold to the BOM and ‘common minerals’, is 2.5 per cent.

Part of the royalty goes to the central treasury, while the remainder goes to local government treasuries.

Surtax royalty

Effective from 1 January 2011, Mongolia introduced a surtax royalty regime that imposed a second tier of royalties (in addition to the standard flat-rate royalty described above) on the total sales value of 23 types of minerals. The surtax royalty rates vary depending on the type of mineral, its market price and the degree of processing. The degree of processing will determine the surtax royalty rate, but generally the range is between zero and 5 per cent, with the exception of unprocessed copper ore, which attracts a surtax royalty rate of up to 30 per cent on unprocessed ore.

ii Taxes

The position of entities and individuals operating in the mining sector is no different to that of other entities or individuals operating in other sectors within Mongolia. The keystone piece of tax legislation, which establishes the framework for taxation in Mongolia, is the General

\(^{62}\) Article 47.11 of the Minerals Law.

\(^{63}\) Article 48.9 of the Minerals Law.

\(^{64}\) Article 48.7.3 of the Minerals Law.

\(^{65}\) Article 48.9 of the Minerals Law.
Law on Taxation (2008) (General Tax Law). The General Tax Law is then supplemented by a number of other taxation laws regulating specific areas and types of taxation in Mongolia. Set out below is an overview of certain taxes of particular relevance to participants in the mining sector. Since 2007, the Mongolian government has been working on a broad-ranging reform of the tax code. As part of the reform process, revised drafts of the main tax legislation (including the General Tax Law, Corporate Income Tax Law and Personal Income Tax Law) have been proposed to the parliament. These changes are intended to support business entities and build a more refined and clear tax environment in Mongolia.

**Income tax**

In terms of the Economic Entity Income Tax Law (2006) all Mongolian-sourced income is taxable at a rate of 20 per cent for the first 3 billion togrogs of income per foreign entity that is not residing in Mongolia or operating through its representative office in Mongolia. Mongolian-sourced income in excess of 3 billion togrogs is taxable at a rate of 25 per cent.66

**Withholding tax**

Mongolian entities are subject to a withholding tax of 10 per cent on all dividends or royalties paid to other Mongolian entities. Non-resident entities are subject to a withholding tax of 20 per cent on all Mongolian-sourced income that is paid offshore (including by way of dividends, royalties and interest payments). All withheld tax must be remitted directly to the Mongolian tax authorities.

**Tax on licence transfer**

A licence-holder is subject to a withholding tax of 30 per cent on the sale price of the licence. Tax is not withheld in the case of transfer of a licence from the licence-holder to its parent company or to a new company that is established due to merger.

**Personal income tax**

In terms of the Law on Personal Income Tax (2006) Mongolian tax residents are liable to pay 10 per cent personal tax on their taxable income, which is withheld by their employers and remitted directly to the Mongolian tax authorities.

While not a tax, under the Law on Social Insurance of Mongolia (1994), contributions must be made each month into the Social Insurance Fund in amounts relative to employees’ salary:

- **by employers:** between 10 per cent and 13 per cent; and
- **by employees:** 10 per cent.

**Value added tax**

In terms of the Law on Value Added Tax (2015) (the VAT Law), value added tax (VAT) at a rate of 10 per cent is payable in respect of all goods sold, work performed and services

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66 ‘Permanent residents’ are taxed on their worldwide income. An entity will be regarded as a ‘permanent resident’ where it is incorporated in Mongolia or, if it is a foreign entity (i.e., incorporated outside Mongolia), where its head office is situated in Mongolia.
rendered within Mongolia. VAT at a rate of 10 per cent is also payable in respect of goods imported into Mongolia and in respect of service fee or management payments made by Mongolian taxpayers to offshore or non-resident service providers.

The VAT Law provides for a zero VAT rate for specified processed or beneficiated mineral products, as determined by government resolution from time to time.

**Tax treaties**

The rates and types of taxation set out in this section may vary depending on whether there is a double taxation treaty in place. Mongolia is party to double taxation treaties with a number of countries and while the specific terms of these treaties will vary between countries generally, all of them will avoid, to differing extents, double taxation on foreign investors paying tax in multiple jurisdictions including Mongolia (by, for example, reducing the 20 per cent withholding tax on dividends paid to non-Mongolian entities).

**iii Duties**

Equipment and other goods imported into Mongolia attract customs duty at a flat rate of 5 per cent other than in respect of certain zero-rated exceptions such as medical devices, computer technology devices and livestock. Certain types of equipment used in the mining sector (such as heavy machinery), which are purchased using offshore funding and imported into Mongolia, may be subject to exemption from customs duty.

**iv Other fees**

The payment of annual licence fees by licence-holders and the meeting of minimum expenditure commitments by exploration licence-holders are primary obligations and any failure to fully meet these obligations gives MRPAM the right to revoke the affected licence.67

**Exploration licence: annual licence fees and minimum commitments**

Annual exploration licence fees and minimum annual exploration expenditure commitments must be paid, both on a per-hectare basis, as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Annual licence fees</th>
<th>Minimum annual exploration expenditure</th>
</tr>
</thead>
<tbody>
<tr>
<td>Year 1</td>
<td>145 togrogs</td>
<td>Not applicable</td>
</tr>
<tr>
<td>Year 2</td>
<td>290 togrogs</td>
<td></td>
</tr>
<tr>
<td>Year 3</td>
<td>435 togrogs</td>
<td>US$0.50</td>
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<td>Years 4–6</td>
<td>1,450 togrogs</td>
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<tr>
<td>Years 7–9</td>
<td>2,175 togrogs</td>
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<tr>
<td>Years 10–12</td>
<td>7,250 togrogs</td>
<td>US$10</td>
</tr>
</tbody>
</table>

**Mining licence: annual licence fees**

For a mining licence, an annual licence fee is payable, on a per-hectare basis, of 21,750 togrogs for all minerals other than coal and ‘common minerals’ in respect of which the annual licence fee is 7,250 togrogs.

67 Article 56 of the Minerals Law.
VII OUTLOOK AND TRENDS

There can be little debate that the mining sector in Mongolia has been adversely affected by global trends over recent years; rapidly cooling commodity prices, moderating consumption by China (especially of coal), lack of access to funding in the junior exploration market and a marked trend away from greenfield projects to an emphasis on process optimisation, capital efficiencies and shareholder returns across the mining industry, have all taken their toll. However, there have also been a number of Mongolia-specific issues that have further dented investor confidence in the country, and led to a further substantial fall in foreign direct investment into the mining sector over the past few years.68

In April 2015, the Mongolian government (a 34 per cent shareholder in the Oyu Tolgoi project), Rio Tinto plc and its subsidiary Turquoise Hill Resources Limited (the owner of the balance of the project) signed the Oyu Tolgoi Underground Mine Development and Financing Plan (UMDFP) addressing those outstanding issues between them that had caused the shutdown of the development of the underground phase of the Oyu Tolgoi Project (which is reported as holding 85 per cent of its economic value) since July 2013. The UMDFP addressed these issues and laid down the basis for the future financing of the project. Following the UMDFP, the parties signed a US$5.3 billion project financing plan for the underground mine in May 2016, and all necessary permits for the underground expansion have been granted and the project is ramping up. The first production as a result of the underground mine is expected in 2020. The importance of the Oyu Tolgoi project to Mongolia’s mining industry and its economy more generally cannot be overstated, and the outlook for Mongolia will be significantly affected by the mine’s success and timing of its further development. The underground mine is expected to be at full capacity in 2027, increasing the mine’s annual production of copper from 200,000 tons to 500,000 tons (where it currently sets) and making Oyu Tolgoi one of the top three copper mines in the world.

While the development of the Oyu Tolgoi project has renewed momentum and is moving ahead, little progress has been made with respect to the massive Tavan Tolgoi coal project. According to preliminary analysis, the Tavan Tolgoi coal deposit in Umnugovi aimag has an estimated 7.4 billion tonnes of coking coal. In 2010, the Mongolian parliament initiated a tender process to select investors for the development of the Tavan Tolgoi project, but due to certain economic and political circumstances, the selection of the investor was delayed. In August 2014, the government set out additional requirements for proposed investors, including that the state would solely hold the mining licence for the deposit, and that any investor could only operate at certain locations under an investment and cooperation agreement. A consortium comprising China’s Shenhua Energy, Japan’s Sumitomo and Mongolia’s Energy Resources was eventually awarded the tender to develop Tavan Tolgoi and negotiated a number of agreements relating to the development of the project and accompanying infrastructure with the Mongolian government, which were then submitted to the Mongolian parliament in April 2015 for final approval. As of the date of writing, the Tavan Tolgoi process is stalled and remains mired in politics.

A new draft of the Labour Law (1999) proposing significant changes to the employee framework was introduced in the Mongolian parliament in June 2015. The new draft law is, on the whole, employee-friendly and proposes term restrictions on fixed term contracts,

68 Foreign direct investment decreased 52 per cent between 2012 and 2013 and a further 64 per cent over the first five months of 2014 (Source: Bloomberg, 2 July 2014).
roster scheduling, limited overtime and a number of other potentially onerous obligations for employers. The draft has met with strong opposition from the business community, and for the time being seems to be stalled while it is being discussed further within the Ministry of Labour.

The VAT Law (revised version) (2015) is effective as from 1 January 2016 and replaces the previous Law on Value Added Tax (2006). Whereas previously VAT on certain capital equipment as well as certain exploration works and pre-mining activities was reclaimable, the revised VAT Law no longer provides these allowances. These changes have likely had an adverse impact on mining sector participants (particularly explorers and juniors) and will continue to do so in the future.

Notwithstanding significant and persistent headwinds across the mining industry globally, the resolution of the dispute between the Mongolian government and Rio Tinto concerning the development of the Oyu Tolgoi underground mine must be seen as a positive and noteworthy event. However, for Oyu Tolgoi to truly act as a catalyst for the mining industry in Mongolia and all those that depend on it, the Mongolian government will need to continue to take constructive steps to promote the country and re-engage the international investment community and convince them that Mongolia is indeed ‘open for business’. With a change in government following the June 2016 parliament elections, there are high hopes that the new government, elected with a formidable majority of seats in the Mongolian parliament, will take concrete steps to re-entice foreign direct investment by creating a stable and investor-friendly policy framework.
Chapter 13

NIgeria

Oladotun Alokolaro and George Ukwuoma

I OVERVIEW

Nigeria is richly endowed with an array of solid mineral deposits. However, these mineral deposits are not being fully exploited for economic gain. This is perhaps premised on oil exploration and production activities having a significant shorter lead time than mining in terms of production. Most mining activities in Nigeria to date are either artisanal or associated with illegal mining. With the global decline in oil prices, Nigeria once again seeks to diversify its economy from being a mono-dependent economy to multi-dependent and one of its key areas of focus in this regard, is the mining sector.

To this end, the government has urged the review of the sector’s policies and the legal and regulatory framework governing same with a view to attracting the necessary foreign investment to boost local mining. One of the critical steps taken thus far, is the introduction in 2016 of the roadmap for the growth and development of the Nigerian mining industry. The recent roadmap (an improvement on the 2012 roadmap) acknowledges the barriers to a vibrant mining sector (such as: the lack of reliable geological data; limited enforcement of existing laws; lack of clarity on institutional and organisation design; fiscal uncertainty and lack of skilled manpower) and provides the Nigerian government’s blueprint as to how these issues would be addressed.

The principal law governing the Nigerian mining sector is the Nigerian Minerals and Mining Act of 2007 (the Act) and the Minerals and Mining Regulations of 2011 (the Regulations). While the formulation of mining policies remains vested in the Ministry of Solid Minerals, Mines and Steel Development, institutions such as the National Geological

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1 Oladotun Alokolaro is a partner and George Ukwuoma is a mid-level associate at Advocaat Law Practice.
2 The occurrence of solid minerals is widespread across the entire breadth of Nigeria with evidence of numerous minerals in various regions. Some of the known minerals include the following: gold, coal, bitumen, iron ore, tantalite, columbite, lead, zinc, sulphides, barytes, cassiterite, gemstones, talc, feldspar, marble and the recently discovered nickel with most of these minerals occurring in the schist belt which includes Northern Nigeria.
3 The Minerals and Mining Act No. 20 of 2007 is the principal legislation regulating all aspects of exploration and exploitation of solid minerals in Nigeria and the Act repealed the Minerals and Mining Act, No. 34 of 1999.
4 The Minerals and Mining Regulations 2011 provide the guidelines for operations in the solid minerals sector.
Survey Agency\(^5\) and the Mining Cadastre Office (MCO)\(^6\) have been established to promote the identification and exploration of minerals and to administer mineral titles on an open and transparent basis respectively.

There are identifiable risk factors that tend to impede the quest for foreign investment in the sector. Some of these risk factors include security risk, fiscal risk, currency risk and political risk. The issue of insecurity in the mineral-rich northern region of Nigeria is presently being addressed while the unstable monetary policy – giving rise to recurring exchange rate fluctuations – has been addressed, with the foreign exchange rate now stable.

Some of the recent notable developments in the mining sector include the establishment of the 30 billion naira Mining Intervention Fund (MIF) by the Ministry in collaboration with the bankers’ committee of the CBN and the Bank of Industry (BOI). The fund is to support local miners in boosting local production of solid minerals and bridge the gap on importation of these minerals. Another notable development in the sector, is the signing of two memoranda of understanding between Nigeria and China on geosciences cooperation. The agreement provides for cooperation between the Nigerian Geological Survey Agency (NGSA) and the China Geological Survey (CGS) as well as between the NGSA and the Shandong Provincial Bureau of Geology and Mineral Resources of China in the areas of research and development of basic geology and geological maps compilation, aero–geophysical survey, the mineral resources and energy raw material exploration joint programme in marine geology, geoscience research and monitoring of geo-hazards, hydro and environmental geological surveys as well as the manufacture and marketing of geological and mineral exploration equipment and tools, provision of bankable feasibility reports and geosciences laboratory equipment and facility.\(^7\) This is in addition to the already existing memorandum of understanding entered into between the federal government of Nigeria and a consortium of Chinese and Nigerian investors to enable the consortium mine coal for the purposes of generating up to 1,200MW of electricity. Another remarkable deal in the mining sector is the current plan by an American multi-power production company, Milhouse Generation Services, to construct Nigeria’s first coal to power plant in the Nsukka area of Enugu State of Nigeria. The company announced that it had secured an operating licence from the Nigeria Electricity Regulatory Commission (NERC) and the project that is aimed at augmenting the nation’s power generation capacity is to produce 30 megawatts (MW) of coal-fired electricity from two power substations. There are also plans for the development of the vast nickel deposit recently discovered in Kaduna state, northern Nigeria.

II LEGAL FRAMEWORK

The Nigerian mining legislation is based on a system of absolute ownership of mineral rights by the federal government acting through the Ministry of Mines and Steel Development (the Ministry). By virtue of the provisions of the Act and Regulations, the Minister of Solid Minerals, Mines and Steel Development (the Minister) is charged with the responsibility of ensuring the orderly and sustainable development of Nigeria’s mineral resources and creating

\(^5\) The Agency was established by the Nigerian Geological Survey Agency (Establishment) Act 2006.

\(^6\) The Mining Cadastre Office was established by Section 5 of the Nigerian Minerals and Mining Act 2007. In 2009, it resumed the issuance of mineral titles after suspending same for the purposes of a revalidation exercise.

an enabling environment for both local and foreign investors in the mining sector. Apart from the Act and the Regulations the sector is also regulated by other similar legislations such as the Environmental Impact Assessment Act, Land Use Act, Explosives Act, Foreign Exchange (Monitoring and Miscellaneous Provisions) Act, Companies and Allied Matters Act, Labour Act, Employees Compensation Act, Immigration Act, Nuclear Safety and Radiation Protection Act, Mines and Quarries (Control of Building etc.) Act, Company Income Tax Act, Schedule to the Taxes and Levies (Approved List for Collection) Act (Amendment) Order 2015, Water Resources Act and National Environmental Standards, Regulations Enforcement Agency (Establishment) Act. These legislative instruments address various aspects of mining operations in Nigeria. Though there are no legal classification provisions for the reporting of mineral resources and mineral reserves in any of the legislative instruments, there are prescribed reporting requirements that mining title holders are expected to abide by under the Regulations. As a consequence of the present government’s policy to revamp the mining sector, the Act has come under scrutiny and an amendment is presently pending before the National Assembly, seeking to amend the Act to provide for the increased participation of the state governments and host communities in mining activities and also to provide sanctions for the illegal exportation of unprocessed minerals from Nigeria. The proposed amendment bill also seeks to provide for the establishment and operation of minerals processing facilities in Nigeria as a pre-condition for the grant of mining leases and licences.

The extant laws discussed above are administered by various agencies and institutions, chiefly the Ministry, which is charged with the overall administration of the Act. Other departments charged with specific functions are the Mines Inspectorate Department (MID), charged with the responsibility of ensuring that mining operators adhere strictly to the laws and regulations in the course of their mining operations; the Mines Environmental Compliance Department (MECD); and the MCO, charged with the issuance and administration of mining licences. Others include but are not limited to the Federal Ministry of Environment, the Federal and States Inland Revenue Services, the Nigeria Nuclear Regulatory Agency and the Federal and States Ministries of Land and the Corporate Affairs Commission (CAC).

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14 Employee Compensation Act, 2010 was signed into law by the former president, Dr Goodluck Jonathan on 21 January 2011.
15 No.8, 2015.
21 See Regulations 34, 44, 55, 66, 76, 86 and 138; Schedule 5 Minerals and Mining Regulations, 2011.
In relation to international treaty obligations affecting the mining industry, Nigeria is still not a signatory to any mining specific treaty and conventions save for initiatives such as the Africa Mining Vision (AMV), which was adopted by African heads of state at the February 2009 African Union (AU) summit following the October 2008 meeting of African Ministers responsible for Mineral Resources Development. The aim of the AMV is to set out policies and action plans on how mining can be used to drive continental development. However, Nigeria is a signatory to several international treaties that seek to protect foreign investment, including investments in the mining sector. These treaties include, but are not limited to, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the Multilateral Investment Guarantee Agency Convention and the Treaty on the International Centre for the Settlement of Investment Disputes. Nigeria has also entered into various bilateral investment agreements to facilitate the development of its mining sector, notably with countries such as the United States, China, Turkey and South Korea.

III MINING RIGHTS AND REQUIRED LICENCES AND PERMITS

The ownership of all minerals occurring beneath or upon any land in Nigeria including its continental shelf and territorial waters are vested in the federal government. This ownership right of all minerals is consistent with the provisions of the Constitution of the Federal Republic of Nigeria 1999 (as Amended).

Private parties may, in accordance with the Mining Act acquire mining rights through an application to the MCO under the Ministry. Mining titles are usually granted on a priority basis but may be granted through a competitive bidding process. For the grant of mining titles through a competitive bidding process, the Minister determines the areas, free of any validly existing mineral titles, to be designated for the bidding exercise. It is an offence, punishable upon conviction with a fine or a term of imprisonment or both, to engage in mining operations otherwise than in accordance with the provisions of the Act.

There are classifications of mining titles that a private party (usually a private limited liability company) may acquire for the exploration and exploitation of mineral resources in Nigeria, which include the following.

Reconnaissance permit

The holder of a reconnaissance permit under the Act is only allowed to undertake operations for preliminary prospecting of minerals through geological mapping and geophysical surveys and does not allow the holder to engage in excavation, drilling or pitting. The holder is only permitted to obtain and remove samples of insignificant quantity and such title is not transferable. The permit holder, is therefore, allowed to undertake reconnaissance activities on all land within Nigeria that is available for mining operations on a non-exclusive basis and does not cover land that is already the subject of a mining exploration licence, small-scale mining lease, mining lease or water use permit. The permit is valid for a period of one year and may be renewed upon satisfactory application for renewal of same.
**Exploration licence**

The exploration licence, granted for a three-year term and renewable for two consecutive periods of two years, each subject to the fulfilment of the minimum work obligation and other relevant requirements of the Act, permits the holder to exclusively conduct exploration activities on a land area not exceeding 200 square kilometres and that is not subject to an existing exploration licence, mining lease or small-scale mining lease. The holder of an exploration licence has the exclusive right to apply for and be granted, subject to the provisions of the Act, one or more of a small-scale mining lease, mining lease or quarry lease in respect of any part of the exploration licence area. The validity of the exploration licence and the period allowed for renewal when calculated together must not exceed seven years in total. It must be noted that the licence is granted to incorporated companies and mining co-operatives and holders of reconnaissance permit in respect of a mining area.

**Mining lease**

The mining lease confers on the holder, among other rights, the exclusive occupation and use of the licence area for the purposes of exploring and exploiting mineral resources. The duration of a mining lease is usually for the term applied for by the applicant and does not exceed 25 years in the first instance, though the term may be renewed for the consecutive 25-year period subject to satisfactory compliance with the minimum work obligations and any commitments that may be specified by the Ministry. The area of land in respect of which a mining lease can be granted is determined in relation to the ore body as defined in the feasibility study submitted in respect of the application for the mining lease together with an area reasonably required for the workings of the mine; such area must not exceed 50 square kilometres. A mining lease holder is not permitted to commence work in the lease area until after he or she has submitted to the MECD all environmental impact assessment studies and mitigation plans required under applicable environmental laws and has procured the MECD’s approval for the same; has concluded a community development agreement approved by the MECD with relevant communities; and has paid all necessary compensation as required by the Act. By the provisions of the Act, a valid application for a mining lease by a qualified applicant shall be granted within 45 days subject to the applicant meeting all the conditions for a grant.

**Small-scale mining lease**

The small-scale mining lease allows the holder of the lease to conduct artisanal mining operations that exclude the extensive and continued use of explosives, toxic chemicals or agents on an area of land not less than five acres but not exceeding three square kilometres. The holder of a small-scale mining lease is not allowed to employ more than 50 workers in a typical work day and not allowed to have underground workings more than seven metres below the surface nor galleries extending more than 10 metres from a shaft. A small-scale

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26 See Section 67 of the Act.
27 Section 71 of the Act.
28 Section 65 of the Act.
29 Regulation 48(1)(a) and (b).
30 Section 90(1) of the Act.
31 Regulation 48(1)(b) and (c).
mining lease is granted to individuals, incorporated companies and mining co-operatives and holders of an exploration licence, is granted for a period of five years and may be renewed for further terms each of five years with an unlimited number of renewals.32

**Quarry lease**

A quarry lease is granted for the quarrying of all quarryable minerals such as asbestos, china clay, gypsum, marble, limestone, sand, stone, laterite, pipe clay and gravel as may be specified in the lease.33 The quarry lease is granted in respect of an area not exceeding five square kilometres for a period of five years, which may be renewed for further terms each of five years with no limitation to the number of renewals.34 A quarry lease is granted to individuals, incorporated companies and mining co-operatives and construction companies as well as holders of exploration licence.

**Water use permit**

This is a right granted to a mining titleholder i.e., an exploration licence, mining lease, small-scale mining lease and quarry licence to obtain water for use in the course of mining exploration and exploitation.35 The permit is granted for the period for which the relevant mining title is granted.36

The above mining rights, once granted to a party, are protected by the judicial system, which functions independently of both the executive and the legislative arms of government. In addition, there are numerous investment guarantees provided under various local legislations in Nigeria as well as international treaties to which Nigeria is signatory. Foreign investors, upon meeting all conditions and requirements for the application of a lease or licence, are not restricted from acquiring mining rights. However, a foreigner cannot apply for or hold mining rights except such a foreigner incorporates a company in Nigeria, which may be 100 per cent owned by the foreigners, as provided under the extant company and foreign investment laws.

The applicants for mineral titles are required to demonstrate to the MCO evidence of sufficient working capital to conduct mining operations. Upon the grant of the mining title, holders of mining titles are under an obligation to carry on exploration and or exploitation of mining operations in a safe and skilful manner taking all necessary safety, environmental and pollution precautions. They are to minimise and manage any environmental impact resulting from mining activities and are required to rehabilitate and reclaim all disturbed land to its natural or predetermined state or such state as the laws and or regulations may prescribe. In this regard, an applicant is required, as part of its environmental impact assessment report for an application for mining rights, to submit an Environmental Protection and Rehabilitation Programme to the MECD.37 The Environmental Protection and Rehabilitation Programme,

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32 Regulation 50 of the Regulation.
33 Sections 77 and 78 of the Act.
34 Regulation 71 of the Regulations.
35 Regulation 77 of the Regulations.
36 Regulation 81(1).
37 Section 119 of the Act.
which must be approved by the Ministry before the issuance of any mining title, must provide for specific reclamation and rehabilitation actions, citing the estimated cost and timetable for such rehabilitation.38

A mineral title-holder who intends to abandon or cease operations in a leased area is required to provide notice to the MID and the MECD detailing the intended abandonment plan and the operations of the mine up until the notice for such abandonment or cessation of operations was issued. Upon receipt of the notice, recommendations are made to the Minister and, should the title-holder still seek to abandon the mining site, he or she would be required to seal and cover every mineshaft; make safe all tailings and water retention areas; and demolish or lock all potential hazardous buildings, structures, plants or equipment.39

Under the Act and the Regulations,40 every mineral title-holder is also required to contribute to the Environmental Protection and Rehabilitation Fund, in accordance with the amount specified in the Environmental Protection and Rehabilitation Programme approved by the MECD, to guarantee that the environmental obligations of mineral title-holders such as mine closure and remediation are met.

Except for reconnaissance permits, all of the mineral titles listed above can be consolidated and transferred or assigned to a third party upon application to the MCO, fulfilment of specified conditions and payment of all necessary fees. A holder of contiguous mineral titles is allowed to consolidate his or her titles of like kind to only one title upon application to the MCO and the fulfilment of certain conditions. Small-scale mining leases and quarry leases can each be converted to mining leases if the holder of the quarry lease or small-scale mining lease is qualified under the Act and the Regulations to hold a Mining Lease. The term of the mining lease from such conversion shall be the shorter of the term requested by the applicant or the maximum term for the mining lease. On the other hand, a title-holder cannot create a charge or an encumbrance on the title or facilities that are part of the mining operations except such charge or encumbrance is to secure financing for the mining operations and such can only be done upon confirmation of the status of the title by the MCO. Notice of assignment, transfer or charge of a mining title is to be given to the MCO within 30 days of creation of the charge or assignment.

IV ENVIRONMENTAL AND SOCIAL CONSIDERATIONS

The principal legislation that governs environmental and social considerations for mining operations in Nigeria are the Act, the Regulations, the National Environmental Impact Assessment Act,41 National Environmental (Mining and Processing of Coal Ores and Industrial Minerals) Regulations 2009, the National Environmental (Permitting and Licensing System) Regulations 2009, the National Environmental (Noise Standards and Control) Regulations 2009 and the National Environmental Standards and Regulations Agency (Establishment) Act.42 These extant laws and regulations are administered by officials of the federal and state Ministries of Environment and the National Environmental Standards and Regulations

38 Section 120 of the Act.
39 Section 159 of the Act; see also Regulation 225 of the Regulations.
40 Section 121 of the Act; see also Regulation 184 of the Regulations.
42 National Environmental Standards and Regulation Enforcement Agency (Establishment) Act No. 92, 2007.
Agency (NESREA). The laws provide that prior to embarking on a mining project, a mining title-holder must submit an environmental impact assessment report to the Ministry of Environment for approval. Upon submission of the report, the Ministry will seek the view of all stakeholders as to the siting of the mining project and what adverse effects, if any, such project would have on its immediate environment. Where there is likely to be a significant impact on the environment with no possibility of mitigation, the project may be referred for mediation or to a review panel who will be the final arbiter to determine whether the project will be permitted or refused. Subsequent to the approval of the Ministry of Environment, the environmental impact assessment report must be submitted to the MECD before the commencement of mining operations or upon application for renewal of mining titles as the case may be.

The National Environmental (Mining and Processing of Coal Ores and Industrial Minerals) Regulations 2009, National Environmental (Permitting and Licensing System) Regulations 2009, and the National Environmental (Noise Standards and Control) Regulations 2009 are aimed at minimising environmental pollution from the mining and processing of coal, ores and industrial minerals. They prescribe the permitted requirements for mine emissions, noise above specified levels and for the discharge of effluent from a facility. These Regulations are administered by the NESREA. The time frame for the entire environmental review process for mining projects varies and may take up to one year but environmental conditions and requirements must be complied with throughout the life span and subsistence of the mining title.

Mining operations are prohibited in areas that have been held to be sacred sites. Where mining activities affect such sacred sites, the mining title-holder may be liable to pay compensation to the community where such sacred sites lie. Sacred sites are determined by the MCO on the advice of the Mineral Resources and Environmental Committee. Lawful occupiers of any land that is the subject of a mining title are entitled to fair compensation for any disturbance of their surface rights and for any damage done to the land including damage to crops, economic trees and buildings. Failure to pay the occupiers of the land compensation may lead to the suspension or revocation of a mining title.

Occupiers of land compulsorily acquired for mining purposes are also entitled to compensation. The usual practice is that the holder of a mining title is required to provide security for the payment of compensation in the form of a deposit or to reimburse the federal government for any compensation paid to any state government or lawful occupier in respect of any land that is the subject of a mining title. The lawful occupier of any land within an area subject to a mining lease retains the right to graze livestock upon and to cultivate the surface of the land provided that the grazing or cultivation does not interfere with mining operations in the area. A holder of a quarry lease, mining lease or small-scale mining lease is required to enter into a community development agreement with the host communities of the mining title area, which will ensure transfer of economic and social benefits to the communities as well as individual members of the communities.

It needs to be emphasised that due to the attachment of local communities to their land, a mineral title-holder may constantly have to deal with a host community, family or individual holder of land comprising the title area. As such, it is important for a mining

43 Section 98 of the Act.
44 Section 107 of the Act.
45 Section 109 of the Act.
title-holder to ensure that it has a robust relationship with such community, family or individual holder in respect to access to the area. Prompt payment of compensation and provision of employment opportunities and social amenities will facilitate a robust and lasting relationship with the community. The federal government has very recently made it a basic requirement that mining companies must in addition to obtaining a standard environmental impact assessment (EIA) report also obtain the consent of their host communities before the issuance of new permits or licences. This measure was put in place to reduce the impact of mining activities on host communities. It must be noted that this additional requirement for host community consent could have a direct impact on mining rights or mining projects in Nigeria as the process for the actual commencement of mining operations may be unduly protracted and no doubt increase operational costs for the mining operators.

V OPERATIONS, PROCESSING AND SALES OF MINERALS

All plants, machinery, equipment and accessories imported for mining activities are subject to inspection at the respective ports of entry. Such machinery or equipment is, however, exempted from payment of customs and import duties. To qualify for the exemption from payment of customs and import duties, such plant, machinery, equipment and accessories must be imported specifically and exclusively for mining operations and the MID must approve of such machinery or equipment prior to its importation.46

For the purposes of mining activities, foreign investors are required to import their proposed operating funds through an authorised dealer in the autonomous foreign exchange market established by the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act.47 The importation of operating funds through these means allows for the unconditional repatriation to the home country of the title-holder of dividends, profits and interests earned on funds imported into the country.

A mining title-holder is permitted to employ foreigners for its operations, but to do so they must obtain a residence permit, work permit and an expatriate quota grant in accordance with the provisions of the Immigration Act.48 Upon engagement, their terms of employment and welfare are regulated by the Labour Act49 and other laws regulating employment relations and welfare of employees in the country. The Labour Act restricts the employment of women and children under the age of 16 from working in underground mines.50 It should be noted that under the Nigerian Minerals and Mining Act, a mining title-holder is entitled to expatriate quota and resident permit in respect of expatriate personnel approved for his mining operations.51

Upon commencement of production, the mining title-holder has unrestricted rights to possess and export the minerals produced from the mines subject to the payment of the requisite royalties. To export the minerals won, the mining title-holder must register with the

46 Sections 25(1)(c) and 25(2) and (3) of the Act.
48 Sections 36 to 38, Immigration Act No. 8, 2015.
50 Sections 56 and 59(5) of the Labour Act.
51 Section 25(1)(b) of the Act.
Nigerian Export Promotion Council, procure a permit to export minerals for commercial purposes from the MID (evidence of payment of the requisite royalty must be presented as a condition for its grant) and comply with any Nigeria Customs Service requirements.

In conducting mining operations, the common business structure often adopted by foreign investors operating in the mining sector in Nigeria is a limited liability company that must be registered in accordance with the provisions of the CAMA, the principal law regulating businesses in Nigeria. Owners of such mining operations may be able to access financing for their mining operations on a debt and or equity basis from both local and international lenders and they may also approach the capital market to raise finance.

Guarantees exist under several enactments in Nigeria for the protection of foreign investments in the mining sector, like other foreign investments. For instance, the Nigerian Investment Promotion Commission Act guarantees a foreign investor rights to the unconditional transfer, through an authorised dealer in freely convertible currency, of his or her profits or dividends accruing from the investments, payments in respect of foreign loan servicing and proceeds from the sale or liquidation of the investment enterprise. Furthermore, the same statute also guarantees that no enterprise is to be expropriated by any government of the federation and that any person who owns capital or investment enterprise cannot be compelled to surrender same to any other person. It must be noted that Nigeria is also a signatory to a number of international treaties aimed at protecting foreign direct investments in the country.

VI DUTIES, ROYALTIES, TAXES AND INDEMNIFICATION

Mining companies, by virtue of various tax laws in Nigeria, are liable to a company income tax on their taxable profits and same is payable to the Federal Inland Revenue Services (FIRS) while individuals or partnerships are liable to personal income tax on any profit or gain from their mining activities payable to the relevant state revenue service. It is also worthy of note that by virtue of the Schedule to the Taxes and Levies (Approved List for Collection) Act (Amendment) Order 2015, mining companies may be liable to payment of mining, milling and quarry fees in states where they are imposed. Mining companies are also liable to pay education tax which is assessed at 2 per cent of their assessable profit. Value added tax of 5 per cent is to be charged by a mineral title-holder on all minerals sold in Nigeria; however, minerals exported are exempted from value added tax. Education tax and value added tax are payable to the FIRS.

Royalties payable on minerals obtained from mining activities are prescribed by the Regulations. Where minerals are sought to be exported solely for the purposes of analysis or experiment, the Minister may waive the payment of royalty on such minerals. It must be noted that concessions can be granted at the point of renewal to licenses of mining companies with evidence of yearly payment of royalties to the federal government throughout the duration of their licence. Furthermore, the Minister may also defer the payment of royalties

52 Section 54 of Companies and Allied Matters Act, Cap 20, Laws of the Federation of Nigeria, 2004.
54 See paragraph 3 of the Schedule to the Taxes and Levies (Approved List for Collection) Act (Amendment) Order 2015.
55 Schedule 4 of the Minerals and Mining Regulations 2011.
payable on minerals won for any prescribed period. The taxes and royalties rates do not discriminate between Nigerian companies wholly owned by foreign nationals or Nigerian companies wholly owned by Nigerians and apply equally to both. All holders of mining titles are required to pay annual service fees for their titles. In particular, holders of mining leases are required to pay surface rent at a yearly rate as may be prescribed by the Minister for their mining operations.

While the above represents the applicable taxes and royalties payable on minerals won, the mining title-holders are entitled to various tax advantages and incentives under the Act as well as under the Company Income Tax Act,\(^{56}\) which are as follows:

a. capital allowance of 95 per cent of qualifying expenditure incurred on exploration, development and processing;

b. exemption from customs and import duties on approved plants and machinery, equipment and accessories imported specifically and exclusively for mining operations;

c. tax holiday for the first three years of operation, which period may be extended for another two years;

d. expatriate quota and resident permit in respect of expatriate quota personnel;

e. personal remittance quota personnel for the transfer of external currency out of Nigeria;

f. free transferability of dividends or profits, payment in respect of servicing a foreign loan and foreign capital in the event of sale or liquidation of mining operations in any convertible currency;

g. grant of investment allowance of 10 per cent on qualifying plant and machinery; and

h. the investor may also be entitled to claim an additional rural investment allowance on its infrastructure cost. This will, however, depend on the location of the company and the type of infrastructure provided.

VII OUTLOOK AND TRENDS

The most remarkable development in the Nigerian mining sector is the introduction of the roadmap for the growth and development of the Nigerian mining industry that was released in August 2016. The roadmap recommends and proposes eight significant props for the success of the mining industry in Nigeria to include the partnership between the state and the federal government in facilitating mining projects, data availability, institutional reform with the introduction of a new regulatory agency and the reformation of the already existing public mining institutions as well as the creation of an investor-friendly regulatory environment. In ensuring these are achieved the roadmap has established the Mining Implementation and Strategy Team (MIST), which is charged with the following tasks of: developing a resource (financial and non-financial) mobilisation strategy for the mining sector; developing a framework for monitoring and evaluating the implementation process and progress; and developing an accountability framework for management and delivery of the action plan. Although the effect of this roadmap is expected to become clear by the year 2025, what we have seen are a series of both local and international institutional interventions to raise adequate investment to achieve the success of the mining sector. One of these interventions is the US$150million support from the World Bank for the Mining Sector Support for Economic Diversification programme. The crucial part of the programme

is to provide technical assistance for the restructuring of the Solid Minerals Development Mining Investment Fund, which is expected to ensure the availability of finance to artisanal and small-scale mining operators through development finance.

The focus in rebuilding the mining sector that the MIST seeks to achieve through the roadmap is to win over domestic users of industrial minerals that currently import in order to achieve import substitution as a first phase in the rebuilding process and subsequently focus on expanding domestic ore and mineral asset processing and beneficiation industry. The third phase is to ensure a return to global ore and mineral markets at a market competitive price point. As a further strategy to implementing the roadmap the Ministry has proposed the introduction of the Minerals Commission Bill, which seeks to build and improve regulatory framework within the mining sector for the active participation of key stakeholders.

Apart from these developments the Nigerian government proposes an amendment of the Minerals and Mining Act to vest in the state government’s ownership right of solid minerals, which is currently being considered as a Bill in the National Assembly. There is also a proposed Bill to establish the Nigerian Solid Minerals Development Bank to provide facilities and development for solid minerals sector in the country and the proposed establishment of the Mines Police as a division of the Nigerian Police to combat the problem of illegal mining.

In conclusion, it is important to note that the federal government is determined to revitalise the mining sector as part of the ongoing efforts to diversify the economy. The proposed roadmap by the current administration will, no doubt, address many of the issues hindering the development of the sector.
I OVERVIEW

While Pakistan is one of the best locations for setting up a mining business, the lack of a solid legal framework results in a nuanced situation for foreign investors. The primary issue is the lack of any modern properly legislated Mining Law or Mining Act, enforced in a legal manner duly backed by the action of a parliament. However, what we do have is a set of various procedural laws and policies made by respective provincial governments and a National Mineral Policy at federal level. Problems arise due to the scattered nature of such procedures, while most of these piecemeal mining regulations currently exist in the form of promulgated notifications. As most of these laws have not gone through the proper process of parliamentary debates and procedures for validation, there is growing concern that they may be a product of bureaucratic and political manipulation, which may affect the interests of foreign investors seeking to invest in the mining industry of Pakistan.

Despite this legal vacuum, the Pakistan mining sector has been attracting international foreign investment, the most recent being in January 2016 when Pakistan signed a number of coal mining agreements for the Tharparkar region (Sindh), which should result in an estimated 3.8 million tonnes of coal production per annum. After the Reko Diq saga, it seems that this project will be a good omen for the local economy with China’s banks and private companies supplying US$1.5 billion in loans, while Pakistan will contribute US$500 million via private and public finance.

As of 2016, marble mining activities have increased in the Khyber Pakhtun Khwa (KPK) province, especially the Federally Administered Tribal Areas (FATA). The only problem is that conventional blasting and lack of sophisticated techniques causes much marble waste. From a legal and technological perspective, it would be fair to say that there is much room for improvement in mining, geological and surveying techniques and, legally, the mining industry faces a lot of challenges due to the red tape involved in the procurement of licences from the relevant government authorities. There are known irregularities in auctions, and foreign companies often complain of bias against their interests in mining licences.

Other problems include the fact that the local laws do not support mining companies in the event that such local or foreign companies are unable to maintain their solvency and service their existing debt.
A more significant find in the past few years has involved the discovery of multiple iron-copper-gold deposits near Chiniot in the Punjab. Many questions have been raised, however, regarding the feasibility of mining such deposits.

Pakistan has over 5,000 operational mines of copper, gold, bauxite, lead, zinc, iron and chromite. There are also massive reserves of non-metallic minerals comprising salt, gypsum, clays, barite, phosphate, dolomite and limestone in the country.

II LEGAL FRAMEWORK

The Regulation of Mines and Oilfields and Mineral Development (Government Control) Act 1948 (as amended in 1955, 1964 and 1976) and its related rules provide the basic framework for granting and managing mining rights in Pakistan. The Act and the rules are the main instruments of administration, compliance and dispute resolution in respect of Pakistan’s minerals.

The federal government and the four provincial governments administer the Act through their separate rules with respect to the minerals assigned to them. Thus, the federal government administers the Act in respect of oil, natural gas and nuclear energy and minerals, and the provincial governments administer it in respect of other minerals.

At federal level, the Ministry of Petroleum and Natural Resources and the Director General of Petroleum Concessions, which comes under the Ministry, regulate the mining industry. The Departments of Mines and Minerals are organised into three divisions:

- Licensing;
- Exploration Promotion; and
- the Inspectorate of Mines (Federal DG Petroleum and Natural Resources).

The mining sector of the four provinces of Pakistan (i.e., Punjab, Baluchistan, Sindh and KPK) are regulated by the local offices of the Director General of Mines and Minerals. Azad Jammu Kashmir (AJK) and Gilgit Baltistan are governed federally through the offices of the Director General of Petroleum and Natural Resources.

The federal government, with the cooperation of provinces, published the National Mining Policy in 1995. Currently, the main source of law is the National Mining Policy 2013. Besides this, there are many laws and statutes governing the mining sector at both federal and provincial levels.

The recent 18th Constitutional Amendment, and its effect upon Article 172-3, should have meant that the share and control of the province and the federal government would be divided between the provincial and local governments for minerals, oil and natural gas, but this has remained an ambiguous issue so far and the mining sector has not entirely devolved to the provinces so far. A more dynamic effort to create a provincial level policy has been that of KPK, where Fuzaal Siddiqui, a Pakistani-Canadian geoscientist of repute, was the focal person and principal author of the Khyber Pakhtunkhwa Mineral Policy 2014. The document was judged as being of sufficient merit to be launched with some fanfare by Imran Khan, Chairman of Tehreek-e-Insaf, the ruling political party of Khyber Pakhtunkhwa, on 7 July 2014. However, despite its dynamic and modern formulation, little has been seen in terms of its practical application so far, due to political disturbances in the region. It is important to note that, unlike mining, natural oil and gas fall under the domain of the federal government and are not subject to provincial decisions, although it has been suggested that the 18th Amendment may have changed this position. The rules and procedures are also
different for the oil and gas sector, with the framework being composed of yearly offshore and onshore Petroleum Concession Rules, Petroleum Policies and other laws. However, the basic Act for both petroleum and minerals remains the Regulation of Mines and Oilfields and Mineral Development (Government Control) Act 1948 (see Section II, supra) and its related rules, which provide the basic framework for granting and managing petroleum and mineral mining rights in Pakistan.

III MINING RIGHTS AND REQUIRED LICENCES AND PERMITS

i Title
From this point onwards, any reference to the ‘Rules’ includes:

- the KPK Mining Concession Rules 2005;
- the Sindh Mining Concession Rules 2002;
- the Punjab Mining Concession Rules 2002; and
- the Baluchistan Mining Concession Rules 2002.

As per the National Mineral Policy 2013, the ownership of minerals other than nuclear minerals and those occurring in special areas (FATA, Islamabad Capital Territory (ICT) and International Offshore Water Territory (IOWT)) is a provincial subject under the Constitution. Provincial governments and federating units are responsible for regulation, detailed exploration, mineral development and safety concerns in these operations, whereas geological or geophysical surveying and mapping, national and international coordination and formulation of national policies and plans are federal responsibilities. In line with Constitution Articles 172(2) and 172(3), as given by the 18th Amendment in 2010, the federal and provincial governments jointly endorse this policy, which provides for appropriate institutional arrangements, a modern regulatory framework, internationally competitive fiscal and regulatory regimes and a programme to expand Pakistan’s geological database. This policy document also emanates from the constitutional position as laid down in Articles 70 and 97. The respective government may, by notification in the Official Gazette, make rules for the grant or transfer of mineral concessions or titles in respect of any mineral falling in its domain.

ii Surface and mining rights
As per the Rules, the rights of the holder of a mining lease or exploring licence give them the right to enter and occupy the surface land that comprises the exploration area for the purpose of carrying out exploration operations, subject to the rights of surface-holder. This also includes the right to take and divert water on, or flowing through, such land and use it for any purpose necessary for exploration operations subject to, and in accordance with, the provisions of law for the time they are in force. The Rules confer the right for the erection or construction of ancillary works in the reconnaissance area as may be reasonably necessary. Under the exploration licence or the mining lease, there is an entitlement to carry out such other operations, including the erection or construction of ancillary works on the surface land, as may be reasonably necessary for, or in connection with, the mining or exploration operations, removal, selling or disposal of the same. Under the provincial Rules, the holder of a mineral title is not allowed to carry out exploration or mining operations at, or upon, any point within a distance of 50 metres from the boundary of the exploration area with permission. The same rule applies while working close to a railway line, reservoir, canal or
other public works or when building or carrying out surface mining operations near public places. Notice must be given to the Licensing Authority at least a month in advance regarding occupying, clearing and preparing any land for mining purposes. Reasonable compensation to the local population may also have to be paid in the form of indemnification to the local authority against third party claims for damage, injury or disturbance. Also, under the Rules, the licensee or a lessee shall allow existing and future licence or lease-holders of any area that is within, or adjoins, or is reached by the land held by the licensee or the lessee, all reasonable facilities of surface or underground access thereto, on the terms and conditions as may be determined by the Licensing Authority.

### iii Additional permits and licences

For the purpose of acquisition of rights, an application needs to be made to the relevant authority for the grant of a reconnaissance licence. For minerals that come under the domain of the federal government, the application has to be made to the Director General of Petroleum and Natural Resources. In the case of minerals falling under the administrative domain of the relevant province (where the minerals are found), the application has to be made to the Director General of Mines and Minerals of that respective province. No proprietary rights are required, and applications are entertained on a first come, first served basis (R.82 of the Rules). The concession rules for all four provinces allow for a type of ‘exclusive’ reconnaissance licence based on certain conditions and financial standing of the applicant. A reconnaissance licence can only be for a period of 12 months or less.

An exploration licence is granted after application for the intended area or location to the provincial government authority (DG Mines and Minerals), and there is no prerequisite for a reconnaissance licence in this case. An exploration licence is available on a first come, first served basis and sometimes it can also be achieved through periodic auctions of mineral-rich locations by the concerned provincial governments.

The prerequisite to a deposit retention licence is a mandatory exploration licence. An exploration licence is available on a first come, first served basis and is for a maximum of three years with two renewals allowed. A mineral deposit retention licence (MDRL) is granted when an exploring licence-holder makes a significant mineral discovery – at that point, he or she may apply for an MDRL, which is an incentive for successful exploration licence-holders who cannot exploit a mineral due to commercial issues. The MDRL is available for two years and is then followed by a mining lease (the MDRL can be skipped if the party conducting exploration has the requisite funding to begin mining work). The grant of a mining lease confers an exclusive right for mining in an area. On application, the government can convert the exploration and MDRL licence into a mining lease. Another method of acquiring a mining lease is through auction in case of proven reserves (that are discovered at the expense of the government).

Reconnaissance rights cannot be transferred. Exploration rights can be transferred but only after two years (possibly after a renewal). Mining rights can, however, be transferred subject to the legal requirements pertaining to foreigners and notification to the relevant licensing authorities regarding the transfer and assignment of titles.

Reconnaissance rights cannot be mortgaged. Mining rights (mining lease and licences) and exploration licences can, by nature, be easily mortgaged to raise finance, but no transfer of an exploration licence shall be permissible before two years elapse from the issuance of the licence. Complications can, however, arise in a situation where the lessee wants to surrender
the lease or licence. In such a case, if the lease has been mortgaged or charged in favour of a financing institution, the licensee or the lessee shall not be entitled to surrender the lease in whole or in part, except with prior approval in writing of the Licensing Authority.

The owner of a mining lease or licence can sub-contract the technical mining activities to third parties or enter into partnerships with other legal entities (they can subcontract but not sublet – see, for example, Rule 170 of the KPK Mining Concession Rules), but that individual or corporate entity remains the sole owner of the licence, with all its rights and obligations. Also, during an assignment, a lessee cannot divide the leased area between the partner and the partners, as the case may be, without prior approval of the Licensing Authority.

Under the Rules, more than one licence or lease may be granted to the same person. In cases where two different minerals are inter-bedded or closely located, the Licensing Authority has the power to direct the licensee or lessee, as a compulsion, to get the grant for systematic mining operation and utilisation of a second mineral, within three months. Failing this, the main lease or licence may be cancelled.

The Licensing Authority has the power to grant the title to explore one mineral over one area to a person. However, in case of discovery of another mineral over the same area, the right of acceptance or refusal for the grant to explore for the second mineral would be offered to the licensee within a specified period. If it is refused, it may mean that the Licensing Authority has deleted any viable portion of the area containing the other mineral for grant to another person, or will grant a mineral title over the same area for the other mineral or mines in favour of any other person.

The holder of a right to conduct reconnaissance, exploration and mining is also entitled to exercise rights over residue deposits on the land concerned, but, particularly in the case of a new discovery, a fresh application has to be made to the provincial or federal Licensing Authority (whichever has jurisdiction) for permission to exploit those residue deposits. In such a case, the government has a pre-emptive right to purchase these deposits.

Under the National Mineral Policy 2013, minerals other than nuclear minerals and those occurring in special areas (FATA, ICT and IOWT) are a provincial subject under the Constitution. See Section III.i, supra.

Under the Pakistan Offshore Petroleum (Exploration and Production) Rules 2003, the rights to explore and mine can be granted apart from petroleum rights offshore. Therefore, two different licences can exist: one for petroleum; and one for minerals in the same area. The authority in charge in this case is the federal and not the provincial government.

iv Closure and remediation of mining projects

As per the Rules, the licensing authority has to be notified regarding the closure of a mine. This closure may be based on a voluntary termination of the duration of the lease, a blacklisting or the refusal of the authority to renew the lease. At this point, the lessee must return the premises in appropriate condition, dealing with the buildings and structures on the surface at their own expense. Any security deposits to the authority will only be refundable when any outstanding dues as well as damages to the site are accounted for.

At the expiry, surrender or determination of a licence or a lease, the licensee or the lessee, as the case may be, is obligated to deliver to the Licensing Authority the demised premises and all mines in a proper and workable state save in respect of any working as to which the Licensing Authority may have earlier sanctioned abandonment, in which case he or she shall securely plug any bores and fill up or fence any holes or excavations that he or
she may have made in the land to such extent as the Licensing Authority may require. The lessee or the licensee is also required to restore the surface of the land and buildings and other structures not belonging to him or her, which he or she may have damaged in the course of prospecting or mining.

IV ENVIRONMENTAL AND SOCIAL CONSIDERATIONS

i Environmental, health and safety regulations

The Licensing Authority has the right to demarcate and create safety zones in relation to structures erected on land to which the mineral title relates. During surface operations, the lessee is also forbidden from damaging trees, the environment, road structure, public areas (mosques or parks, etc), agricultural land and any reserved or protected forest parts. The lessee or licensee is entitled to take clear measures to prevent damage to the environment, and, where some adverse impact on the environment is unavoidable, take measures to minimise such impact.

Sections 17–22 of the Mines Act 1923 govern health and safety in the mining sector. The new Mines Safety Act, Minerals Act and Illegal Mining Measures Act with specific application to the Khyber-Pakhtunwa province are expected in 2014, depending on approval from the parliament. Many basic agendas for health and safety have already been discussed in the recently launched KPK Mineral Policy 2014.

The Rules denote a clear obligation upon the owners, mining lessees and the mining officials to keep track of health and safety violations on a mining site. The Licensing Authority has the power to carry out routine inspections and levy fines for such violations.

ii Environmental compliance

No mineral title can be granted unless the application is accompanied by an environmental impact assessment in terms of the Environmental Protection Act 1997, and shall identify the extent of any adverse effect that the plan for development and operation of the mine and the carrying out of the programme of proposed mining operations would be likely to have on the environment and on any monument or relic in the area over which the lease is required, and proposals for eliminating or controlling that effect. In addition to this, there is a requirement on behalf of the application to present valid proposals to the Licensing Authority for the prevention of pollution, the treatment and disposal of waste, the safeguarding, reclamation and rehabilitation of land disturbed by mining operations, the protection of rivers and other sources of water, and for monitoring and managing any adverse effect of mining operations on the environment. The lessees and licensees are also covered in special provisions under the Rules for the handling of reserved and protected forests during their operations.

iii Third-party rights

In Pakistan, indigenous peoples are the various tribal groups. Those with Pakistani nationality should not have problems getting a competitive response from the auction of leases by the provincial governments. Pakistan does not have any national mineral policy provisions on indigenous and tribal peoples, including those residing in FATA and Provincially Administrative Tribal Areas. While Pakistan has been a signatory to ILO Convention 107 on Indigenous and Tribal Populations since 1960, it has so far not signed the ILO Convention 169 on indigenous and tribal peoples.
In one recent case,\(^3\) a constitutional petition was made challenging the right of government regarding mines and minerals, including issues of land compensation and surface rent. The petitioners sought cancellation of notices issued by authorities, asserting that their predecessor-in-interest was the owner of a river bed, who had leased out said property to a company for mining of minerals. In response thereof, respondents issued notices to parties to said lease. This was based on the claim that they, being the legal heirs of their predecessor-in-interest, were owners of suit property as per a previous declaration by the competent court of law. It was successfully argued by the government authorities that, under provisions of the Constitution and Section 49 of the West Pakistan Land Revenue Act 1967, read with the Khyber Pakhtunkhwa Concession Rules 2005, all mines and minerals had been declared to be government property, and that under Rr142 and 204, the Director and Director General were authorised to issue licence regarding the mining of minerals to interested persons through auction, and landowners had right to surface rent payable by the lessee concerned through the Mineral Department. Under Section 49 of the West Pakistan Land Revenue Act 1967, all mines and minerals had been declared to be property of the provincial government, and the Khyber Pakhtunkhwa Mining Concession Rules, 2005 had been framed in that regard. Provisions of Section 49 of the West Pakistan Land Revenue Act 1967 were clear on the subject, and no exception could be made.\(^4\)

V OPERATIONS, PROCESSING AND SALE OF MINERALS

\(i\) Processing and operations

There are no special regulatory provisions relating to processing and further beneficiation of mined minerals but recent experience with the Reko Diq case suggests that in the future, the state’s policies may be angled more towards provisions such as those requiring the smelting or further industrial processing of precious metals to be done locally (for the purposes of job creation) instead of sending the raw material abroad for processing.

\(ii\) Sale, import and export of extracted or processed minerals

There is no clear-cut legal restriction on the sale or export of minerals subject to proper excise and tax payments by the entity carrying out the operations.

\(iii\) Foreign investment

Even though the Reko Diq matter has sent a negative message to the international community regarding the risk of expropriation, Pakistani laws clearly set out the guarantee that foreign investors need not be concerned about this:

\(a\) the Protection of Economic Reforms Act 1992 provides that no foreign industrial or commercial enterprise established or owned in any form by a foreign or Pakistani investor shall be compulsorily acquired or taken over by the government; and

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\(^4\) It was further added that under Government of Khyber Pakhtunkhwa Notification No.10/31-SOTA. II(HD)173, dated 31-7-1975, all rivers, river beds and rivulets had been declared to be state property.
the Foreign Private Investment (Promotion and Protection) Act 1976 guarantees that a foreign investor in an industrial undertaking may, at any time, repatriate capital and profits.

Both (a) and (b) apply to the mining sector and its operations. Reko Diq was a one-of-a-kind investor–state dispute, which had a unique judgment. Additionally, the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011, which gives effect to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 1958 was passed with the aim of providing security to foreign investors. Interestingly enough, it was held not to apply to the Reko Diq scenario by the Supreme Court.

It is worth mentioning the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011, which gives domestic effect to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 1958, to which Pakistan was already a signatory. It is being said that this makes the recognition and enforcement of foreign arbitral awards in Pakistan relatively easier than it was before. However, after the Reko Diq case, it has become clear that the interpretation of what qualifies as a ‘foreign award’ may cause many problems for investors in the future, particularly in the mining sector.

VI CHARGES

The latest details in this regard are contained in the National Mineral Policy 2013. These taxes, levies and compulsory fund contributions are contained in various taxation-based rules and regulations. Mining companies are subject to Income Tax in the form of Minimum Corporate Tax. Relief is allowed from taxation on refining or concentration of mineral deposits, development and pre-commencement expenditure. Ring-fencing means that a mining company will be assessed for income tax on the entirety of its mining operations in Pakistan. The double taxation provisions apply here, especially in terms of taxing dividends, and withholding tax provisions apply to non-resident contractors. A tax set at 15 per cent shall be deducted from the gross amount paid to a non-resident person on account of royalties and fees for technical services.

Mining companies are subject to sales tax, additional profits tax and a resource rent tax rate based on profitability levels. Foreign companies and their non-Muslim stakeholders are exempt from zakat. Depending on its organisational size, the mining entity may be liable to contribute towards the Workers’ Profit Participation Fund, Workers’ Welfare Fund, Workers’ Children Education Cess, Employees’ Social Security Contribution, and Employees’ Old-Age Benefits. There is also an excise duty levied on minerals as well as the surface rent and compensation. There is tax relief available on importing mining machinery and industrial raw materials for Pakistani mining companies and the mineral industry generally.

The details of such royalties payable to the state are contained in Rule 65 of the Rules. In the case of minerals other than base metals or coal, for example, the royalty is determined based on the fair market value of the mineral or group of minerals.
VII OUTLOOK AND TRENDS

In 2015, an interesting matter came to light. Internationally renowned geologist, Fuzail Siddiqui, approached Josh and Mak in 2015 for the filing of an interesting writ petition. The background of the matter was that the geologist had advised the then-secretary of Mines and Minerals, Punjab to help with inclusion of taking into account international standards in implementation of the National Mineral Policy in 2013. International standards now have a legal requirement that conduct of mineral exploration and reporting of results must be done by a ‘qualified person’ who has at least a BSc degree in geology, experience in the type of mineralisation and membership of an authorised professional organisation. However, this aspect of the National Mineral Policy implementation has remained in abeyance so far, and Fuzail Siddiqui is now leading a writ petition to ask the courts to order the implementation. He is convinced that adaptation of the legal concept of qualified person is one change that will trigger the process of much desired efficient and effective increase in the contribution of minerals to the betterment of the economy of Pakistan.

The years 2015–16 have been a continuation of ongoing debates on the interpretation and effect of the 18th Amendment upon Article 172(3). The oil and gas producing provinces are entitled to have 50 per cent ownership and management control over mineral resources in their respective regions. There is an ongoing tussle of interpretation between provinces and the Federal Ministry of Petroleum and Natural Resources on Article 172(3). This is because the confusion has caused Sindh to claim its exclusive right in the extension of exploration licences to oil and gas companies, while Baluchistan has demanded that the Ministry of Petroleum and Natural Resources be abolished. This has halted many hydrocarbon and mining projects in the past year, hence a consensus framework between the federal Petroleum Ministry and respective provinces is long overdue.

In 2016 The Khyber Pakhtunkhwa Mines And Minerals Development And Regulation Ordinance, 2016 (Khyber Pakhtunkhwa Ord. No. X of 2016) No. Legis: 1(6) 2016 was sent over to provide for the establishment of the Khyber Pakhtunkhwa Mineral Investment Facilitation Authority to regulate the minerals, mines and mining in the Province of the Khyber Pakhtunkhwa. This piece of legislation was aimed at doing away with the discretionary powers of officials at district level on exploration licensing and create an authority to facilitate investment in the sector and to lift the ban on fresh mine explorations in the province. Section 3 of the Ordinance provides for the setting-up of the KP Mineral Investment Facilitation Authority to be headed by the relevant minister and have 13 members. Section 6 of the Ordinance provides for the formation of the KP Mineral Titles Committee to be headed by the Secretary for Mines and Mineral Development department and six other members.

Under the section 9 of the ordinance, there are two types of licences in KPK, a reconnaissance licence for a period of one year over an up to 1,000 square kilometres and an exploration licence for a period of five years over an area up to 500 square kilometres.

The ordinance was, however, passed in the absence of a provincial assembly in session, and allegedly in a very secretive way. The government claims that this ordinance repeals the mines and mineral related portion of the Regulation of Mines and Oilfield and Mineral Development (government control) Act 1948. Again, this becomes a self-assessed interpretation of the 18th amendment by the KPK.

It is unlikely how this ordinance will actually prevent corruption with continued speculation that the rushed ordinance was aimed at helping and facilitating some politically influential business elements get licences in KPK for mining and not for the benefit of the general mining industry.
Chapter 15

PORTUGAL

Rui Botica Santos and Luis Moreira Cortez

I OVERVIEW

Even if the public perception of the mining projects currently being developed in Portugal may be limited to the communities where such projects are developed, the fact remains that Portugal’s mining industry has had a very significant boost over the last years.

The exact numbers are not public, but growing interest of foreign investors in Portugal’s resources coupled with the exploration of new minerals, notably lithium, has significantly increased the mining operations throughout the country and new relevant investments are formalised every week.

As such, and in order to create a conducive environment to attract private investment in this sector, new base legislation has been approved with significant amendments to the previous legal framework, with the aim of obtaining an increasing level of initiative from investors. Law No. 54/2015 of 22 June has been approved, revoking Decree-Law No. 90/90 of 16 March, along with all administrative regulations that were in under the revoked Decree-Law. However, the new base legislation provides that all regulations approved through Decree-Law No. 90/90 will remain in force until new complementary legislation is approved, as well as the determination of reserve areas, captive areas and protection perimeters. The new legislation will apply to contracts and licences issued after its coming into force, but the parties to previous exploration contracts may choose, through agreement, to adjust the contract to the new rules within a one-year period after its coming into force.

Regarding the risk factors to be taken into consideration by investors, it must be stressed that Portugal is governed by the rule of law, which in turn guarantees political and legal stability and the independence of the judiciary. This fact, together with the growing attention and support that the government has been giving to the mining industry (and to its investors), reduces the risk factors that are, per se, inherent in mining activities and common to all states where the rule of law prevails.

The territory of Portugal covers 50 per cent of the Iberian Pyrite Belt (IPB), which is considered to be the main metallogenic province in the EU. The IPB is the primary source of base metals in the EU.

Somincor, a company owned by the Lundin Mining Group, operates the Neves Corvo mines, which are among the largest copper mines in Europe. They are located in southern-central Portugal, within the IPB. This copper project is considered to be the most important mining project in Portugal and one of the most important investments in Portugal.

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In addition to the Neves Corvo and Aljustrel mines (which are both copper and zinc projects), there is another significant mining operation in central Portugal (Panasqueira, a tungsten project).

As far as mining projects with short-term potential are concerned, the EsanMet/EDM joint venture for several areas in the IPB and the EDM/Alminas joint-venture for Gavião (a copper project) show great potential and expectations among the investors. There are also other ongoing mining projects that have drawn the attention of certain investors, the most prominent being the ongoing gold project in Jales-Gralheira, the gold project developed by Colt Resources in Montemor and the ongoing iron projects developed by MTI and CPF in Moncorvo and Carviçais.

The lithium project of Mina do Barroso, in which the UK company Savannah Minerals has recently acquired a majority participation, and the zinc/copper project in Lagoa Salgada evidence huge potential and are two of the most promising concessions in the country.

Ozdogu Portugal, a subsidiary of Ozdogu Group based in Turkey, has just started activity in Portugal and has a very interesting, ambitious plan, with clear priority given to copper projects in the Iberian Pyrite Belt.

Concerning uranium projects, EDM has been granted the monopoly over the exploration and exploitation of this resource through a legal instrument. However, no activity has been registered in this particular area due to political decisions made by the government.

Portugal’s mineral potential is considered to be far from being fully exploited. The local geological resources are diverse and of a complex nature:

a northern Portugal is fortunate to have tungsten and tin deposits (associated with the contact between granite and metal sediments), and also precious metals, and uranium and lithium deposits;

b northern-central Portugal has a predominance of granitic rocks;

c as for south-central Portugal (in addition to gabbros, diorites, serpentinites, anorthosites, granodiorites, tonalites and granites), the most important mineral occurrences are base metals associated with the Cambrian-Ordovician volcanic sedimentary complex, precious metals, tungsten and tin, as well as the potential presence of chrome, nickel, cobalt, platinum, and basic and ultra-basic rocks. Non-metallic minerals currently include ornamental rocks and marble, in particular;

d in the south, acid volcanic rocks in the volcanic sedimentary complex form the metallocot of the polymetallic massive sulphides deposits that are typical of the IPB; and

e non-metallic resources also include sands, gypsum, clay, kaolin, limestone, diatomite and salt.

II LEGAL FRAMEWORK

The main legal sources are EU law and national laws. As an EU Member State, Portugal follows and complies with EU directives and regulations. Since they are part of the public domain, mineral resources are subject to laws passed in parliament, government legislation (decree-laws) and secondary legislation (i.e., specific regulations produced at either government or ministerial level). The ministry in charge of this sector is the Ministry of the Economy, but other ministries such as the Ministry of Health, the Ministry of the Environment, and the
Ministry of Labour and Social Security, may also have a role whenever the laws or regulations in question impinge on their areas of responsibility. Some local or municipal regulations may apply to the licensing of the mining infrastructure.

Mining activity in Portugal is essentially governed by two laws that establish the legal framework governing the both within and outside the public domain.

Law No. 54/2015 of 22 June (Mining Law), which revoked Decree-Law No. 90/90, establishes the new base legislation regarding the ‘General Legal Framework for the Discovery and Use of Geological Resources’, and Decree-Law No. 88/90, of 16 March (the Mineral Deposits Regulation), still in force, complements the previous regulation.

There is, however, other complementary specific legislation that affects mining activity, including:

a Decree-Law No. 162/90 of 22 May, which approves the General Health and Safety at Work in Mines and Quarries Regulation;

b Ordinance No. 598/90 of 31 July, as amended by Ordinance No. 897/95 of 17 July, which establishes the fees payable with regards to exploitation and operation geological resources;

c Decree-Law No. 10/2010 of 4 February, which lays down provisions for the construction, operation and closure of landfills of waste resulting from the mining activity, and which has implemented European Parliament and Council Directive No. 2006/21/CE;

d Decree-Law No. 151-B/2013 of 31 October, as amended by Decree-Law No. 179/2015 of 27 August, which approves the legal framework of governing environmental impact assessments of public and private projects that may significantly affect the environment, pursuant to Directive No. 2011/92/UE of the European Parliament and Council of 13 December;

e Decree-Law No. 127/2013 of 30 August, which establishes the legal framework regarding industrial emissions, applicable to the integrated prevention and control of pollution, pursuant to Directive No. 2010/75/UE of the European Parliament and Council;

f Ordinance No. 395/2015 of 4 November, which establishes technical rules governing the procedures established by the legal framework regarding environmental impact assessments;

g Decree-Law No. 198-A/2001 of 6 July, which establishes the legal framework governing the environmental rehabilitation of degraded mining areas;


i Decree-Law No. 165/2002 of 17 July, as amended by Decree-Law No. 156/2013 of 5 November, which establishes the powers and duties of the bodies involved in protection against ionising radiation and in general protection principles, and transposes the corresponding provisions of Council Directive 96/29/EURATOM of 13 May, which establishes basic safety standards for the protection of the health of the general public and workers against the dangers of ionising radiation, into Portuguese law;
Decree-Law No. 169/2012 of 1 August, which approves the Responsible Industry System and regulates the industrial activity, the installation and exploration of responsible corporate areas, as well as the procedure for accrediting entities within the system;

Decree-Law No. 84/90 of 16 March, which approves regulations concerning the exploration and exploitation of spring water;

Decree-Law No. 85/90 of 16 March, which approves regulations concerning the exploration and exploitation of industrial mineral waters;

Decree-Law No. 86/90 of 16 March, which approves regulations concerning the exploration and exploitation of mineral water;

Decree-Law No. 87/90 of 16 March, which approves regulations concerning the exploration and exploitation of geothermal resources;

Decree-Law No. 270/2001 of 6 October, as amended by Decree-Law No. 340/2007 of 12 October, which approves the legal framework regarding the exploration and exploitation of mineral masses (quarries); and

Decree-Law No. 109/94 of 26 April, which approves the legal framework regarding the exploration, exploitation and production of oil.

The Ministry of the Economy is the main government body that defines, implements and evaluates the geological and energy policies, and issues the main administrative decisions on the licensing, granting and claiming of mining concessions through its Energy and Geology General Directorate (DGEG). The Ministry of Environment is responsible for matters such as environmental impact and assessment, territorial planning and regional development policies as well as pollution. Labour protection and health and safety matters fall under the auspices of the Ministry of Labour. The autonomous regional governments of Madeira and Azores may intervene in the licensing process if the project is located in those regions.

There is no standard classification for public reporting of mineral resources and reserves. According to international practice, the reporting terminology is as follows: ‘inferred’, ‘indicated’ and ‘measured’ for mineral resources; and ‘probable’ and ‘proved’ for mineral reserves.

### III MINING RIGHTS AND REQUIRED LICENCES AND PERMITS

#### i Title

Paragraph 84 of the Portuguese Constitution provides that ‘mineral deposits, mineral and medicinal water sources and natural subterranean cavities below the ground, save for such rocks, ordinary earth and other materials as may habitually be used for construction’ belong to the public domain (i.e., to the state).

Therefore, all mineral deposits and occurrences in Portuguese territory and in its marine exclusive economic zone that, due to their rarity, high specific value or importance in terms of the industrial application of their content, may be of special interest to the Portuguese economy (ore deposits, hydro-mineral and geothermal resources) vest in the state. Mineral masses (rocks and other mineral occurrences not qualified by law as mineral deposits) can, however, be privately owned.

If a specific geological resource meets both classifications, the legal framework that confers the highest economic importance and permits better development of all of its potential benefits is applicable.
Title to mineral deposits cannot be transferred to private parties, but paragraph 12 of the Mining Law provides, with regard to the rights in respect of resources belonging to the public domain, that the following rights may be vested:

- **a** preliminary assessment rights, for undertaking studies that allow better understanding of the existing resources;
- **b** exploration, allowing operations with a view to discovering resources and the determination of their characteristics, until the confirmation of the existence of economic;
- **c** experimental exploitation rights, for occasions where it is impossible to establish exploitation works normally; and
- **d** exploitation, allowing the execution of activities following exploration (i.e., the commercial exploitation of resources).

The exploratory works may be undertaken directly by the state, or granted to private individuals or companies by means of administrative contracts (licences or concessions).

For purposes of the confirmation and commercial exploitation of resources, Portuguese territory and the Portuguese exclusive economic zone are classified as either:

- **a** reserved areas over which there are rights conceded over the public domain’s geological resources; or
- **b** the remaining available areas.

Prospecting and exploration rights, as well as commercial exploitation rights, can be granted in respect of both types of area.

According to Article 15, paragraph 2 of the Mining Law, the commercial exploitation of mineral resources is subject to the prior issuance of establishment licences, which are issued to the landowner, or to a third party if there is a prior commercial exploitation contract between the third party and the landowner. The Ministry of Economy keeps a record of all identified mineral resources and the prospection, exploration and commercial exploitation concessions.

### Surface and mining rights

**Procedures for acquisition of mining rights**

Mining rights are acquired through a licence for exploration or concession (exploitation) contracts with the state.

Applications for exploration and exploitation rights must be submitted to the DGEG, together with the supporting documents required by law.

According to Article 9 of the Mining Law, the granting of such rights must always be preceded by a consultation procedure with the municipalities of the areas in question, and other competent authorities within the fields of environmental protection, territorial planning, cultural heritage, forests, etc, that will give their expert opinion on the eventual constraints or implications of the development of these activities. However, this consultation will not be applicable to the granting of preliminary assessment rights, which do not have to be preceded by this procedure.

**Preliminary assessment rights**

The concession of preliminary assessment rights, as provided in Articles 16 and 17 of the Mining Law, allows potential investors to develop studies in order to evaluate the geological...
potential and obtain more information about the existing resources in a specific area. Any entity with technical, economic and financial capacity for the development of mining activities may apply for the concession rights from DGEG. These preliminary assessment rights cannot be transmitted and can be granted for a maximum period of one year, without the possibility of extension.

Once the duration period of these rights is over, the applicant should inform DGEG if they wish to vacate the area or request the granting of exploration, exploitation or experimental exploitation.

**Exploration licence**

Once an application has been assessed and found to be in order (i.e., all the required documents have been submitted, and compliance with the objective conditions governing the grant of the rights applied for is confirmed), and provided that there are no reasons to reject the application summarily, the DGEG notifies the applicant to post a provisional bond.

At this stage the applicant must present at least the following documents:

- an application addressed to the Ministry of the Economy;
- a geographical map that identifies the proposed area;
- a summary description of the application for the exploration and research rights that identifies the minerals included in the application;
- the project’s deadline and its possibility to be extended, and over what periods;
- a general plan of the works to be done;
- the amount of the proposed investment and the type of finance, as well as the payments to be made to the state; and
- evidence of the competence, reliability, and technical and financial capacity, of the applicant.

Once the provisional bond is posted, the application must be published in the Official Bulletin, national newspapers and newspapers in the proposed concession area, giving public notice of the application and inviting interested parties to submit substantiated objections within 30 days.

After this period, the DGEG may request the applicant to provide additional information regarding the conditions proposed.

Once the procedure has been concluded, the DGEG must, within 90 days, submit the application, together with its own opinion, to the Minister of the Economy for a decision.

The Minister of the Economy may order a call for proposals for prospecting activities in defined areas and, with regard to specific resources, by means of an open or limited public tender.

If a public tender or limited tender (among those companies that have expressed an interest in the area) is launched, the procedure for granting the prospecting rights may take six to 12 months. Should this not be necessary, the procedure is shorter and can be completed in just two months from the publication of the application.

Generally, the prospecting and research contract establishes the royalties that will be payable in the event that an exploration concession is granted.

**Experimental exploitation concession**

If, during or after the expiry of the validity period of an exploration licence, the revealed resources have characteristics that do not allow the immediate establishment of the
Portugal

exploitation project, the licence-holder may request the detachment of the area and an experimental concession. Experimental concessions are usually granted for two years, and allow surveys and works involved in the testing and surveying of the mineral.

An experimental concession has the advantage of not requiring annual releases of areas, and is the stage that immediately precedes the granting of an exploration concession. However, this stage is not mandatory, and an exploration concession may be granted without a prior experimental concession.

The administrative contract that establishes the experimental concession addresses the following aspects:

- the deadline, which cannot exceed five years, including possible extensions;
- exploitation conditions and other activities to develop;
- mandatory complementary studies;
- investment and work plan;
- compensation to be paid to the state;
- financial bonds to be posted; and
- environmental and landscaping recovery obligations.

**Exploitation concession**

Exploitation rights can be granted to the holder of preliminary assessment rights, exploration rights or experimental exploitation rights that reveal the existence of mineral deposits. In the case where none of these apply, exploitation rights may be granted over available areas or over areas that are the subject of such rights, if the correspondent contracts do not include those geological resources and if there are no incompatibilities arising from the development of both activities.

The procedure for granting an exploitation concession is similar to the exploration concession procedure. However, the documents that must be filed with the application are much more extensive, as the applicant has to prove the existence of a commercial mineral deposit and compliance with all required conditions.

The following must be submitted in support of the application, in addition to the documents referred to above with regard to the prospecting and surveying licence:

- a brief description of the mineral deposit;
- the names of those responsible for the technical management of future operations;
- the applicant’s commercial registry certificate;
- an undertaking signed by the proposed technical manager;
- a detailed report including a description of the mineral deposit, and the drawings necessary in order to understand the same;
- a topographical map;
- a plan showing the mining and mineralurgical facilities, and the antipollution and land reinstatement measures to be implemented;
- environmental impact study and permits (if required); and
- a pre-feasibility exploitation study.

A concession can be granted directly, upon application by the interested party, or via a public tender or some other administrative procedure to that end.

Depending on the type of award (i.e., direct or by public tender), the procedure takes between six and 18 months.
Conditions for the granting of the rights

Concession contracts provide that the concessionaire assumes the obligation to make a specified minimum investment and to create jobs. Typically, these investments must be secured by bank guarantees (or some other reliable means, as agreed with the DGEG).

Prospectors, operators and grantees of an exploitation concession must commence the works within three months of signing the contract, and must indemnify third parties with regard to loss and damage directly caused by their activities.

Furthermore, prospectors and operators must:

a. work according to the approved plan; and
b. implement all prescribed safety measures.

Holders of an exploitation concession must:

a. initiate the necessary exploitation works within a year counting from the execution of the concession contract, unless a different deadline is determined in the contract;
b. indemnify third parties over damages arising from the exploitation activity;
c. ensure that there is constant activity on-site, unless otherwise authorised;
d. comply with the health and safety at work and environmental protection rules;
e. use the resources in accordance with adequate technical norms and in the best public interest, and refrain from dangerous mining practices;
f. whenever possible, and provided that exploitation compatibility exists, to operate public domain resources with a confirmed economic value in the delineated area;
g. report data regarding the nature and status of the resource, within the timing stipulated by the grantor; and
h. refrain from overambitious works that may compromise the best economical exploitation of the resources.

Holders of an experimental exploitation concession must, in addition to the obligations referred to above, carry out the works to correctly identify the resources within the agreed terms. A bank guarantee to secure the working programme expenditure is also required. The amount of the guarantee varies depending on the extent of the investment. The guarantee is released once the conclusion of the proposed and contractual investment has been confirmed by the relevant Portuguese authorities.

Term of the award of the rights

Exploration licences are generally issued for an initial period of three years, extendable for two additional one-year periods. According to the law, the total term of exploration licences, including extensions, cannot exceed five years, except in certain justified cases.

The law establishes a maximum term for exploitation licences of 90 years, including possible extensions.

Security over mining assets

A mortgage over a licence is allowed if it is restricted to securing finance related to work and development expenditure in the concession area. Any security related to activities of
the companies or groups other than those related to the concession area are subject to prior

government consent. The enforcement of the mortgage is restricted to the procedures set out

in the relevant provision and a public tender process will be required.

All relevant mining assets are considered part of the concession, and its sale or transfer

is also subject to prior authorisation from the Portuguese government. Such restriction is only

applicable, in practical terms, to major and relevant mining assets.

Protection of mining rights

The Constitution and the law provide a stable legal framework. Access to the courts is

unrestricted, save for the usual legal restrictions. The mining sector is supervised by the

Ministry of the Economy and the Secretary of State for Energy, and its administrative
decisions or penalties may be appealed to the Administrative Court. The performance of

concessions is governed by the general law.

Private parties may acquire the right to explore or to exploit the public domain by

administrative contract. Such contracts contain the following provisions:

a mutual rights and obligations;
b the area and identification of the land;
c the commencement and termination dates;
d the renewal conditions;
e the operations programme;
f the investment plan; and

g other specific legal clauses.

Subject to lease, the private parties may also occupy buildings in the area granted that are

recognised by the government as necessary for the operations.

Private parties that have either previously owned a quarry, or made a quarry contract

with the owner of a mineral mass or spring water, must obtain an establishment licence and

may occupy non-public domain areas that are necessary for the temporary prospecting and

exploration, subject to the payment of rent and a collateral fee. Areas subject to exploration

or exploitation contracts, and surrounding areas, may be subject to public easement.

There is no difference between the rights granted to Portuguese parties and those granted
to foreign parties. Parties that are not resident in the EU must first have been established in

accordance with the law of a Member State of the EU.

Additional permits and licences

In order to conduct exploratory works, concessionaires must conduct a prior environmental
impact study (EIS) in order to obtain an environmental licence.

Closure and remediation of mining projects

There are environmental obligations that must be undertaken after the closure of a mining
project, particularly environmental recovery obligations.

Depending on the nature of the exploitation, and the areas and infrastructure covered,
the obligations relating to the closure of the mine can be quite demanding, both technically
and financially.

2 Article 14, paragraph 3 of the Mining Law.
Guarantees to secure mine closure obligations are provided via the creation of a mine closure fund, to which annual transfers are made in accordance with the closure costs and the lifetime of the mining project. The contributions to this fund may be treated as costs for the purposes of the calculation of the mine operator’s net income.

The fund must be subject to restrictions that limit the use of the fund assets for the purpose for which the fund was created.

IV ENVIRONMENTAL AND SOCIAL CONSIDERATIONS

i Environmental, health and safety regulations

The main provision is Law No. 54/2015, which provides that all direct and indirect safety, health and environmental interests of workers must be protected.

The main regulatory bodies are the Ministry of Labour and Social Security, the Ministry of Health and the Ministry of the Economy. Decree-Laws Nos. 274/89, 162/90, 441/91, 26/94 and 141/95, 82/99, and Implementing Decree No. 34/92 (regarding uranium), develop and complement the primary provisions.

ii Environmental compliance

The executive bodies are the Ministry of Environment and the Ministry of Labour and Social Security. The primary legislation is Law No. 11/87, which creates the general legal framework governing the environment, and Law No. 54/2015 and Decree-Law 88/90, which are complemented by the following Decree-Laws:

a Decree-Law No. 151-B/2013 of 31 October, as amended by Decree-Law No. 179/2015 of 27 August, which approves the legal framework of governing environmental impact assessments of public and private projects susceptible of producing significant effect in the environment, pursuant to Directive No. 2011/92/UE of the European Parliament and Council, of 13 December;

b Decree-Law No. 169/2012;

c Decree-Laws Nos. 78/2004, as amended by Decree-Law No. 126/2006, and Decree-Law No. 102/2010 (regarding air pollution); and


Portugal complies with the EU environment directives and regulations. Mining projects require environmental permits. Both the operation and closure of geological resources are subject to technical rules, and environmental protection, sustainability and landscape recovery measures (i.e., those included in plans approved by authorities such as the environment and municipal authorities). Decree-Law No. 151-B/2013 of 31 October, as amended by Decree-Law No. 179/2015 of 27 August, provides that mining projects are subject to an environmental impact assessment (EIA), which includes an EIS, in order to determine the direct and indirect effects and consequences of the project on the environment, and to recommend sustainable remedies to compensate for or minimise those effects.

An environmental licence is also required. An environmental licence is an administrative instrument that ensures that the best industrial techniques available are used, including remedies to minimise waste production, and air, noise, water and soil pollution (as per Decree-Law No. 127/2013 of 30 August, which establishes the legal framework regarding for industrial emissions, applicable to the integrated prevention and control of pollution,
pursuant to Directive No. 2010/75/UE of the European Parliament and Council). This licence takes into account the content of the EIA. The time involved in obtaining a permit varies, but normally takes between eight and 12 months.

An EIA may not be required for mining exploitation projects involving mining works affecting fewer than five hectares or with production below 150,000 tons per year.

iii Third-party rights
There is a strong body of equity legislation in Portugal, although there are no specific legal provisions regarding indigenous, aboriginal, or other currently or previously disadvantaged, peoples, which affect the acquisition or exercise of mining rights.

iv Additional considerations
There are no other social, environmental and political considerations that could have a direct impact on mining rights or mining projects.

V OPERATIONS, PROCESSING AND SALE OF MINERALS

i Processing and operations
There are no special provisions or limitations with regard to the import of equipment and machinery, other than those in the EU Health and Safety Directive.

There are also no general restrictions or limitations on the processing, export or sale of metallic minerals, although the government reserves the right to monitor the processing, export and sale of metallic minerals for statistical and auditing purposes.

Regarding the use of foreign labour and services, the general Portuguese labour rules apply, under which a foreigner must be duly authorised to work in Portugal (i.e., possess a work visa). There are no specific provisions applicable to mining operations.

ii Sale, import and export of extracted or processed minerals
There is a specific legal framework governing the mining, sale and export of uranium. There are, however, no general restrictions or limitations on the import, export or sale of processed minerals.

iii Foreign investment
There are no restrictions or limitations in Portugal on the imports of funds for mining activities, or on the use of proceeds from the export or sale of metallic minerals. There are no restrictions on foreign investment, and no difficulties in capital repatriation. Foreign investment in mining companies or mining projects is not subject to government review.

Although the government may require evidence of the technical and financial capacity of the concessionaires of mining projects, the criteria applicable to foreign investors are the same as those applicable to Portuguese investors.

Depending on the existing programmes, it is possible to obtain financial and fiscal incentives for the development of mining projects. These projects are managed by the Portuguese Agency for Trade and Investment.3

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3 www.portugalglobal.pt.
VI CHARGES

i Royalties
Royalties are defined in the concession agreements entered into by the state and concessionaires. Royalties were, until recently, generally calculated on the basis of two calculations, at the discretion of the state:

- a percentage of the mine head value of the ore (1 per cent to 4 per cent); or
- a percentage of the net smelter return on sales (up to 10 per cent).

In the recent past, and when minerals prices were booming, the state tried to change its approach with regard to royalties by introducing a progressive formula linked to the net smelter return on sales, with a minimum of zero per cent and a maximum of 25 per cent. The higher rates up to 25 per cent apply only to cases in which the markets operate with speculative prices. This approach was abandoned due to the crises in the sector.

ii Taxes
Two taxes apply directly to the companies under Portuguese law: corporate income tax and municipal tax.

The standard rate of corporate income tax rate is currently 21 per cent. However, an additional corporate tax of 3 per cent accrues for companies with a taxable income over €1.5 million, 5 per cent for taxable incomes over €7.5 million and 7 per cent for taxable incomes over €35 million. The municipal tax is fixed yearly by the municipal authority and applies to companies trading within the area of the municipality. The rate of this tax is up to 0.5 per cent of the company’s taxable income.

Depending on the phase and the development of the investment project, certain tax credit incentives and other incentives for industrial investments may be applicable.

iii Duties
There are no specific provisions with regard to the duties applied to minerals.

iv Other fees
Under exploitation contracts, holders of exploitation rights are required to pay an annual fee to the state for the duration of the contract. This fee varies depending on the area of the concession.

VII OUTLOOK AND TRENDS
The approval of the new base legislation and the change of government policy with regard to the calculation of royalties (see Section VI.i, supra) (which applies only to new contracts or in the renegotiation of existing contracts, but is not unilaterally applicable to existing contracts) have significantly increased the ability of the applicable legal framework to attract private investment to the mining sector, and have specified and further detailed aspects that were previously omitted or insufficiently determined by the previous legislation.

Save for the latest amendments to the base legislation, there appear to be no plans to significantly alter the existing laws and regulations.
I OVERVIEW

i New mining code


The new Mining Code (2016 Code) will apply to new applications with the provisions of the 2003 Mining Code (2003 Code) continuing to apply to existing permits.

Key changes from the 2003 Code to the 2016 Code are summarised below.

Length of mining permits

Under the 2016 Code, a small-mine permit will be issued for an initial term of five years (previously three years under the 2003 Code). The term may be renewed for three years at a time without any limit on the number of renewals.

A mining permit will be issued for an initial term of between five and 20 years (depending on the mineral reserves identified and the investment required); this is less than the maximum 25 years for an initial permit under the 2003 Code. Mining permits will be renewable as many times as necessary until the resource is exhausted.

Changes to fees, royalties, taxes and tax relief

Under the 2016 Code:

a Fees such as entry fees and quarry permits will increase.

b An annual surface royalty has been introduced, which is payable by all mining title holders.

c In 2012, most taxes relating to the mining sector were moved from the 2003 Code to the General Tax Code. This continues under the 2016 Code, except for the specific ‘mining tax’. Under the 2016 Code, mining activities will be subject to a quarterly tax levied on the market value of the commercialised product. Rates for some common substances include iron ore (concentrate 5 per cent, locally processed 2 per cent); phosphate (calcium-aluminate and lime phosphate 5 per cent, phosphoric acid 1.5 per cent); and gold at 1.5 per cent.

d The mining title holder will continue to be exempt from all taxes and fees, including VAT and the COSEC port charge during the period commencing on the date of entry into force of the mining permit (or small-mine permit) and ending on the first date of

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1 Mouhamed Kebe is the managing partner of GENI & KEBE.
commercial production (investment period). However, the exemption will not apply to the statistical royalty, community solidarity royalty and other community taxes (rates for these taxes are not defined in the 2016 Code).

The introduction of production sharing agreements

The 2016 Code permits the state of Senegal and a mining company to enter into a production sharing agreement. This gives the mining company the exclusive right to research and mine a particular area and recover the cost of doing so from sale of the mined substance. The profits from the sale of the product are split between the state and the mining company in an amount specified in each individual agreement. Where a production sharing agreement exists, the mined substance will not be subject to the quarterly mining tax outlined above.

The creation of local development funds

The 2016 Code introduces an obligation for mining title holders to contribute annually to a local development fund.

- Entry fees for the grant of small-mine permits and mining permits, as well as fees for research permits, semi-mechanised authorisations and quarry permits will increase under the 2016 Code.
- The 2016 Code introduces an annual surface royalty payable by all title holders, including holders of research permits and quarry permits. These will be 50,000 CFA per hectare for a small-mine permit and 250,000 CFA per square kilometre for a mining permit.
- Most taxes relating to the mining sector were previously moved from the 2003 Mining Code to the General Tax Code in 2012. However, the specific ‘mining tax’ that is included in the 2003 Code will continue in modified form under the 2016 Code. The mining tax under the 2016 Code is structured so that the all authorised mining activities will be subject to a ‘quarterly mining tax’ levied on the market value of the commercialised product. The tax rate will vary depending on which substance is being mined. Rates for some common substances include iron ore (concentrate 5 per cent, locally processed 2 per cent); phosphate (calcium-aluminate and lime phosphate 5 per cent, phosphoric acid 1.5 per cent) and gold 1.5 per cent.

Production sharing agreements

The 2016 Code permits the state of Senegal and a mining company to enter into a production sharing agreement. Such an agreement gives the mining company the exclusive right to research and mine a particular area and recover the cost of doing so from sale of the mined substance. The profits from the sale of the product are split between the state and the mining company in an amount specified in each individual agreement. Where a production sharing agreement exists, the mined substance will not be subject to the quarterly mining tax outlined above.

Enhanced social and environmental obligations

The 2016 Code introduces an obligation for mining title holders to contribute annually to a local development fund in the amount of 0.5 per cent of sales, minus ‘annual fees’
The local development funds are to promote the economic and social development of local communities residing around mining areas, and must include women’s empowerment projects.

Under the 2016 Code, small-mine permit holders will be required to provide a guarantee as security for the cost of rehabilitating their mine site. Small-mine permit holders under the 2003 Code are not required to do this. Obligations for mining permit holders remain the same (to deposit funds in a trust account with a Senegalese bank that will be used to rehabilitate the mine site).

Under the 2016 Code, all mining title holders are required to:

a. respect, protect and implement human rights in areas affected by mining operations;
b. respect the provisions of the Forestry Code where the mining title has been granted over a ‘classified forest zone’; and
c. respect the principles and obligations under the Extractive Industries Transparency Initiative (EITI), such as declaring all payments made to the state to the EITI authorities.

The passing of the new law follows a three-year consultation and legislative drafting process and introduces many initiatives that have been used within the region.

The bill will now be presented to the president for promulgation and after that time, it will be published in the National Gazette.

The 2003 Code was designed to attract and foster investment and development in mineral resources in the country. The 2003 Code embodies a transparent, predictable, simple, stable and non-discriminatory mineral regime. The country’s Mineral Policy Statement sets out the main objectives for the development of the mineral resources to be found in Senegal, and promotes international principles necessary to encourage foreign investment inflows into the national economy. Application of the 2003 Code is designed to reduce transaction costs, and the legal environment is based on the principles of clarity, flexibility, competitiveness and sustainability, provided that:

a. diversification of mineral production and the beneficiation of mineral products before export is encouraged;
b. the lawful rights and interests of investors are guaranteed;
c. foreign investments are governed by the non-discriminatory principle, meaning that they will be treated no less favourably than comparable domestic investors;
d. the protection of the environment and the sustainability of mining will be a key objective; and
e. projects will be designed using a comprehensive information system for mineral resources management, integrated with other natural resources (such as, land, forest reserves and water) with proper regard for environmental and social issues.

II LEGAL FRAMEWORK

Mining in Senegal is mainly regulated by:

a. Act No. 27/2016 on the Mining Code dated 30 October 2016, enacting the new Mining Code (2016 Code);
b. Act No. 2003-36, dated 24 November 2003, enacting the current Mining Code (2003 Code); and
Apart from the Mining Codes, the mining sector is also affected by:

1. Regulation No. 18/2003/CM/WAEMU, dated 22 December 2003, enacting the West African Economic and Monetary Union (WAEMU) Mining Code;
2. the Environmental Code, No. 2001-01 of 15 January 2001;
3. the Tax Code No. 2012-31 of 31 December 2012;
4. the revised Uniform Act of OHADA relating to general commercial law, dated 15 December 2010;
5. Statute No. 98/03, dated 8 January 1998, enacting the Forest Code and its implementing decree, dated 20 February 1998; and
6. the exchange regulations in force in the member countries of WAEMU.

The competent authorities in the mining sector are:

1. the Ministry of Energy and Mines;
2. the Directorate of Mines and Geology;
3. the district mine departments (each of the 14 administrative districts in the country has a mining office).

By Decree No. 2013-381, dated 20 June 2013, Senegal constituted its national committee for the Extractive Industries Transparency Initiative (EITI). The main objective of the committee is to enforce the EITI, the objective of which is to ensure the transparent use of revenues from mining in such a way as to contribute to poverty reduction and sustainable development.

### III MINING RIGHTS AND REQUIRED LICENCES AND PERMITS

#### i Title

All mineral substances contained in the ground and underground within the territory of the Republic of Senegal, its territorial waters and continental plateau are the property of the state; mining exploitation title-holders acquire possession of the mineral substances that they extract.

Titles are transferable and transmittable subject to the prior approval of the Minister of Mines.

#### ii Surface and mining rights

Within Senegal, and in accordance with the 2003 Code, the state can grant to one or many legal entities the right to undertake or conduct one or many mining operations relating to mineral substances contained in the ground or underground.

These legal entities must prove their technical and financial capacities to carry out all mining operations. The conditions under which mining operations can be carried out by these entities are defined by agreements (mining conventions) between the state, represented by the Minister of Mines and Geology (the Minister), and applicants.

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2 WAEMU is the economic union of eight African states with a common currency, the same reserve bank and the same business law: Benin, Burkina Faso, Guinea Bissau, Ivory Coast, Mali, Niger, Senegal and Togo.

No one can undertake or conduct an activity governed by the 2003 Code within Senegal without holding a mining title according to the terms of the mining legislation.

**Prospecting**

Three original counterparts of the application for a prospecting authorisation must be forwarded to the Minister, who must acknowledge receipt. The application must provide:

- the information and documents showing the identity of the person responsible for the works as set out under Article 5 of the 2003 Code;
- the aims of the planned prospecting, its scientific or economic character, its geographical location and its likely duration; and
- a brief description of the works programme, methods to be used, the anticipated results and supplementary technical information (in particular, the parameters for basic analysis of the initial state of the prospecting site and its environment).

A prospecting authorisation is granted for six months and is renewable once, with no fee required. It does not allow any pre-emptive rights to its beneficiary. It is not transferable and does not give rise to any fiscal exemptions. The beneficiary is obliged to communicate the results of its research to the Director of Mines and Geology.

**Mining exploration**

The beneficiary should first get approval for its research project and the budget. The applicant for a research permit should then submit three original counterparts to the Minister for Mines. The application must provide:

- the information and documents showing the identity of the person responsible for the works as set out under Article 5 of the 2003 Code;
- a description of the mineral substances for which the application for the permit is made;
- the coordinates of the exploration area;
- an estimate of the surface area of the exploration permit area sought;
- an extract of the map of Senegal on a scale of 1:50,000 or 1:200,000 on which the exploration permit area sought is indicated;
- a presentation of the planned exploration works and methods to be used; and
- any supplementary technical information, such as the parameters for basic analysis of the exploration site.

A research permit is issued for three years, renewable twice. In the event of renewal, the research permit holder must relinquish part of the perimeter granted (generally 25 per cent), and gain approval of the programme and the budget for the renewal requested. In the event of competitive requests, priority is given to the tender offering the best conditions and guarantees for the state.

**Mining exploitation**

**Exploitation permit**

An exploitation permit is delivered by a presidential decree for a period not exceeding five years. It is renewable and can be transferable. The applicant should include:
three original counterparts from the application addressed to the Minster four months before the expiry of the exploration permit;
b documents for identification of persons and corporates, the reference of the exploration permit coordinates and surface of the area sought;
c a feasibility study indicating the characteristics and performance of mining production units, the economic and financial assessment of the project and its socio-economic impact;
d a report detailing the results of the exploration phase indicating, in particular, the reserves, grades, types of mineral deposit and metallurgic tests;
e a plan for the development and start-up of mining operations;
f an investment plan and a timing chart for the undertaking of the mining project;
g an environmental impact study concerning the mining operation (approved by the Ministry of Environment, which delivers a certificate of confirmity); and
h a draft of the convention between the state and the exploration permit holder if the demand does not derive from a current, valid exploration permit.

The exploitation company must be set up, under the provisions of the OHADA Uniform Act relating to commercial companies and economic interest groups, between the company with the research permit or its designated subsidiary and the state of Senegal. The parties will sign a shareholders’ agreement to set out the terms and conditions for the establishment and management of the company.

The government takes its free carried stake during the exploitation phase, which represents 10 per cent of the mining company shares, and may negotiate up to 25 per cent for itself or local applicants.

The company is managed by a board of directors the composition of which depends on the proportion of the shares in the exploitation company.

Mining concession

This is delivered by a presidential decree for a period of five years and is renewable for a period not exceeding 25 years. Concession of mining exploitation titles on a perimeter cancels any previous exploration permit within that perimeter. These rights are granted by decree to applicants who demonstrate adequate technical, financial and managerial capability to engage in mining activities.

The 2003 Code also provides other permits and licences to conduct mining activities, such as those for artisanal and small mine exploitation, and private and temporary quarries.

The protection of mining rights depends on the mining operations.

For prospecting, the authorisation confers on its holder a non-exclusive right of prospecting valid for substances targeted over the whole of the authorised zone.

However, the prospecting authorisation does not confer any particular right for obtaining a mining title or disposing of the discovered substances for commercial purposes.

The prospecting authorisation is neither transferable nor transmittable. It constitutes a moveable possession that cannot be lent or given as a guarantee.

For exploration, the permit confers on its holder, within the boundaries of its perimeter on the surface and indefinitely in depth, the exclusive right to explore for the mineral substances for which it is issued.

Any holder of an exploration permit that satisfies all its contractual obligations, in accordance with the clauses of the 2003 Code, is entitled to:
take samples of mineral substances extracted during exploration works;

b an exploitation permit or a mining concession; and

c be prioritised for the granting of an exploration permit for all substances other than those relative to its mining title and that could be discovered inside the perimeter of the valid exploration permit.

The mining exploitation title confers on its holder:

a the exclusive right of exploitation and the free disposal of mineral substances for which the mining exploitation title has been issued, within the limits of the perimeter attributed and indefinitely in depth;

b the right of renewal of the title;

c the right of the extension of rights and obligations attached to the mining exploitation title and other collecting and processing related to substances for which the mining exploitation title is issued (the holder is obliged to request the extension of its title to these substances within six months);

d the right of occupation of an area of the national territory and free disposal of mineral substances attributed to it under the exploitation permit;

e the right to transform the exploitation permit into a mining concession in the case of discovery of significant additional proved reserves inside the perimeter of the exploitation permit or inside another adjoining perimeter belonging to the holder of the exploitation permit;

f a real state right distinct from the propriety of the land, registered as such and susceptible to mortgage. The decree granting the exploitation permit or mining concession is, in effect, a state-approved declaration for carrying out works in relation to the permits; and

g the right to give up, transmit or let its mining exploitation title, subject to prior authorisation of the Minister in charge of mines and the payment of fixed taxes.

### iii Additional permits and licences

Only the permits and licences mentioned above are required to conduct mining activities.

### iv Closure and remediation of mining projects

Any holder of a mining title is under an obligation to rehabilitate the sites at the expiry of each mining title, except for the perimeters that are still covered by an exploitation mining title. To this end, the holder of a mining title must open an account in a commercial bank in Senegal into which funds are paid to cover the cost of the implementation of the restoration programme.

### IV ENVIRONMENTAL AND SOCIAL CONSIDERATIONS

#### i Environmental, health and safety regulations

Each applicant for a mining permit must prepare, at its own expense, an environmental impact study (EIS) in accordance with the Environment Code and the implementing decrees.

Health and safety rules apply to prospecting, exploration and exploitation work, most notably in quarries, plants and laboratories, as well as the security rules relating to transport, stockpiling and utilisation of explosives and dangerous products summarised by the Mining Code, the Labour Code and by decree.
Any accidents that occur during a mining operation, as well as any identified dangers, should be brought to the attention of the Ministry of Energy and Mines, the competent administrative authority.

All mining title-holders should abide by the preventative measures prescribed by the administration in charge of public security, hygiene and employee security, for preservation of their deposits, expanses of underground water, buildings and public roads.

ii Environmental compliance

All mining projects require the completion of an environmental assessment.

As previously noted, each applicant for a mining permit must prepare, at its own expense, an EIS to assist in such purpose.

iii Third-party rights

The occupation of lands by the holder of a mining title, inside or outside the perimeters granted, gives the owners or occupants of the lands the right to compensation for any losses suffered. The expenses, compensation and, in general, all charges relating to the application of land occupation clauses are borne by the mining title-holder.

V OPERATIONS, PROCESSING AND SALE OF MINERALS

i Processing and operations; sale, import and export of extracted or processed minerals

Subject to exchange regulations and clauses in the 2003 Code, the holder of a mining title can freely:

\[ a \] import, without financial settlement, any equipment belonging to it;
\[ b \] import to Senegal any possessions and services necessary for such activities; and
\[ c \] export the mineral-extracted substances, their concentrates, primary derivatives and all other derivatives after performing legal and regulation formalities for the exportation of these substances.

Holders of mining titles are guaranteed the free choice of suppliers, subcontractors and service providers as well as partners.

All protocols, contracts and conventions with the purpose of entrusting, giving up or transferring partially or totally the rights and obligations resulting from the mining title, are, however, submitted to prior approval of the Minister.

The holders of mining titles, their suppliers and subcontractors must use, as far as possible, services and materials of Senegalese origin, and products made or sold in Senegal insofar as these services and products are available under competitive conditions of price, quality, guarantees and delivery.

ii Foreign investment

The holders of mining titles granted in accordance with clauses of the 2003 Code are submitted to the exchange regulation in force in Senegal. As such, they are allowed to:

\[ a \] collect in Senegal all funds acquired or borrowed from abroad, including receipts from the sale of their share production;
\[ b \] transfer abroad:
• the dividends and products of capital invested, as well as the product of clearings or realisation of their assets; and
• funds destined for the reimbursement of loans (capital and interest) contracted abroad, and payment of foreign suppliers of materials and services for mining operations; and

c. import all funds acquired or borrowed abroad necessary to carry out mining operations.

Foreign workers resident in Senegal, employed by any mining title-holder, are guaranteed the free conversion and transfer of all or part of their salary, subject to the payment of taxes and various contributions, in accordance with the exchange regulations.

Foreign bank accounts may be opened by mining title-holders in Senegal in currencies necessary to carry out transactions for mining operations. Nevertheless, foreign investors must comply with the WAEMU foreign exchange regulations. Where the amount to be repatriated is up to 500,000 CFA francs, it should be lodged with an authorised intermediary with supporting documentation. Payments abroad as capital transactions for the repayment of long-term debt should be subject to a request to the Minister of Finance for authorisation. Each request must be accompanied by supporting documentation attesting to the nature and circumstances of the operation.

The general guarantees granted by the state concern requisition and expropriation, the confidentiality of documents and information, non-discrimination, the free choice of partners, suppliers and subcontractors, the stabilisation of fiscal and customs regimes, and exchange regulation. A clause is inserted into each mining convention that protects mining title-holders from amendments to the taxation regime, attempting to maintain contract stability.

Constructed or acquired installations and infrastructures in the framework of mining operations cannot be expropriated or requisitioned by the state, except for reasons of force majeure or public necessity. In this case, the state will pay to the holder of the mining title fair compensation in accordance with the relevant legislation.

VI CHARGES

i Royalties

Under the 2003 Code, any activity exploiting mineral substances, authorised in accordance with the provisions of the 2003 Code, is subject to payment of an annual mining royalty of 3 per cent of the value of the mining site. The terms of payment and collection of mining royalties are specified in the implementing decree. There are no exemptions from mining royalties, which is due on any minerals extracted from the soil or subsoil of Senegal.

ii Taxes

The holder of the mining exploitation title is liable for company tax, in accordance with the clauses of the General Tax Code, but the holder of a mining concession is exempt for seven years from company tax starting from the concession’s date of issuance. For large exploitation projects necessitating mining concessions and mobilisation of large investment, the duration of the exemption is at least equal to the period of loan repayment, but which may not exceed 15 years from the date of issuance of the mining concession.
Specific advantages are also granted during the exploration and exploitation phases. The holder of an exploration permit benefits from total exemption from the tax regimes and taxes of any nature during the entire period of the permit and its renewals.

In 2012, the state created a new special contribution on mines and quarries at a rate of 5 per cent, but many mining companies have refused to pay this tax because they consider it a breach of the stabilisation clause in the mining conventions.

iii Duties

Starting from the date of granting of the mining exploitation title or small mine exploitation authorisation, or the extension of production capacity of an existing exploitation, the holder of a mining exploitation permit or mining concession or beneficiary of a small mine exploitation authorisation, as well as any undertakings working on its behalf, will be exempt from all customs applicable on entry, including value added tax and COSEC (fees to the Senegalese Shippers’ Council) regarding:

\( a \) equipment, materials, supplies, machines, and spare parts not produced or manufactured in Senegal, and specific materials required for mining operations;

\( b \) fuel, oil products, material and spare parts, and complements required for mining operations; and

\( c \) temporary admission to full exoneration from import and export taxes and duties in relation to materials, machines and equipment that, once used, may be re-exported or transferred.

The period expires on the notification of the Minister of the first production date. It may last no longer than four years for mining concessions, two years for exploitation permits and one year for small-mine exploitation authorisations.

iv Other fees

The grant, renewal, extension or conversion and the sale, transfer or farm-out of mining titles of research and exploitation are subject to payment of fixed fees, as provided below:

\( a \) research permits: 500,000 CFA francs;

\( b \) mining concessions: 7.5 million CFA francs; and

\( c \) other mineral mining rights: 1.5 million CFA francs.

These amounts are reviewed every five years by decree.

As previously noted, the concession holder is under the obligation to compensate the landowner in the event that its activities cause damage to the landowner’s property.

There is also an obligation to restore the site to its previous state upon the expiry of a mining title, to which end it must open an account in a bank in Senegal into which funds are paid to cover the costs of the implementation of the restoration programme.
Chapter 17

SOUTH AFRICA

Pieter Willem Smit

I OVERVIEW

For more than a century, South Africa’s mining industry has been one of the main driving forces of its economy, which is generally considered to be Africa’s wealthiest economy. This state of affairs is attributable to a number of factors, including the extraordinary mineral wealth of South Africa, relatively good access to infrastructure, a well-developed financial sector, and relative political stability and predictability.

In recent years, South Africa’s mining industry has come under some pressure, as a result of creeping regulatory uncertainty (especially in relation to the manner in which existing laws are implemented and enforced), a shortage of electricity and reduced spending on infrastructure maintenance and development.

The South African government’s formal position on mining and international investment is that South Africa is ‘open for business’ and that investment in the mining sector is to be welcomed. In practice, the situation is rather more complicated, as the promotion of investment in mining is often subordinate to South Africa’s domestic agendas of black economic empowerment, affirmative action, land restitution and redistribution, and decolonisation.

One example of changing government policy (and legislation) on international investment is to be found in the promulgation (on 15 December 2015) of the Protection of Investment Act 2015. Despite its title, which suggests a positive impact on investment, the legislation has been criticised by investors, commentators and academics as reducing the level of protection afforded by South Africa to international investors, especially as the legislation is intended to replace South Africa’s bilateral investment treaties, which the government is allowing to lapse. This development should be seen against the backdrop of South Africa’s embarrassing involvement in the late 2000s in an international investment dispute brought in the International Centre for Settlement of Investment Disputes under South Africa’s bilateral investment treaties with Belgium and Luxemburg. The issue in question was the allegation that South Africa’s Mineral and Petroleum Resources Development Act 2002 (MPRDA) constituted an indirect expropriation of the mineral rights held by Finstone Sàrl and its subsidiaries prior to the commencement of the MPRDA on 1 May 2004.

1 Pieter Willem Smit is a director at Falcon & Hume Inc.

2 Piero Foresti, Laura de Carli & Others v. The Republic of South Africa, ICSID Case No. ARB(AF)/07/01.
Nevertheless, foreign investors continue to hold the majority of mining interests in South Africa, including large mining projects owned by Anglo American, AngloGold Ashanti, BHP Billiton and the like. A number of smaller mining companies, especially Canadian and Australian, are also developing new projects in South Africa.

II LEGAL FRAMEWORK

South Africa’s mining legislation is based on a system of state ‘custodianship’ of mineral resources, in which the state, acting through the Minister of Mineral Resources, issues different types of licences to applicants on a ‘first come, first served’-basis and upon satisfactory demonstration of the applicants’ ability to comply with the financial, technical, environmental, health and safety and socio-economic development requirements set out in the legislation. The most important legislation concerned is the MPRDA, which came into force on 1 May 2004. Other important legislation includes the Mine Health and Safety Act 1996, the Mining Titles Registration Act, 1967, the Mineral and Petroleum Resources Royalty Act 2008, the Precious Metals Act 2005 and the Diamonds Act, 1986.

The most important licences relating to mining are:

- prospecting rights (which authorise invasive exploration work, on an exclusive basis, but not mining);
- mining rights (which authorise mining and exploration on a large scale and for long periods, on an exclusive basis); and
- mining permits (which authorise small-scale mining on areas less than five hectares and for short periods, on an exclusive basis).

Other mining-related authorisations include reconnaissance permissions (which authorise non-invasive exploration activities on a non-exclusive basis) and retention permits (which protect the exclusivity enjoyed by prospecting rightholders during periods when it would be uneconomical to apply for a mining right or mining permit due to, for example, adverse economic conditions).

The commencement of the MPRDA signified an important departure from the preceding regulatory environment, which existed for more than 100 years prior to the MPRDA, where the right to mine was based on a system of private ownership of ‘mineral rights’ (being essentially limited real rights and servitudes in respect of land), which could be freely traded. In order to accommodate the transition, the MPRDA contains detailed provisions allowing for the conversion of ‘old order rights’ into prospecting rights and mining rights regulated by the MPRDA. This process seems to be largely completed, with old order rights and conversion playing a less important role in the mining industry and, indeed, legal practice. However, a small number of old order mining rights are yet to be converted into new mining rights.

In the international sphere, the most important treaties from the perspective of foreign investors would be the bilateral investment treaties concluded between South Africa and various foreign states. However, as mentioned before, the South African government has adopted the Protection of Investment Act 2015, and has announced that it is not renewing its bilateral investment treaties. The net effect of this development is the watering down of protection for foreign investors in the South African mining industry.
Other noteworthy international treaties include a variety of trade agreements with various countries, the Treaty on the Non-Proliferation of Nuclear Weapons, various treaties relating to climate change and South Africa’s involvement in the World Trade Organisation.

Mineral reporting requirements in South Africa are largely regulated by the rules of the JSE Limited, South Africa’s premier stock exchange. In terms of the JSE rules, mineral resources and reserves are to be reported in accordance with South African Code for Reporting of Exploration Results, Mineral Resources and Mineral Reserves.

Mining legislation in South Africa is administered and enforced by the Department of Mineral Resources (DMR). The DMR is further divided into five main branches, namely, mineral policy and promotion; mineral regulation; mine health and safety; corporate services; and the chief financial officer. The mineral regulation branch is primarily responsible for the processing of applications, awarding of licences and enforcement of the MPRDA. The mine health and safety branch is primarily responsible for the administration and enforcement of the Mine Health and Safety Act 1996 (MHSA), including investigations into safety incidents, injuries and fatalities occurring at mines in South Africa. In both cases, there are regional offices of the DMR in each of the nine provinces of South Africa, which are primarily responsible for the administration of the MPRDA and MHSA. However, especially in the case of mineral regulation, the ultimate decision-making, including the granting of licences, consideration of internal appeals and decisions to suspend or revoke licences owing to non-compliance, are taken at national level by officials in the DMR Head Office in Pretoria.

III MINING RIGHTS AND REQUIRED LICENCES AND PERMITS

i Title

For all practical purposes, the state could be regarded as the ‘owner’ of underground minerals. However, to avoid large numbers of claims for expropriation of mineral rights as a result of the transition from the old system of private ownership, the MPRDA does not refer to the state as having ‘ownership’ of underground minerals. Instead, the MPRDA provides that the mineral resources are the ‘common heritage’ of all South Africans, and that the state is the ‘custodian’ thereof for the benefit of all South Africans.

The right to mine underground minerals is conferred on (private) third parties by the state, acting through the Minister of Mineral Resources (or his or her delegate), based on a ‘first come, first served’-application system and upon satisfactory demonstration of the applicants’ ability to comply with the financial, technical, environmental, health and safety and socio-economic development requirements set out in the legislation.

For the duration of the mining right in question, the holder of the mining right may, for all practical purposes, be regarded as the owner of the minerals. In any event, the holder of the right to mine becomes owner of the minerals at the latest upon extraction of the mineral from the land where it naturally occurred.

Once a private party holds a prospecting right or mining right, it is possible for the private party to transfer such right (or a portion thereof) to another private party, subject to the consent of the Minister of Mineral Resources in terms of Section 11 of the MPRDA. The requirement of consent for transfers also applies to the transfer of a controlling stake in the business entity that holds the right, unless such business entity is a listed company.
ii Surface and mining rights
As mentioned in Section II, supra, the most important licences relating to mining are:

a prospecting rights (which authorise invasive exploration work for a limited period, on an exclusive basis, but not mining);
b mining rights (which authorise mining and exploration on a large scale and for long periods, on an exclusive basis); and
c mining permits (which authorise small-scale mining on areas less than five hectares and for short periods, on an exclusive basis).

Other mining-related authorisations include reconnaissance permissions (which authorise non-invasive exploration activities on a non-exclusive basis), and retention permits (which protect the exclusivity enjoyed by prospecting rightholders during periods when it would be uneconomical to apply for a mining right or mining permit due to, for example, adverse economic conditions).

In terms of Section 5 of the MPRDA, prospecting rights and mining rights are limited real rights in respect of the land and minerals to which they relate. In simple terms, this means that prospecting and mining rights constitute limitations on the rights of ownership of the person who owns the land. Moreover, Section 5 of the MPRDA expressly authorises the holder of a prospecting right or mining right to enter the land in question, together with his or her employees, and to bring onto that land any plant, machinery or equipment and build, construct or lay down any surface, underground or undersea infrastructure that may be required for the purpose of prospecting, mining, exploration or production, as the case may be.

In other words, a prospecting right or mining right encompasses not only the right to exploit the minerals in question, but also the surface rights necessary for the exercise of such right.

In order to make sure that the landowner or lawful occupier of the land in question does not suffer undue hardship as a result of prospecting or mining activities on the land, the MPRDA provides that the holder of a prospecting right or mining right must compensate the landowner or lawful occupier for any loss or damage suffered by the landowner or lawful occupier as a result of the prospecting or mining activities. The amount of compensation payable may be agreed contractually between the parties, or it may be determined by the court or by way of private arbitration. It has become a common practice for mining companies to enter into surface leases or ‘surface use agreements’ with landowners or lawful occupiers, which sets out the parties’ respective rights and obligations, and fixes a compensation amount for purposes of the MPRDA.

Neither payment of compensation nor agreement between the mining right holder and the landowner as to the quantum of compensation are prerequisites for access to land for the purposes of mining or prospecting activities.3

Prospecting rights and mining rights are obtained by means of an application submitted in prescribed form to the Regional Manager of the DMR in the province or region where the proposed mining operation is to take place. The application must be submitted online, must be accompanied by the prescribed application fee and must be motivated by means of

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detailed documents describing the manner in which the applicant proposes to conduct the prospecting or mining operations in question and comply with the other requirements set out in the legislation. These documents include, for example:

a. a mining work programme containing a detailed description of the geology of the resource being mined, the method and time schedule according to which the resource will be mined and a financing plan setting out the economics of the operation and the proposed method in which it will be financed;

b. documents demonstrating how the applicant will comply with black economic empowerment requirements;

c. a social and labour plan, indicating how the mine will contribute to the sustainable socio-economic development and empowerment of its workers, surrounding communities and labour-sending areas; and

d. an environmental impact assessment and environmental management programme.

The environmental impact assessment is not submitted together with the other documents when the application is first submitted to the DMR, but is conducted and developed over the course of the time when the mining right application is being processed.

Many applicants have expressed great frustration at the amount of time it takes to finalise mining right applications and prospecting right applications. Periods of up to five years from date of application until date of grant are not unheard of. These delays may be ascribed in part to the massive backlog created upon the commencement of the MPRDA, when thousands of old order rights holders submitted their rights for conversion within a period of two to five years. Further, the DMR does not have sufficient staff to process all the applications efficiently. In practice, it very often occurs that applications in respect of large, well-known projects are attended to first (we have seen examples where large mining right applications took less than a year to finalise) while applications in respect of smaller projects are repeatedly overlooked for several years. This has also led to a proliferation of litigation between smaller applicants and the DMR in the form of administrative law reviews.

The duration of rights granted under the MPRDA depends primarily on the motivation submitted in support of a specific time period, subject to certain statutory limits. For example, if an applicant can only demonstrate a mine life of 20 years, that applicant cannot obtain a mining right for a period of 30 years. In terms of time limits, a prospecting right may be valid for a maximum period of eight years (up to five years’ initial period and one renewal for up to three years), a mining permit may be valid for up to five years (an initial period of two years and up to three renewals for one year each) and a mining right may be renewed an unlimited number of times for up to 30 years at a time.

Prospecting rights and mining rights are generally subject to conditions that are little more than restatements of the legal principles applicable to these rights in terms of the legislation. The most important of these terms and conditions include (in the case of a mining right) the duration of the right, the payment of royalties to the state, the black economic empowerment requirements under the MPRDA, limitations on the transferability of the right and the undertakings made in terms of the mining work programme, the social and labour plan and the environmental management programme. In some cases, statutory conditions are further circumscribed by the terms and conditions of a specific right. For example, some mining rights are subject to a limitation on the transfer of any shares (not only...
a controlling interest) in the holder (whereas the MPRDA only limits the transferability of a controlling interest in the holder). Many commentators believe these conditions are ultra vires and therefore invalid. However, they are seldom if ever tested in South African courts.

Mining rights are protected through various means. For example, interfering with the lawful mining activities of the holder of a valid mining right constitutes an offence under the MPRDA and may be punishable by imprisonment or the imposition of a fine. The DMR further maintains a public registry of all prospecting and mining rights, so that the public is deemed to have knowledge of the existence and extent of all prospecting and mining rights. In civil law, the holder of a mining right may obtain an interdict (injunction) prohibiting all third parties, including a landowner, from hindering or interfering with its mining activities, and may enforce its rights against any third parties.

At the moment, there is no special restriction on the surface rights or mining rights that may be acquired by foreign parties, save to note that all mining rights are subject to the requirement that historically disadvantaged South Africans (HDSA) must have at least 25 per cent plus one vote participation in the economic benefit and voting rights of the holder of a mining right.

iii Additional permits and licences

In addition to a mining right, a party wishing to conduct mining activities requires at least the following additional permits or licences:

a. an environmental authorisation authorising in detail the listed activities that will form part of the mining and mineral processing activities;
b. a waste management licence in respect of management of tailings;
c. a water use licence in respect of use of any natural water sources, as well as to make provision for the treatment, storage and disposal of water in the mine itself and in tailings dams, etc; and
d. air quality licences.

Other licences depend on the nature of mining activities to be undertaken, or the natural, social or cultural environment where the mining activities are to take place. The most notable licences would be:

a. licences for the possession, processing and beneficiation of precious metals;
b. licences for the possession, processing and beneficiation of uncut diamonds;
c. licences for the possession, beneficiation, transportation and exporting of nuclear materials and radioactive materials;
d. licences for the destruction or relocation of archaeological sites or graves; and
e. zoning of land for mining purposes in areas subject to town planning schemes.

Depending on the circumstances, many other licences, permits or authorisations may be applicable. The above list is not exhaustive and only serves to illustrate the most important and most common licences.

iv Closure and remediation of mining projects

In terms of Section 24 of the National Environmental Management Act 1998 (NEMA), the holder of a prospecting right, mining right or mining permit must provide acceptable financial provision for the rehabilitation, closure and ongoing post decommissioning
management of negative environmental impacts. The financial provision may take the form of a cash deposit in a rehabilitation trust account, a bank guarantee or an approved insurance product provided by a recognised financial institution.

The manner in which rehabilitation is to be done is prescribed in terms of a closure plan, which must be developed by the mining right holder and approved by the DMR after the cessation of mining activities. The contents of the closure plan will be dictated by the attributes of the environment, the nature and extent of the disturbances to be rehabilitated, the likely consequences of not rehabilitating (or partially rehabilitating) the disturbances concerned, the commitments and mitigation measures set out in the environmental management programme and a value judgment as to the acceptable level of environmental degradation, which may remain after conclusion of rehabilitation.

In theory, the MPRDA makes provision for the issuing of a closure certificate upon successful finalisation of the remedial action set out in the closure plan. The issuing of a closure certificate terminates the holder's statutory liability for rehabilitation and potential claims arising from environmental degradation remaining as a result of mining activities. We are yet to see a successful application for a closure certificate, given that it is not in the government's interest to release mine owners from liability for environmental degradation, even if rehabilitation seems to be completed.

IV ENVIRONMENTAL AND SOCIAL CONSIDERATIONS

i Environmental, health and safety regulations

In South Africa, mining activities are regulated under NEMA. NEMA sets out a number of core principles, aimed at sustainable development, sustainable exploitation of natural resources, management of environmental impacts from economic activities and emphasising the right of people to live in an environment that is not detrimental to their health and well-being. In terms of Section 2(2) of NEMA:

... environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably.

In order to obtain a prospecting or mining right, an applicant must demonstrate that the prospecting or mining activities will not result in ‘unacceptable’ pollution or environmental degradation. To this end, the applicant must perform either a basic assessment or an environmental impact assessment, and obtain an environmental authorisation (authorising the prospecting or mining activities concerned) that incorporates an environmental management plan or programme.

Health and safety in South African mines is also closely regulated under the MHSA, as well as detailed regulations (some dating from before the commencement of the MHSA).

The aim of the MHSA is to make the employer (the mine) primarily responsible for the health and safety of all persons at a mine (including employees, contractors and occasional visitors).

The MHSA places detailed obligations on the employer to provide sufficient training regarding the health and safety hazards and risks encountered at the mine, and how to deal with such situations. The employer is also responsible for providing sufficient personal protective equipment to all persons at the mine. The employer is further obliged to keep thorough records on the health of its employees, including establishing each employee's
baseline health upon commencement of employment, undertaking annual health assessments for all employees and performing final ‘exit’ assessments upon termination of an employee’s employment.

Failure by any person to comply with health and safety regulations at a mine, or to obey lawful instructions relating to health and safety issued by a person responsible for enforcement of the mine’s health and safety rules and policies, constitutes an offence under the MHSA. Failure by an employer to take reasonable steps to ensure safe and healthy working conditions for its employees at a mine also constitutes an offence under the MHSA.

The MHSA further empowers the Chief Inspector of Mines and his or her delegates to issue far-reaching directives in relation to health and safety at a mine, including to cease all activity at a mine until a certain risk is sufficiently addressed.

ii Environmental compliance

As mentioned above, mining activities are regulated under NEMA. NEMA sets out a number of core principles, aimed at sustainable development, sustainable exploitation of natural resources, management of environmental impacts from economic activities and emphasising the right of people to live in an environment that is not detrimental to their health and well-being.

In order to obtain a prospecting or mining right, an applicant must perform either a basic assessment (for prospecting activities and mining permits) or an environmental impact assessment (for mining rights), and obtain an environmental authorisation (authorising the mining activities) that incorporates an environmental management plan or programme.

The procedure for obtaining an environmental authorisation consists, very broadly, of the following:

- an application submitted to the DMR (which administers the provisions of NEMA insofar as it relates to mining activities);
- a scoping phase, when environmental risks are identified at a basic level and remedial measures are suggested. The scoping report compiled at the conclusion of this phase is then published for public comment within a period of 30 days;
- following public comments and consultations on the scoping report, detailed field studies are then performed by experts in various scientific disciplines (depending on what is appropriate in the circumstances), including ecology, biology, hydrology, archaeology, geophysics, etc. At the conclusion of this phase, an environmental impact assessment report and a draft environmental management programme is compiled, which is then published for public comment within a period of 30 days;
- following receipt of public comments on the environmental impact assessment report and draft environmental management programme, a final environmental impact assessment report and environmental management programme is compiled, taking into account (and addressing as far as possible) all comments raised during the process; and
- the final environmental impact assessment report and environmental management programme is then submitted to the DMR for approval.

Timelines for public comments on the documents may (and should) be extended in cases where the reports are complicated and voluminous and any members of the public (including lobby groups) request an extension.
The EIA process may take between eight and 18 months to complete, depending on how sensitive the environment is and how many reports need to be compiled and peer reviewed.

### Third-party rights

In terms of Section 104 of the MPRDA, communities have a ‘preferent right’ to apply for prospecting or mining rights in respect of communal land. This provision remains largely untested in our courts, and it is uncertain how this provision will practically manifest itself. The interpretation of this section poses myriad potential difficulties in the context of competing applications between communities and other applicants.

## V OPERATIONS, PROCESSING AND SALE OF MINERALS

### Processing and operations

There is no general limitation on the import and export of equipment in South Africa. However, under the Revised Mining Charter promulgated in June 2017, mining rightholders will be expected to source a certain percentage of their capital goods from local producers, including historically disadvantaged South Africans. This plays a role in the level of black economic empowerment credit given to mining rightholders.

Other than the environmental licensing requirements, and special permits required for processing, possessing, transporting or exporting of precious metals, diamonds and nuclear materials, there are no general restrictions on processing of extracted minerals.

As far as use of foreign labour and services is concerned, we note that under the Revised Mining Charter, mining rightholders are expected to source certain minimum percentages of their services from local producers, including from historically disadvantaged South African service providers.

Use of foreign labour is regulated in terms of immigration laws, and, given South Africa’s high unemployment rate, the general principle is that foreign labour should only be used for scarce skills.

### Sale, import and export of extracted or processed minerals

Other than the special permits required for processing, possessing, transporting or exporting of precious metals, diamonds and nuclear materials, there are no general restrictions on the sale, import and export of extracted or processed minerals. Imports may be subject to customs duty imposed under the Customs and Excise Act 1964.

In terms of draft amendments to the MPRDA currently subject to public comment, the government proposes imposing certain restrictions on the export of unprocessed minerals, in an effort to promote local beneficiation of minerals.

### Foreign investment

South Africa implements a system of exchange control, in terms of which Reserve Bank approval is required to transfer sums of money to and from South Africa. Reserve Bank approval may be obtained in advance in respect of a large number of proposed or potential transactions, for example, in respect of all dividends payable in respect of a foreign investor’s
shareholding in a company. Generally speaking, the Reserve Bank finalises applications for exchange control approvals relatively quickly, for example, in a matter of weeks rather than months.

Foreign investors in South Africa enjoy various levels of protection of their investments, depending on whether South Africa has bilateral investment treaties with the investor’s country. In cases where no bilateral investment treaty exists, the Protection of Investment Act 2015 will apply (as soon as it is put into force). According to commentators, this legislation significantly waters down the level of protection previously afforded under bilateral investment treaties. For example, investors are given legal protection of their investments to the same extent as any South African citizens, with reference to the property rights under Section 25 of the Constitution of the Republic of South Africa. This section of the Constitution is constantly being interpreted by our courts, and there is case law to the effect that our law does not recognise any forms of constructive or indirect expropriation. Moreover, the Act stipulates that investment disputes will be decided by the South African domestic courts, unless the South African government consents to international arbitration.

VI CHARGES

i Royalties

In terms of the Mineral and Petroleum Resources Royalty Act 2008 (Royalty Act), a person who wins or recovers a mineral resource in South Africa must pay a royalty for the benefit of the National Revenue Fund in respect of the transfer of that mineral resource to another party.

In terms of Section 4 of the Royalty Act, a formula is prescribed for the calculation of the extent of the royalty, based on the earnings before interest and taxes from the sale of refined or unrefined mineral resources. The maximum percentage royalty in respect of refined mineral resources is 5 per cent, and the maximum royalty in respect of unrefined mineral resources is 7 per cent.

ii Taxes

In addition to the royalties mentioned above, South African mining companies are subject to normal taxes, such as standard income tax on companies, withholding taxes on dividends to shareholders, value-added tax (in certain circumstances) and transfer duties in respect of transfers of land or prospecting and mining rights. However, mining companies may deduct large portions of capital expenditure against their taxes, and may ring-fence capital expenditure and taxable income in respect of distinct mining operations. Moreover, gold mining companies enjoy a special tax dispensation where income tax rates increase as the company’s profits increase, while allowing shareholders to receive dividends even where no income tax is payable due to low profits. A detailed discussion of the tax regime applicable to mining companies in South Africa is beyond the scope of this chapter.

iii Duties

Duties payable by mining companies include transfer duties and custom duties for importing of goods.
South Africa

iv Other fees
In addition to the taxes, duties and royalties mentioned above, mining companies pay prospecting fees based on the area of the land where exploration takes place, and small fees for various applications and administrative processes under the MPRDA.

VII OUTLOOK AND TRENDS
The most interesting recent development in the South African mining industry was the promulgation of the Revised Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry on 15 June 2017. The Revised Mining Charter radically changes the ways in which black economic empowerment in the South African mineral industry will be accomplished.

One of the most important changes is the abolition of any notion of ‘once empowered, always empowered’. In other words, the Revised Mining Charter, if applied in its current form, will place it beyond doubt that mining companies who have previously concluded empowerment deals will be required to maintain a minimum level of HDSA participation and to ‘top up’ the level of HDSA participation in instances where it does not meet the new target of 30 per cent HDSA ownership.

Other important changes in the Revised Mining Charter include: a minimum HDSA shareholding of 30 per cent for mining rights and 51 per cent for prospecting rights, various new levies to be raised from mining companies and their suppliers, a fixed ratio for involving employees, communities and HDSA entrepreneurs in the shareholding structures, a mandatory 1 per cent dividend payable to HDSA shareholders annually, the establishment of a government agency to hold and administer shares in mining companies earmarked for traditional communities, more stringent requirements for purchasing of capital goods and services from South African and HDSA suppliers, and increased requirements for employment of HDSAs in junior, middle and senior management of mining companies.

One of the major concerns regarding the Revised Mining Charter is that it not only signifies a fundamental departure from the policies which underpinned the previous iterations of the Mining Charter, but it also differs substantially from the version of the Draft Mining Charter released to the public for comment in April 2016 without having undergone any further consultation processes to consider the changes appearing in the final version promulgated on 15 June 2017.

The promulgation of the Revised Mining Charter caught the mining industry, and investors, by surprise and has since become the subject of intense litigation between the South African Chamber of Mines and the Minister of Mineral Resources. The Chamber of Mines seeks to judicially review the Revised Mining Charter as being ultra vires, unlawful, procedurally unfair and otherwise unconstitutional.

The promulgation of the Revised Mining Charter appears to have alienated government and investors significantly in a time when mining companies are already struggling. While it appears likely that the Chamber of Mines will succeed in its legal challenge against the Revised Mining Charter, it would be naïve to assume that there will ultimately be no changes to the Mining Charter from its present form. In all likelihood, the Charter will be adapted over time to serve a more radical economic transformation agenda. The questions is just whether the change will be gradual enough for mining companies to be able to absorb the impacts.
I OVERVIEW

i Government policy towards mining and international investment
The US government values the mining industry for its production of domestic raw materials, strategic minerals and high-wage jobs, despite the US’s reputation for creating a burdensome permitting and environmental regulatory regime. Federal, state and local governments receive billions of dollars annually in taxes, royalties and fees from the mining industry. The United States seeks and attracts international investment, including financial investment and direct investment in mining operations.

US law generally permits foreign investments in US industries, including mining. The US government places few restrictions on such investments, unless they are deemed to have national security implications. Projects involving the export of particular minerals, such as uranium or rare earth elements, can receive greater scrutiny when foreign companies are involved. Foreign investors are increasingly looking to the United States as a secure source of investment in mineral projects and to obtain reliable sources of minerals.

ii Risk factors
Security of title and tenure for mining claims, leases and licences is key to attracting foreign investment in US mining. There is little risk of expropriation of mining operations by government seizure or political unrest. The US political landscape is characterised by inaction in the area of mining law reform; Congress has been working towards comprehensive mining law reform for many decades, but the General Mining Law has remained relatively unchanged since its passage in 1872. Thus, there is little risk that title to land for mining operations will be threatened by government intervention as long as all required fees, rentals and royalties are paid in a timely manner.

Perhaps the biggest risk in US mining ventures is the delay caused by the environmental review, compliance and permitting of a project. These steps can be very costly and time-consuming, and even without protracted litigation, it is not unusual for a major mining project to require in excess of 10 years to obtain all the necessary environmental approvals.

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iii Mine ownership

Ownership of the US mining industry is in private hands: there are no government-owned mines or mining companies. Many companies operating US mines are based in the United States, such as Newmont Mining Corporation (gold), Peabody Energy Corporation (coal), US Steel (iron ore) and Freeport-McMoRan (copper). Many other operations in the United States are owned by foreign companies, including Barrick Gold's numerous mines (gold) and Rio Tinto's subsidiaries such as Kennecott Utah Copper Corporation (copper-molybdenum).

iv Significant trading agreements concerning minerals

Many international treaties of general application apply to mining industry investment by foreign persons into the United States, but none specifically address investments in the mining industry or trading in various minerals. However, one failed transaction of note was the attempted acquisition by Chinese National Offshore Oil Corporation of the rare earth element mine at Mountain Pass, California (then owned by Unocal), which was blocked by the US government on national security grounds in 2005.

v Notable developments

The most notable development in the legal and regulatory landscape for the US mining industry was the 2016 election of US President Donald J. Trump. Since taking office, President Trump has focused his Administration's early efforts on reforming the energy and environmental policies of the former President Obama. For example, President Trump signed an executive order on 28 March 2017, directing the Environmental Protection Agency (EPA) to review, and if necessary, revise or rescind several regulations affecting coal-fired electric utilities and coal mining companies. The executive order asks government agencies to review all existing regulations, guidance documents, policies and other actions that could potentially burden the production of domestic energy resources. Specifically, it instructs the EPA to suspend or revise the 2015 Clean Power Plan regulations aimed at reducing carbon dioxide emissions from existing power plants by 32 per cent by 2030. The executive order also directs the Secretary of Interior to lift the moratorium on federal coal leasing and terminate the ongoing review of the federal coal program initiated by the Obama Administration in 2016. Furthermore, on 1 June 2017, President Trump withdrew from the Paris Agreement on Climate Change (Paris Accord). The withdrawal from the Paris Accord, in combination with the proposed energy and environmental policy reform, could potentially spur increased domestic energy production in the near term.

On the legislative front, Senators Lisa Murkowski and Maria Cantwell introduced bipartisan legislation known as the Energy and Natural Resources Act of 2017 (ENRA). The ENRA includes measures to expand domestic non-fuel mineral production and decrease permitting times for critical and strategic minerals. Among other provisions, the legislation proposes establishing an analytical and forecasting capability to identify critical mineral demand, supply, and other factors to allow informed actions for avoiding supply shortages and mitigating price volatility. It is currently under consideration by Congress.

The US Geological Survey reports that, in 2016, US mines produced an estimated value of US$74.6 billion of nonfuel minerals—up slightly from US$73.4 billion in 2015. Increased construction activity, particularly in infrastructure and residential sectors, contributed to this growth. Prices for several metals, especially precious metals, increased towards the end of 2016. However, there was an overall decline in the value of metal production. In 2016, US metal mine production was estimated at a value of US$23.0 billion. This represents a
5 per cent decrease from 2015 metal mine production. Gold (37 per cent), copper (29 per cent), iron ore (15 per cent), and zinc (7 per cent) were the largest contributors to the metal production value in 2016. As in 2015, several US metal mines idled or closed in 2016. Nevertheless, 11 states individually generated more than US$2 billion in non-fuel minerals for 2016.

II LEGAL FRAMEWORK

i Introduction

The US legal system consists of many levels of codified and uncodified federal, state and local laws. The government’s regulatory authority at each level may originate from constitutions, statutes, administrative regulations or ordinances, and judicial common law. The US Constitution and federal laws are the supreme law of the land, generally preempting conflicting state and local laws. In many legal areas, the different authorities have concurrent jurisdiction, requiring regulated entities to comply with multiple levels of regulation. Mining on federal lands, for example, is generally subject to multiple layers of concurrent federal, state and local statutes and administrative regulations.

Federal and state governments have developed comprehensive mining regulatory schemes. Although the United States is a common law nation, practising US mining law often resembles practising mining law in civil law countries because the regulatory schemes are set out in detailed codifications. However, these mining law codifications are subject to precedential interpretation by courts pursuant to common law principles (and in some situations by quasi-judicial administrative bodies). As such, US mining law may originate from federal, state and local laws, including constitutions, statutes, administrative regulations or ordinances, and judicial and administrative body common law.

Determining which level of government has jurisdiction over mining activities largely depends on surface and mineral ownership. A substantial amount of mining in the United States occurs on federal lands where the federal government owns both the surface and mineral estates. Federal law primarily governs mineral ownership, operations and environmental compliance, with state and local governments having concurrent or independent authority over certain aspects of federal land mining projects (e.g., permitting, water rights and access authorisations). If the resource occurs on private land, estate ownership is a matter of state contract law, but operations and environmental compliance are still regulated by applicable federal and state laws. Estate ownership on state-owned land is regulated by state law, and operations and environmental compliance are regulated by applicable federal and state laws.

ii Regulation of the mining industry

The General Mining Law of 1872 (GML) is the principal law governing locatable minerals on federal lands. The GML affords US citizens the opportunity to explore for, discover and purchase certain valuable mineral deposits on federal lands open for mineral entry. Locatable minerals include non-metallics (asphaltum, bog iron, cement, diamonds, feldspar, granite, 

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2 See, e.g., 43 CFR Sections 3000.0-5-3936.40 (BLM minerals management regulations).
3 30 USC Sections 21 to 54, and Sections 611 to 615, as amended.
marble, salt, slate, umber, uranium, etc.), and metallic minerals including copper, gold, lead, nickel, silver and zinc. Locating these mineral deposits entitles the locator to certain possessory interests:

a. unpatented mining claims, which provide the locator with an exclusive possessory interest in surface and subsurface lands, and the right to develop the minerals; and

b. patented mining claims, which pass title from the federal government to the locator, converting the property to private land. However, a mining patent moratorium has been in place since 1994 and no new patents are being issued.

The Federal Land Policy and Management Act of 1976 (FLPMA)⁴ governs federal land use, including access to and exercise of GML rights on lands administered by the BLM and the US Forest Service (USFS). The FLPMA recognises ‘the Nation’s need for domestic sources of minerals’,⁵ and provides that the FLPMA shall not impair GML rights, including, but not limited to, rights of ingress and egress.⁶ However, the FLPMA also provides that mining authorisations must not ‘result in unnecessary or undue degradation of public lands’.⁷ More generally, BLM and the USFS have promulgated extensive regulations governing mineral development on public lands.⁸

The National Environmental Policy Act (NEPA),⁹ requires federal agencies to prepare an environmental impact statement (EIS) for all major federal actions significantly affecting the quality of the human environment. Mining operations on federal lands or with a federal nexus generally will involve an EIS or a less intensive environmental assessment (EA) examining environmental impacts. The NEPA process will involve consideration of other substantive environmental statutes.

The United States Securities and Exchange Commission (SEC) regulates mineral resources and reserves reporting by entities subject to SEC filing and reporting requirements. The SEC’s reporting classification system is based on the SEC’s 1992 ‘Industry Guide 7’, which provides for declaration only of proven and probable reserves. The SEC generally does not recognise other reporting codes, such as the Committee for Mineral Reserves International Reporting Standards, which provide additional disclosures and are used by many other mineral-producing nations. The SEC recently issued proposed regulations, which would lead to increased disclosure obligations for mining companies. If adopted, the SEC regulations would supersede Industry Guide 7 and require the disclosure of exploration results, mineral resources and mineral reserves.

III MINING RIGHTS AND REQUIRED LICENCES AND PERMITS

i. Title

In the United States, land generally can be severed into surface and subsurface estates, creating a split estate where the surface and mineral rights can be held by different parties. The ability to sever the unified estate depends on land ownership. Federal land mineral

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⁴ 43 USC Sections 1701 to 1787.
⁵ 43 USC Section 1701(a)(12).
⁶ 43 USC Section 1732(b).
⁷ 43 CFR Section 3809.411(d)(3)(iii); see also 43 USC Section 1732(b).
⁸ See, e.g., 43 CFR Sections 3000.0-5-3936.40; 36 CFR Sections 228.1-228.116.
⁹ 42 USC Sections 4321-4370m-12.
interests are regulated by federal law, and title cannot be transferred to private citizens until the minerals have been severed. Under the GML, locatable mineral claims may be patented, transferring title to the locator, but there has been a patent moratorium in place since 1994. Unpatented GML claims provide the locator with exclusive possessory surface and mineral interests, but the locator does not obtain title to the mineral estate. Ownership of state-land minerals is controlled by state law and varies by state. State laws generally are similar to federal laws, in that title remains with the state until the minerals are severed pursuant to statutory procedures. Severance of private land estates is governed by state law, and generally private citizens are free to split their surface and mineral estates.

Once the mineral estate is severed and enters the private market, title to the minerals can be bought, sold, leased or rented as a matter of contract law, subject to reservations in the severance document and applicable laws. The federal government, particularly in the western United States, may have reserved the mineral estate to itself when it transferred ownership of the surface lands to private citizens or state governments, which could affect the surface owners' ability to alienate the minerals.

ii Surface and mining rights

The process for developing locatable minerals rights on federal lands under the GML involves:

a. discovery of a 'valuable mineral deposit', which under federal law means that a prudent person would be justified in developing the deposit with a reasonable prospect of developing a successful mine, and that the claims can be mined and marketed at a profit;
b. locating mining claims by posting notice and marking claim boundaries;
c. recording mining claims by filing a location certificate with the proper BLM state office within 90 days of the location date and recording pursuant to county requirements;
d. maintaining the claim through assessment work or paying an annual maintenance fee; and
e. additional requirements for mineral patents (as mentioned above, there is a moratorium on patents).

The Mineral Lands Leasing Act of 1920 provides US citizens the opportunity to obtain a prospecting permit or lease for coal, gas, gilsonite, oil, oil shale, phosphate, potassium and sodium deposits on federal lands. The process for obtaining a permit or lease involves filing an application with the federal agency office with jurisdiction over the affected land. Depending on the type of permit or lease applied for, applicants may be required to:

a. pay rental payments;
b. file an exploration plan;
c. pay royalty payments based on production; or
d. furnish a bond covering closure and reclamation costs.

These permits and leases are often subject to conditions and stipulations directed at protecting resource values.

The Materials Disposal Act of 1947 provides for the disposal of common minerals found on federal lands, including, but not limited to, cinders, clay, gravel, pumice, sand

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10 30 USC Sections 181 to 287, as amended.
11 30 USC Sections 601 to 615, as amended.
or stone, or other materials used for agriculture, animal husbandry, building, abrasion, construction, landscaping and similar uses. These minerals may be sold through competitive bids, non-competitive bids in certain circumstances or through free use by government entities and non-profit entities.

Although the GML and Mineral Lands Leasing Act require mine claimants, permittees and lessees to be US citizens, a ‘citizen’ can include a US incorporated entity that is wholly owned by non-US entities or corporations. There are generally no restrictions on foreign acquisition of these types of US mining rights through parent-subsidiary corporate structures.

iii Additional permits and licences

Additional permits and licences required to conduct mining activities may include:

\(a\) a mine plan of operations;
\(b\) a reclamation plan and permits;
\(c\) air quality permits;
\(d\) water pollution permits (pollutant discharge elimination system permit, storm water pollution prevention plan, spill prevention control and countermeasure plan);
\(e\) dam safety permits;
\(f\) artificial pond permits;
\(g\) hazardous waste materials storage and transfer permits;
\(h\) well-drilling permits;
\(i\) road use and access authorisations;
\(j\) right-of-way authorisations; and
\(k\) water rights.

iv Closure and remediation of mining projects

The FLPMA requires BLM and the USFS to prevent ‘unnecessary or undue degradation’ of public lands.\(^{12}\) Casual-use hardrock mining operations on BLM lands that will result in no or negligible surface disturbance do not require any reclamation planning. Notice-level exploration operations requiring less than five acres of surface disturbance must meet BLM reclamation standards and provide financial guarantees that the reclamation will occur.\(^{13}\) Plan-level operations require a plan of operations that includes a detailed reclamation plan.\(^{14}\) BLM reclamation standards include saving topsoil for reshaping disturbed areas, erosion and water control measures, toxic materials measures, reshaping and revegetation where reasonably practicable, and rehabilitation of fish and wildlife habitat.\(^{15}\) Mining in BLM wilderness study areas additionally requires surface disturbances be ‘reclaimed to the point of being substantially unnoticeable in the area as a whole’.\(^{16}\)

Mining activities on National Forest lands must be conducted ‘so as to minimise adverse environmental impacts on National Forest System surface resources’.\(^{17}\) Operators must take measures that will prevent or control onsite and offsite damage to the environment

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\(^{12}\) 43 USC Section 1732(b).
\(^{13}\) 43 CFR Sections 3809.320, 3809.500(b).
\(^{14}\) 43 CFR Sections 3809.11, 3809.401.
\(^{15}\) 43 CFR Section 3809.420.
\(^{16}\) 43 CFR Section 3802.0-5(d).
\(^{17}\) 36 CFR Section 228.1.
and forest surface resources’, including erosion control, water run-off control, toxic materials control, reshaping and revegetation where reasonably practicable, and rehabilitation of fish and wildlife habitat.18

State laws may also include closure and reclamation requirements, including, for example, water and revegetation, fish and wildlife protections, and reclamation bonding requirements. Mining projects can often address both federal and state requirements through a single closure and reclamation plan and financial guarantee.

IV ENVIRONMENTAL AND SOCIAL CONSIDERATIONS

i Environmental, health and safety regulations

NEPA is the principal environmental law implicated by mining on federal lands. NEPA requires federal agencies to take a ‘hard look’ at the environmental consequences of federal projects before action is taken. An agency must prepare an EIS for all major federal actions significantly affecting the quality of the human environment. An agency may first prepare an EA to determine whether the effects are significant. If the effects are significant, the agency must prepare the more comprehensive EIS. If the effects are insignificant, the agency generally will issue a finding of no significant impact, ending the process. NEPA does not dictate a substantive outcome; however, the analysis generally requires consideration of other substantive environmental statutes and regulations, including the Clean Air Act,19 the Clean Water Act20 and the Endangered Species Act.21 NEPA is administered by the federal agency making the decision that may significantly affect the environment.

The Clean Air Act regulates air emissions from stationary and mobile sources. The Clean Air Act is administered by the EPA and states with delegated authority. The Clean Water Act regulates pollutant discharges into the ‘waters of the United States, including the territorial seas’.22 The Clean Water Act is administered by the EPA, US Army Corps of Engineers and states with delegated authority. The Endangered Species Act requires federal agencies to ensure their actions are not likely to jeopardise the continued existence of any threatened or endangered species, or to destroy or adversely modify designated critical habitat, and prohibits the unauthorised taking of such species. The US Fish and Wildlife Service and National Marine Fisheries Service administer the Endangered Species Act.

The Federal Mine Safety and Health Act23 requires the Mine Safety and Health Administration (MSHA) to inspect all mines each year to ensure safe and healthy work environments.24 The MSHA is prohibited from giving advance notice of an inspection, and may enter mine property without a warrant.25 MSHA regulations set out detailed safety and health standards for preventing hazardous and unhealthy conditions, including measures addressing fire prevention, air quality, explosives, aerial tramways, electricity use, personal

18 36 CFR Section 228.8(g).
19 42 USC Sections 7401 to 7671.
20 33 USC Sections 1251 to 1388.
21 16 USC Sections 1531 to 1544.
22 33 USC Section 1311(a); 33 USC Section 1362 (defining ‘navigable waters’).
23 30 USC Sections 801 to 966.
24 30 USC Section 813.
25 30 USC Section 813.
protection, illumination and others.\textsuperscript{26} MSHA regulations also establish requirements for testing, evaluating and approving mining products; miner and rescue team training programmes; and notification of accidents, injuries and illnesses at the mine.\textsuperscript{27} Currently, there are no specific mining sustainable development regulations in the US. However, issues of socio-economic impact, cumulative effects and environmental impact often are addressed during a NEPA review.

\textbf{ii Environmental compliance}

Mining projects on federal lands, or that otherwise have a federal nexus, will likely have to go through some level of NEPA environmental review. State laws may also require environmental analysis. Where analysis is required by different agencies, it may be possible to pursue an agreement among the agencies to allow the operator to produce one comprehensive environmental review document that all agencies can rely on.

There is no statutory deadline for federal agencies to complete their NEPA review. Small mine project reviews may take in excess of a year to complete. Larger project reviews usually take longer. Third parties may sue the federal agency completing the review to ensure that the agency considered all relevant factors and rationally related the decisions made to the facts found. Prosecuting the litigation would extend the project approval time, and if the agency loses, additional time would be required for the agency to redo its flawed NEPA analysis. In some instances where mines were proposed in especially sensitive areas, it has taken decades to obtain approval.

\textbf{iii Third-party rights}

The US contains numerous reservations comprised of federal lands set aside by treaty or administrative directive for specific native American tribes or Alaska natives. Tribal reservation title generally is held by the United States in trust for the tribes, and the US Bureau of Indian Affairs administers the reservations. Alaska native lands are owned and administered by Alaska native corporations. Mineral development within the tribal reservations and Alaska native lands requires negotiation with the appropriate administrator.

Tribal cultural interests are considered through NEPA, the National Historic Preservation Act (NHPA),\textsuperscript{28} and the Native American Graves Protection and Repatriation Act (NAGPRA).\textsuperscript{29} NEPA analysis will include social and cultural impacts, and may require tribal consultation. Section 106 of the NHPA requires federal agencies to inventorise historic properties on federal lands and lands subject to federal permitting, and to consult with interested parties and the State Historic Preservation Office.\textsuperscript{30} NAGPRA imposes procedural requirements that apply to inadvertent discovery and intentional excavation of tribal graves and cultural items on federal or tribal lands.

\textsuperscript{26} See, e.g., 30 CFR Sections 56.1-56.20014 (safety and health standards for surface metal and non-metal mines).
\textsuperscript{27} 30 CFR Sections 5.10-36.50, 46.1-49.60, 50.10.
\textsuperscript{28} 54 USC Section 300101 to 307108.
\textsuperscript{29} 25 USC Section 3001 to 3013.
\textsuperscript{30} 54 USC Section 306108.
iv Additional considerations

Not all federal lands are open to mineral entry, including national parks, national monuments, most Reclamation Act project areas, military reservations, wilderness areas, and wild and scenic river corridors. Project proponents should research mineral access when considering exploration activities on federal lands.

Federal mining laws do not require community engagement or corporate responsibility. Those projects that require NEPA review, however, will be subject to public notice and comment requirements, and the review will involve consideration of the project’s cultural, societal and economic impacts. State laws may impose a ‘public interest’ standard for projects requiring state approval. For example, mining operations that require state water rights may need to show that the use of the water is in the ‘public interest’, which may include consideration of wildlife, fisheries and aquatic habitat values.

V OPERATIONS, PROCESSING AND SALE OF MINERALS

i Processing and operations

US mining laws do not restrict or limit importing mining equipment or machinery. If the equipment has dual military-civilian use, it is on the Commercial Control List and may be licensable by the Department of Commerce pursuant to the Export Administration Regulations.31

Foreign employees are governed by general US immigration laws and are required to obtain a work visa or other authorisation. A limited number of visas are available for skilled workers, professionals and non-skilled workers, but these workers must be performing work for which qualified US workers are not available.32

ii Sale, import and export of extracted or processed minerals

There are no restrictions or limitations on the sale, import or export of extracted or processed minerals, unless deemed a national security risk by the US Department of Homeland Security or State Department.

iii Foreign investment

US mining laws generally do not restrict or limit foreign investment. As discussed in Section III.ii, supra, although there is a US citizenship requirement for obtaining locatable and leasable minerals on federal lands, foreign companies are free to rely on a US subsidiary to secure such rights.

Foreign investments are subject to US national security laws. The Committee on Foreign Investment in the United States, for example, is an inter-agency committee chaired by the Secretary of the Treasury that has authority to review foreign investments to protect national security, and make recommendations to the President to block the same.33

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32 8 USC Section 1153(b)(3)(C).
33 50 USC Section 4565.
President may exercise this authority if the President finds that the foreign interest might take action impairing national security, and other provisions of the law do not provide the President with appropriate authority to act to protect national security.34

VI CHARGES

i Royalties
There are generally no royalties levied on the extraction of federally owned minerals, with the exception of fuel minerals and other minerals governed by the Mineral Leasing Act. Many states, however, charge royalties on mineral operations on state-owned lands and taxes that function like a royalty on all lands, such as severance taxes, mine licence taxes or resource excise taxes. These functional royalties can differ depending on land ownership and the minerals extracted.

ii Tax considerations
There are no federal taxes specific to minerals extraction (see above regarding state mining taxes as functional royalties). General federal, state, county and municipal taxes apply to mining companies, including income taxes, payroll taxes, sales taxes, property taxes and use taxes.

Federal tax laws generally do not distinguish between domestic and foreign mining operators. However, if a non-US citizen acquires real property, the buyer must deposit 10 per cent of the sale’s price in cash with the US Internal Revenue Service as insurance against the seller’s income tax liability. The cash requirement can be problematic for a cash-strapped buyer that may have purchased the mine property with stock.

There are no federal tax advantages or incentives specific to mining.

iii Duties
There are no federal duties on minerals extraction.

iv Indemnification
Locatable minerals claimants must pay an annual maintenance fee of US$155 per claim in lieu of performing assessment work required pursuant to the GML and the FLPMA.35 Failure to perform assessment work or pay maintenance fees will open the claim to relocation by a rival claimant as if no location had been made.36 Certain waivers and deferments apply.

Leasable minerals permittees and lessees must pay annual rent based on acreage. The rental rates differ by mineral and some rates increase over time.37 Prospecting permits automatically terminate if rent is not paid on time; BLM will notify late lessees that they have 30 days to pay.38

34 50 USC Section 4565(d)(4).
35 43 CFR Sections 3834.11(a), 3830.21.
36 43 CFR Section 3836.15.
37 43 CFR Section 3504.15.
38 43 CFR Section 3504.17.
State laws may also include closure and reclamation requirements, including water and air pollution controls, recontouring and revegetation, fish and wildlife protections, and reclamation bonding requirements. Mining projects often can address both federal and state requirements through a single closure and reclamation plan and financial guarantee.

Federal and state laws generally require financial guarantees prior to commencing operations to cover closure and reclamation costs. These reclamation bonds ensure that the regulatory authorities will have sufficient funds to reclaim the mine site if the permittee fails to complete the reclamation plan approved in the permit.

VII OUTLOOK AND TRENDS

Compared to recent years, the US minerals industry displays encouraging trends. Non-fuel mineral production increased slightly in 2016. The prices for precious metals in particular began to rise in the latter half of 2016. Moreover, the non-metallic mineral products industry growth rate also showed a general upward trend in the latter half of 2016. As it relates to US industrial minerals production, the approximate value was US$51.6 billion in 2016, which represents a 5 per cent increase from 2015. According to the US Energy Information Administration (EIA), US coal production declined in 2016. The 2016 figures represent the lowest total coal production the industry has experienced since 1978. The low cost and high abundance of natural gas is often cited as a primary reason for the decline in US coal production. Nevertheless, in 2017, the EIA anticipates that an increase in coal-fired electricity generation and exports will increase US coal production by 8 per cent. Notably, in the first quarter of 2017, the EIA reported that coal exports were 58 per cent higher than in the first quarter of 2016.
Part II

CAPITAL MARKETS
I  INTRODUCTION

The Australian mining industry is extremely diverse in size, geographical focus, type of commodity and stage of development. It comprises several of the world’s largest (and generally highly profitable) diversified resource companies, including BHP Billiton and Rio Tinto, together with a significant number of mid-tier producers, junior explorers and mining service providers, operating globally while maintaining an Australian base.

This vast diversity within a capital-intensive industry has generated the need for funds to be raised through many sources and structures. Many junior to mid-tier exploration companies, who produce little in the way of consistent revenue, are generally considered unsuitable for traditional debt financing, and consequently seek to satisfy their capital requirements through equity (or hybrid equity) funding. Larger producing mining companies generally have a number of options as, in addition to being able to fund activities through operating revenue, they can more readily obtain funding through debt sources.

The metals and mining sector is, at the time of writing, by number of companies, the largest industry sector on the Australian Securities Exchange (ASX) with more than 600 companies involved in mineral exploration, development and production across 100 countries. The diversified investor base and market liquidity provided by an ASX listing is generally considered complementary to the capital-intensive nature of resource exploration and development, and has provided access to funding for numerous companies in recent years.

This chapter discusses the regulation of equity capital markets in Australia, specifically focusing on mining companies listed on the ASX. While the mining industry also relies heavily on debt and bond markets, discussion of such markets is largely beyond the scope of this chapter.

II  CAPITAL RAISING

i  General overview of the legal framework

Australia has an extensive legal and regulatory framework governing equity fundraising activities.

Equity fundraising in Australia is principally governed by the Corporations Act 2001 (Cth) (Corporations Act) (in particular, Chapter 6D) and, additionally for companies listed on the ASX, the listing rules of the ASX (Listing Rules).

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1 Simon Rear is a partner, Chris Rosario and Ben Stewart are senior associates and Michael Van Der Ende is an associate at Squire Patton Boggs.
The Australian Securities and Investments Commission (ASIC), an independent Commonwealth government body responsible for the supervision of Australian financial markets, plays a vital role in scrutinising fundraising activities.

**Corporations Act – fundraising provisions**

Companies seeking to raise equity capital from investors in Australia must comply with Chapter 6D of the Corporations Act. This applies, subject to certain exceptions (detailed below), to all offers of securities that are received in Australia, regardless of where any resulting issue, sale or transfer occurs.

Broadly, Chapter 6D provides that, unless a prescribed exception applies (discussed further below), an offer of securities requires disclosure to investors.

Where an offer of securities requires disclosure under Chapter 6D, the issuer must prepare and lodge with ASIC a disclosure document that complies with Chapter 6D and subsequently provide the document to potential investors. Depending on the circumstances of the offer, the disclosure document may take the form of:

- a ‘full-form’ prospectus;
- a ‘short-form’ prospectus (a prospectus that refers to material previously lodged with ASIC instead of setting out the information in its entirety);
- a ‘transaction-specific’ prospectus (a prospectus for continuously quoted securities that is subject to special content rules);
- a profile statement; or
- an offer information statement.

Full-form and transaction-specific prospectuses are the most commonly used disclosure documents.

**Prospectus**

A prospectus must include all the information that investors and their professional advisers would reasonably require to make an informed assessment of, among other things:

- the rights and liabilities attached to the securities offered; and
- the assets and liabilities, financial position and performance, profits and losses, and prospects of the issuer.

This disclosure obligation is, however, limited to information that investors and their professional advisers would ‘expect to find’ in a disclosure document, and is only required to be disclosed if a person whose knowledge is relevant (broadly being the issuer, its directors and certain persons or entities associated with the offer such as an underwriter) actually knew of the information or ought reasonably to have obtained the information by making enquiries.

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2 Continuously quoted securities are, broadly, securities in a class of securities that have been quoted on the ASX in the three months prior to the date of the disclosure document.
**Full-form prospectus**

A full-form prospectus is most commonly used when raising capital as part of an initial public offering (IPO) and associated listing on the ASX. The company must (among other requirements for an IPO and listing) prepare a full-form prospectus containing extensive information, including:

- information regarding the company’s business, board, management, material projects, strategic objectives and growth prospects;
- audited financial statements for the past two or three financial years;
- an investigating accountant’s report commenting on the company’s financial information;
- a technical expert’s report (which, for mining entities, consists of a geological report);
- a summary of the material contracts to which the company is a party; and
- various statutory compliance information (for example, information about fees paid to various advisers in relation to the listing).

**Transaction-specific prospectus**

Once listed on the ASX, a public company whose securities are ‘continuously quoted securities’ may, subject to meeting certain requirements, issue a ‘transaction-specific prospectus’ to raise equity capital.

The Australian regulatory regime recognises that when a company issues continuously quoted securities, the market should generally already have all information necessary to reach an informed view about such securities, based on previous disclosures the entity has made to the market about its activities, financial standing and prospects. Theoretically, the market’s view will already be reflected in the price of those continuously quoted securities. The regime provides that, in respect of companies who satisfy certain criteria, the prospectus content rules discussed in the ‘Prospectus’ section above will be satisfied if the issuer lodges a ‘transaction-specific prospectus’ containing certain limited prescribed content.

Accordingly, issuers who are subject to ongoing continuous and periodic disclosure obligations (i.e., entities listed on the ASX) are not required to reproduce that information in a prospectus that offers continuously quoted securities (or options to acquire such securities). Instead, the entity must disclose the effect that the particular offer of securities will have on the issuer, and disclose material information about the issuer that is required by the prospectus disclosure laws, but that has been excluded from the issuer’s continuous disclosure notices until that point. This differs from a number of overseas regimes (such as the United Kingdom) that require a full-form prospectus for secondary raisings from its shareholders.

**Corporations Act – takeover provisions**

**General prohibition**

Companies seeking to raise equity capital must also comply with the takeover provisions in Chapter 6 of the Corporations Act.

Broadly, unless a prescribed exception applies, Chapter 6 prohibits the acquisition of shares in a listed company (or unlisted company with more than 50 members) as a result of which a person's voting power in the company increases from 20 per cent or below to more than 20 per cent, or from a point that is above 20 per cent and below 90 per cent.
Exceptions to the takeover prohibition

Two exceptions to the prohibition in Chapter 6 relevant to this discussion are acquisitions of voting shares resulting from:

a. an issue of shares pursuant to a ‘rights issue’ (being a pro rata offer of shares to existing shareholders) (the rights issue exception). This rights issue exception extends to an issue of shares to an underwriter of a rights issue; and

b. an issue of shares to an underwriter or sub-underwriter of a fundraising undertaken under a disclosure document (the underwriter exception).

Critically, these two exceptions enable companies to raise equity capital without breaching the Chapter 6 prohibition, while also ensuring appropriate protections for shareholders. The policy basis for the rights issue exception is that each shareholder has an opportunity to participate in the fundraising on a pro rata basis and thereby avoid dilution of their existing holding. The policy basis for the underwriter exception is that the takeovers provisions should not unduly prevent an issuer from using underwriting arrangements to manage the risk of a shortfall in a fundraising. Investors should be afforded adequate disclosure about the potential control effect of any underwriting arrangements.

In recent times, due to the volatile nature of the equity market for mining companies, issuers have increasingly structured rights issues to be underwritten or sub-underwritten by major shareholders, and those shareholders have been able to rely on either the rights issue exception or underwriter exception in the event their underwriting results in an acquisition of voting power that would otherwise breach the takeover provisions.

Anti-avoidance measures

Despite the rights issue exception and the underwriter exception, issuers need to be mindful of structuring fundraisings that could be considered as being designed to avoid the takeover prohibition in Chapter 6. Issuers who undertake an underwritten rights issue but have failed to take sufficient steps to minimise the effect of the issue or underwriting arrangements on the control of the issuer may risk intervention by ASIC or an application by a disgruntled shareholder or ASIC to the Australian Takeovers Panel.3 ASIC and the Takeovers Panel have broad powers to require the issuer to amend the terms of, or seek prior shareholder approval for, the fundraising if it is seen as being structured to avoid the takeover prohibition.

ASX Listing Rules

In addition to the Corporations Act, companies that are listed on the ASX must also comply with the Listing Rules.

The key Listing Rule relevant to equity fundraisings is Listing Rule 7.1. It provides that a listed entity may not, in any 12-month period, issue new equity securities equal to more than 15 per cent of the entity’s issued share capital at the commencement of the 12-month period without the approval of its shareholders. Listing Rule 7.1 is subject to certain prescribed exceptions detailed in Listing Rule 7.2, which include pro rata issues and issues made in connection with regulated schemes of arrangement and takeovers under the Corporations Act.

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3 The Takeovers Panel was established under the Australian Securities and Investments Commission Act 1989 (Cth) and is a peer review body that regulates disputes in corporate control transactions.
The Listing Rules also restrict the issue of equity securities by an entity to its related parties (which include directors), subject to certain exceptions detailed in Listing Rule 10.12 (which are similar to the exceptions in Listing Rule 7.2). Issuers also need to be cognisant of the application of Listing Rule 10.1 to security arrangements as part of a convertible debt security issue and seek shareholder approval or a waiver from the ASX for such an arrangement.

The ASX recognises the importance of the mining industry in Australia and is cognisant of the recent challenges faced by companies (including global market conditions and declining commodity prices) in raising sufficient capital to maintain operations, particularly in the junior exploration space. The ASX has put in place measures to facilitate access to equity capital, including by:

a ‘accelerated entitlement offers’, which are pro rata offers, conducted in a two-stage process. It allows companies to raise capital quickly in the first stage (generally in one or two days) from institutional shareholders (who typically do not require disclosure in relation to a fundraising). The second stage then involves raising funds from retail shareholders (with disclosure) on substantially similar terms, but according to a lengthier standard pro rata offer timetable;

b reducing the minimum time frame for a standard pro rata offer timetable, to improve the timeliness of raising capital; and

c a facility for smaller companies that obtain shareholder approval at their annual general meetings and meet certain criteria (namely having a market capitalisation of A$300 million or less and not being included in the S&P/ASX 300 Index at the time of the annual general meeting) to raise capital by the issue of up to 10 per cent of their issued share capital in a 12-month period in addition to the 15 per cent capacity in Listing Rule 7.1 mentioned above (a facility that has been popularly utilised by eligible mining companies).

Australian Securities and Investments Commission

As the primary supervisor of the Australian securities and financial markets, ASIC plays an important role in fundraisings by scrutinising disclosure documents. If ASIC considers there is a ‘defect’ in a disclosure document (a misleading or deceptive statement or an omission of information required to be provided under the Corporations Act), ASIC may issue a ‘stop order’ preventing the issuer from offering, issuing, selling or transferring its securities while that order is in force. In addition, if ASIC considers a fundraising is having an unacceptable control effect on the issuer, it may bring an application to the Takeovers Panel seeking orders protecting against the effect.

ASIC guidance – disclosure documents

ASIC has published several regulatory guides detailing its policy regarding information that should be included in a disclosure document. While these regulatory guides are not law, ASIC may take enforcement action (such as issuing a stop order) if an issuer does not comply with its guidance.

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4 Practically, before a stop order is imposed, the issuer will usually have the opportunity to discuss its concerns with ASIC and rectify any defects in the disclosure document by issuing a supplementary or replacement disclosure document.
ASIC has clearly articulated that disclosure documents must be worded and presented in a ‘clear, concise and effective’ manner and has provided extensive guidance on how this can be achieved.

ASIC also expects a prospectus to set out information about the risks associated with the offer, the securities offered and the issuer (including risks associated with the business model). Given the inherent speculative nature of the mining industry (particularly during the exploration phase), and the often critical short-term capital requirements of mining companies, the risks section of a disclosure document for a mining company is typically extensive. It should identify specific company and industry-related risks, including commodity price and exchange rate volatility risks, resource or reserve estimation risks, exploration risks, funding risks and sovereign risks. In recent times, ASIC (and the ASX) has placed particular emphasis on ‘forward-looking statements’ relating to production targets and the forecasting of financial information disclosed by mining companies. ASIC has made clear that there must be objectively reasonable grounds for companies to make such predictive statements.

**Liability**

If there is a defect in a disclosure document, certain persons involved in the offer including the directors of the issuer and underwriters (the relevant persons) may be liable for any losses suffered as a result of the defect.

In this regard, the Corporations Act contains a ‘due diligence defence’ to liability in respect of a defect in a disclosure document where the relevant person made reasonable inquiries to ensure, and after doing so believed on reasonable grounds that, the disclosure document did not contain any defects. Accordingly, it is customary for directors of the issuer and certain other persons involved in the offer to undertake a robust due diligence process to ensure that the issuer has complied with its obligations under the Corporations Act.

**Exceptions to requirement to issue a disclosure document**

As previously mentioned, there are a number of exceptions to the requirement to issue a disclosure document when raising equity capital. These include:

- offers to ‘sophisticated’ or ‘professional’ investors (typically high net worth or institutional investors);
- small-scale offers (being personal offers to not more than 20 investors where the amount raised is not more than A$2 million in a 12-month period); and
- offers to certain investors through holders of an Australian financial services licence.

There is also an option for listed entities who satisfy certain conditions (including the offer being a ‘rights issue’, and the shares in the issuer have not been suspended from trading for more than five days in a 12-month period), to offer securities to existing shareholders (including retail shareholders) without lodging a disclosure document. Broadly, the provisions operate on the basis that the combination of an IPO prospectus, as well as periodic and continuous disclosure up until the date of the offer, is sufficient in ensuring that information is adequately disclosed to the market. Companies typically undertake these offers without a disclosure document by issuing an ‘offer document’, which contains limited information about the offer and process of applying for the offered securities. Importantly, however, the ‘due diligence defence’ (mentioned above) does not apply to a rights issue without disclosure under this regime.
ii Foreign investment

Australia’s mining industry typically requires speculative or risk capital to finance mineral exploration and development and has historically relied heavily upon foreign direct investment. The relatively small population of Australia and its limited accumulated wealth has presented problems in raising adequate finance for mining ventures locally, the consequence being that foreign investment has been, and remains, crucial to development of the industry.

Generally, the Australian government encourages and welcomes foreign investment, with almost all proposals for foreign investment in recent years having been approved, subject to some notable (often politically sensitive) exceptions.

In the financial year ending 30 June 2016, mineral exploration and development ranked fourth by industry for levels of foreign investment. In 2015–2016 there were 182 foreign investment approvals in the mineral exploration and development sector for a total proposed investment of A$27.6 billion.

Regulatory regime

Foreign investment in Australia, which has been the subject of recent reform in 2015, is regulated by the Foreign Acquisitions and Takeovers Act 1975 (Cth) (FATA). The FATA is supplemented by the Foreign Acquisitions and Takeovers Regulation 2015 (Cth) (FATR) and is guided by the federal government’s Foreign Investment Policy (the Policy). The Foreign Investment Review Board administers the FATA, FATR and Policy, and the Australian Federal Treasurer (the Treasurer) is the Minister responsible for making decisions under the regime.

The Treasurer has extensive powers to block, impose conditions on or unwind an investment (in addition to imposing penalties) if the FATA is breached or if the Treasurer considers the investment to be contrary to the national interest. The regime broadly covers two types of actions:

a ‘significant actions’ – acquisitions concerning an Australian business or land where there is a change in control that meets certain threshold requirements. Foreign persons may, but are not obliged to, inform the Treasurer of such actions; and

b ‘notifiable actions’ – acquisitions regarded as both ‘significant’ and ‘notifiable’ actions that meet certain thresholds require notification to the Treasurer. Such actions (subject to applicable exemptions) broadly include acquisitions of direct interests in agribusiness, substantial interests in Australian entities, certain interests in Australian land and media businesses and acquisitions by foreign government investors.

Whether a transaction requires notification will depend on various factors including the type of investor, the type of investment, the industry sector in which the investment will be made and the value of the proposed investment. Proposals likely to require prior approval by the Treasurer include:

a acquisitions concerning Australian land (being residential real estate, agricultural land, vacant non-residential land or shares in land corporations or trust estates) with the following specific rules:

- foreign persons need approval from the Treasurer to buy or take an interest in prospecting, mining or production tenements where:
  - the interest provides the right to occupy Australian land and the term of the lease or licence (including extensions) is likely to exceed five years;
  - they provide an interest in an arrangement involving the sharing of profits or income from the use of, or dealings in, Australian land; or
• where a mining tenement is developed to an operational mine, it will then be considered developed commercial property. In which case, there is a monetary threshold of A$55 million (or A$1.094 billion for US, New Zealand, China, Chilean, Japanese and Korean investors) before approval is required;

b acquisitions of ‘direct interests’ by foreign governments (or their associates or separate government entities). Foreign government investors must also seek prior approval to start a new business or acquire an interest in land, including any interest in a prospecting, exploration, mining or production tenement;

c acquisitions of ‘substantial interests’ in existing Australian corporations or businesses with total assets over A$252 million (or A$1.094 billion for private US, New Zealand, China, Chilean, Japanese and Korean investors in non-sensitive sectors); and

d takeovers of offshore companies whose Australian subsidiaries or assets are A$252 million or more (or A$1.094 billion for private US, New Zealand, China, Chilean, Japanese and Korean investors in non-sensitive sectors).

iii Market overview

The mining sector attracts a broad range of investors with varying investment objectives.

In the junior mining and exploration sector, the inherent speculative nature often renders it unattractive to debt financiers and the bond market. This has resulted in the junior sector being predominantly supported by equity investors with high-risk and high-return investment objectives or, less frequently, higher yield corporate bonds.

There has also been a recent trend of junior mining companies who are facing financial difficulty, entering into convertible debt securities (being a type of hybrid debt-equity security). These securities typically provide short-term secured or unsecured loans, often on terms considerably favourable to the lender and with an option to convert the debt to equity at either a fixed or variable conversion rate at the election of the investor. This rewards the investor should the issuer experience growth in share price, but protects their investment via the security over the company’s assets and any interest rate return.

In contrast, larger mining production companies with consistent, significant earnings attract a wider range of investors, including investors in the bond market.

There has been recent increased activity from notable private equity funds investing heavily in the mining sector, and in a number of instances taking strategic cornerstone positions in companies.

The Australian mining industry is also a favoured destination for foreign investors, recently being ranked as the best country for mining investment globally.

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5 An interest of 10 per cent or more of an Australian business or corporation (regardless of value) or gross assets of that business or corporation, or an interest of less than 10 per cent where the foreign government or state-owned-enterprise has entered into a legal arrangement relating to the business or corporation, or the foreign government or state-owned-enterprise obtains special influence or control over the target business or corporation.

6 A foreign person acquires a ‘substantial interest’ in the ownership of a corporation or business if that person (and any associates) acquires 20 per cent or more of the ownership of the entity, or that person together with other foreign persons and each of their associates acquire 40 per cent or more in aggregate of the ownership. This ‘substantial interest’ threshold also applies to foreign government investors (and any associates or separate government entities).
iv Structural considerations

The predominant methods used by mining companies to raise equity capital are via:

a a placement to sophisticated and professional investors (which may or may not include existing shareholders);

b a pro rata offer or rights issue (both in standard and accelerated form) to existing shareholders; or

c a share purchase plan to existing shareholders (being a type of offer of securities designed primarily for retail shareholder participation as it limits each shareholder’s participation to a maximum of A$15,000 in a 12-month period).

As noted above, in recent times, there has also been an increasing trend towards mining companies (particularly junior to mid-level) raising capital through the issue of hybrid debt-equity securities.

Each structure has its advantages, disadvantages and prescribed procedures, and accordingly, a company will need to consider various factors when selecting the most suitable capital-raising structure, some of which are discussed below.

Issue price

The issue price of securities, along with the number of securities to be issued, will determine the quantum of the raising.

An issuer undertaking a placement or a rights issue will generally have the flexibility to commercially agree, or set on its own, the issue price of securities. The issue price will typically be driven by factors such as market demand, urgency of the need for funding, and market perception. By contrast, a share purchase plan has issue price limitations prescribed under the Corporations Act and the Listing Rules, which offers the issuer less flexibility.

Number of securities

Another critical consideration is the number of securities the company should issue.

As detailed above, other than where a specified exception applies, the Listing Rules restrict listed entities from issuing new equity exceeding 15 per cent of their share capital in a 12-month period without shareholder approval. As discussed in Section II.i, ‘ASX Listing Rules’, supra, companies that meet certain criteria may issue new securities comprising an additional 10 per cent of their share capital.

Relevantly, there are exceptions to the 15 per cent restriction in respect of an issue of shares under a pro rata offer or ‘rights issue’, an issue of shares to an underwriter of a rights issue, and an issue of shares under a share purchase plan. A company can rely on these exceptions when structuring a capital raising to obtain greater flexibility in the number of securities they can issue (noting that certain exceptions have their own conditions, for example, a share purchase plan is broadly restricted to issues of securities equal to 30 per cent of a company’s issued share capital).

A placement to sophisticated and professional investors will typically be undertaken utilising a company’s 15 per cent (and if applicable, the additional 10 per cent) placement capacity meaning that the number of securities issued will be dictated by these limitations.

When undertaking an offer of convertible debt securities, each security will generally be counted as the maximum number of equity securities into which it can be converted.
The takeover prohibition in Chapter 6 will also have bearing on the number of securities being offered. Relevantly, the two exceptions to the takeover prohibition (discussed above) are similar to the exceptions under the Listing Rules for a rights issue, and an issue of shares to an underwriter of a rights issue.

**Timing**
The timing for completion of a capital raising may vary significantly depending on the structure.

A placement to sophisticated and professional investors can be completed in one or two business days. A standard form rights issue will, on average, take 20 business days (in addition to the time taken to prepare a prospectus, if applicable). As discussed above, ASIC and the ASX allow for an ‘accelerated rights issue’ truncated timetable so that companies can offer securities to institutional shareholders at an earlier stage.

While share purchase plans generally have greater flexibility with respect to timing, they take, on average, 20 business days to complete. Share purchase plans are commonly conducted following an institutional placement to allow retail shareholder participation on a non-pro rata basis.

**Market perception**
Market perception is another relevant consideration particularly where, for example, a placement (whether to existing shareholders or otherwise) may be seen to have a dilutionary effect (and therefore may be viewed unfavourably by shareholders who cannot participate). Companies often provide justification to the market for conducting a placement instead of a pro rata offer, or ensure that an offer, such as a share purchase plan, is conducted in conjunction with the placement.

**Hybrid capital**
These securities can be attractive to investors because they offer downside protection (as there is no obligation to convert and investors receive a defined interest income) and provide an upside ‘equity kicker’ (as there is the ability to convert into equity to benefit from any capital growth in the underlying shares). Convertible debt securities are also attractive to issuers who can access significant funds quickly by structuring the security as a debt instrument until the equity component is approved by shareholders, without being constrained by the issuer’s 15 per cent placement capacity. However, convertible debt securities can be an expensive way of raising capital, particularly for financially troubled (and therefore riskier) issuers.

**v Tax considerations**
Australia has a complex tax regime with taxes levied by both the Commonwealth and state governments including income taxes, import duties, fringe benefits tax, withholding taxes, goods and services tax (GST), stamp duties, payroll tax, land tax and resource royalties.

**Income tax**
The Australian company income tax rate is currently 30 per cent (for medium-sized to large entities) of taxable income. Australian companies can elect to form a tax-consolidated group with wholly owned subsidiaries to treat the group as a single entity for Australian income tax purposes. This allows intragroup transactions to be ignored for income tax purposes. Companies
Australia

involved in exploration and development activities can receive an immediate deduction for certain exploration and prospecting expenditure, as well as deductions for activities relating to environmental protection and there are incentives for research and development expenditure.

**Tax implications for foreign investors**

Australian tax implications for a non-resident investor may be different depending upon whether they conduct business in Australia using an Australian subsidiary or an Australian branch of a foreign company. Both are taxed at the corporate tax rate with the Australian company taxed on its worldwide income, and the branch being taxed only on its Australian sourced income.

There are double tax agreements that exist between Australia and a number of other countries seeking to reduce or eliminate the double taxation of income. Taxation relief may be available under a relevant double tax agreement for a foreign resident entity if the activities do not constitute a permanent establishment in Australia.

Foreign entities deriving Australian income will need to consider tax provisions relating to repatriation of income, transfer pricing, and deductions available for operations in Australia that go beyond the scope of this chapter.

**III DEVELOPMENTS**

As discussed in this chapter, the most common ways of raising equity capital by mining companies in Australia in recent times have been by way of placements to sophisticated and professional investors, ‘rights issues’ to existing shareholders and share purchase plans. Recent declines in commodity prices have made accessing new funding and meeting the needs of existing financiers increasingly challenging. As a result, companies have been forced to pursue alternative funding options, such as by way of corporate consolidation with other companies that hold excess capital.

Australian mining companies have also turned to the international bond markets as an alternative source of funding. In a recent transaction, an Australian mid-tier exploration company raised funds to finance the development of its greenfield project through the issue of Nordic bonds. This was significant as such a financing option was previously considered unobtainable for a greenfield project without existing cash flows. The success of this fundraising may see more mid-tier exploration and development companies seeking to access bond markets to raise funds rather than pursuing more conventional equity (or hybrid equity) funding options.

In light of the challenging economic environment and in recognition of emerging growth industries (such as technology and innovation), the ASX has recently introduced a number of changes to the eligibility criteria for a company to list on the ASX. This includes a lift in the financial threshold to list on the ASX (based on the company’s profits or assets) and the introduction of a minimum ‘free float’ requirement (i.e., securities held by non-related parties of the listing entity that can freely trade on the ASX without restrictions). These changes may impact the ability of smaller unlisted mining companies to list on the ASX. ASX has also proposed to introduce further regulation in respect of ‘reverse takeovers’, being transactions where the number of shares being issued by the bidder in respect of the transaction (either as consideration in a scrip bid or issued to finance a cash bid) is equal to or greater than the number of shares on issue in the bidder. Once the proposed changes take effect, shareholder approval at the bidder level will be required to undertake a reverse takeover. This reform is likely
to be particularly relevant to the mining industry as ASX research has indicated that of the scrip transactions undertaken between 2012 and 2016, half of the transactions that would fall within the new definition of a reverse takeover were in the resources sector.

Finally, legislation has recently been implemented to facilitate crowd-sourced equity funding as an alternative capital-raising method. Although not currently relevant for most mining companies, such alternative options may become more applicable to the mining industry in the future.
Chapter 20

BRAZIL

Carlos Vilhena and Adriano Drummond C Trindade

I INTRODUCTION

The mining sector is a significant part of the Brazilian economy and accounts for a large proportion of Brazilian exports. According to the Brazilian Mining Association (IBRAM), national mineral production in 2016 was US$24 billion, which represented a decrease in relation to previous years, but the forecast for 2017 is a slight increase to US$25 billion. IBRAM further reports that iron ore was the most exported mineral substance in 2016, representing approximately 61.5 per cent of overall mineral exports, followed by gold (13.4 per cent), copper (8.9 per cent) and niobium (6.2 per cent).

Despite those significant figures, the Brazilian capital market for mining activities does not present the same level of sophistication as in other jurisdictions. Apart from a few companies that are listed on the São Paulo stock exchange (e.g., Vale, CSN, Gerdau, Magnesita and Ferbasa), most capital market transactions involving mining assets are structured in other markets through parent companies, which are usually listed on the Toronto Stock Exchange (TSX) or on the Australian Securities Exchange. Juniors and mid-tier exploration and mining companies tend to float in those jurisdictions where exploration and mining markets are more developed. The TMX Group reports that over 40 with assets in Brazil are listed in the TSX or TSX-V. In some cases, the original shareholders are from Brazil and resort to a non-Brazilian, more traditional, market to raise capital.

In addition to the lack of an investment culture in the mining business, other factors may explain the slow development of Brazilian capital markets for mining, compared with other jurisdictions. The first is the economic downturn of the mining sector, which has been experienced worldwide over the past few years. The second reason is attributable to the political crisis that led President Rousseff to be impeached in 2016 and replaced by President Temer. The third reason is the lack of culture of the Brazilian market to invest in stock exchanges in the mining industry.

Those factors might explain the large preference of investors towards investing or floating on the Toronto Stock Exchange. In the past few years, the number of public offerings in the Brazilian market reduced significantly. A handful of mining companies with operations in Brazil postponed or cancelled their listing plans. Likewise, the number of companies that hold mining assets in Brazil listing in other jurisdictions has also fallen significantly as a result of the market conditions of the mining sector. More recently, the interest of companies with

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mining assets in Brazil towards listing in traditional jurisdictions such as in Toronto has started to recover with a few offerings and plans for offering. If confirmed, this change in the market behaviour may confirm to be a trend.

II  CAPITAL RAISING

i  General overview of the legal framework

Capital raising in Brazil in general is subject to federal corporate laws, capital markets laws and regulations issued by the securities commission (CVM).

Listing in Brazil

There are no specific requirements for raising capital for mining activities in Brazil. Mining companies listed on the São Paulo stock exchange will be subject to the usual requirements in terms of governance and disclosure that are applicable to other industries.

On the other hand, there are no incentives tailored for the mining sector either. Mechanisms such as flow-through shares that may be common in other jurisdictions have no equivalent in Brazil. In terms of incentives for exploration companies, there were studies to create benefits so that the shareholders of listed exploration companies could deduct exploration-qualified expenditure for tax purposes. As the incentive implies a reduction of taxes assessed by the Brazilian government, such studies are still under consideration by the Ministry of Industry, Foreign Trade and Services (MDIC) and the Brazilian Agency for Industrial Development, and the mechanism has not been put in place.

As a consequence, the absence of specific rules considering the particularities of the sector, coupled with high costs in terms of governance and disclosure requirements, discourage exploration companies, juniors and companies with smaller projects or operations from listing in the Brazilian market.

Foreign investment

Foreign direct investment plays an important role in the Brazilian economy and the legislation imposes few requirements (such as the online registration of the investment within 30 days of the date the funds are converted into Brazilian currency). According to the United Nations Conference on Trade and Development, Brazil was the seventh most popular destination for foreign direct investment in 2016, in the amount of US$58.7 billion. In terms of the overall investment in Latin America, Brazil was the main destination for 41 per cent of investment in general.

Foreign investors find no legal restrictions on acquiring stakes in Brazilian mining companies, but in the past few years, the government has put forward the interpretation that restrictions on non-Brazilian ownership apply to border areas (i.e., areas within the 150-kilometre wide strip of land parallel to Brazilian borders), as in other countries of the region. Hence, for those companies based in or that have mining assets in the border area, non-Brazilian equity interest is limited to 49 per cent, directly or indirectly.

Likewise, the Brazilian government also establishes that Brazilian companies that are directly or indirectly controlled by non-Brazilians are subject to certain requirements to acquire rural land, such as the prior approval of the National Institute for Colonisation and Agrarian Reform (INCRA). Since access to land is of paramount importance to the mining sector, non-Brazilian investors should bear in mind this element in channelling their investment.
Debt

One of the main sources of funding for mining projects is through debt transactions. The National Bank for Economic and Social Development (BNDES) has played a key role in financing major mining projects at more favourable rates. It operates in strengthening the capital structure of private companies and provides more favourable conditions for financing intended for projects that contribute to social, cultural and technological development. In 2016, the BNDES teamed up with the Funding Authority for Studies and Project (FINEP) to financially support investment in projects that deal with scientific or technological development. This initiative is known as ‘Inova Mineral’ and approximately US$400 million was earmarked to be used in the initiative. The support of FINEP covers all stages and dimensions of the scientific and technological development cycle: basic research, applied research and the development and improvement of products, services and processes. Mining companies that fit in one or more of those activities may benefit from favourable conditions for funding.

Brazilian commercial banks also provide finance for projects, but in many cases the internal requirements make it harder for projects at the exploration stage to be funded, particularly considering the economic downturn and the political turmoil. Non-Brazilian-based banks may also provide funding for mining projects and usually do so through pre-export finance mechanisms that ensure more favourable taxation.

ii Market overview

Investment in the Brazilian mining sector comprises both Brazilian nationals and non-Brazilian investors. The number of Brazilian investors in the mining sector is not as high as in other sectors of the economy, but their importance should not be downplayed. Vale accounts for a relevant part of the investment in mining, and so do other mining companies, such as Votorantim. In addition, private equity funds are frequently seen in the market, as well as pension funds and companies in general (for instance, in the past few years, steel companies have also gone into the mining business). Unlike other markets, however, retail investors are not common in the Brazilian market.

Non-Brazilian investors are usually global funds, private equity funds, pension funds or mining companies that seek to reinvest and expand their portfolios, as well as companies that seek to secure the supply of raw materials for their industries.

iii Structural considerations

Given the economic downturn and the market conditions of the mining sector, also influenced by the deteriorating political situation, alternative methods of access to funding have been developed and have become more popular in Brazil.

Royalty transactions are common in Brazil and there are more companies specialising in acquiring royalties. The main hurdle is the fact that Brazilian mining legislation does not provide for the registration of the royalty against title, so the royalty remains a contractual obligation that cannot be imposed on a third-party acquirer of the mining property unless such party expressly acknowledges that it is bound by the royalty. Consequently, a series of legal mechanisms and securities need to be put in place to reduce the exposure and provide more assurances to the royalty creditor.

During the past few years, there have also been a number of streaming transactions in Brazil. Streaming arrangements are contracts for ongoing supply of mineral production under which, upon advance payment of a premium, the buyer agrees to purchase at a fixed
discounted and predetermined price, all or part of the mineral production to be extracted by a mining company during a certain period or even throughout the life of the mine. The mining company receives payment up front, which enables it to develop, construct and operate or expand the mine. This arrangement allows the mining company to capitalise on the basis of proven but still unexplored mineral reserves at a cost usually below that of loans.

These streaming arrangements have been praised by mining companies, as they have access to additional fundraising mechanisms to develop the mineral project, and have a purchaser for all or part of its future production (depending on the agreement). Moreover, contrary to capital investment financing, streaming arrangements avoid debt-financing costs, particularly at times when credit access conditions are unfavourable.

One major difficulty of Brazilian mining companies in raising capital is the gap between reporting requirements under Brazilian mining law and other typical reporting standards adopted by the market. Reporting requirements in Brazil still abide by legislation enacted in the late 1960s, which employs standards and terminology that is not the same as in the current market (e.g., the inadequate use of ‘measured, indicated and inferred reserves’). This means that the reporting obligations to the Brazilian Department of Mines (DNPM) are much less detailed than those required by banks and investors. In some cases, Brazilian companies reach the transitional stage between exploration and mining pursuant to domestic legislation, but still need to undertake further exploration so as to produce the report that provides a resource or reserve that is in compliance with the NI43-101 or JORC standards. In order to bridge that gap, Brazilian mining associations (i.e., the Brazilian Association of Exploration Companies, the Brazilian Agency for the Development of the Mining Industry and IBRAM) joined the Committee for Mineral Reserves International Reporting Standards (CRIRSCO). As a result, a non-binding, voluntary Brazilian Code for Resources and Reserves that follows the international standards was put together and submitted to CRIRSCO, which will also contribute to the formation of qualified persons in Brazil.

More recently (a couple of weeks before this article was concluded), the government enacted changes to the Brazilian Mining Code as part of a reform of the sector to encourage investment. One of the changes made to the Mining Code was the possibility of adopting international standards for reporting and abiding by best international practices, which gives room to more market-oriented reporting requirements. This will be subject to forthcoming regulation to be enacted by the newly-created National Mining Agency (further details below).

In the environmental field, the accident involving the Samarco dam in November 2015 is likely to result in more stringent regulation on environmental issues, and more specifically on the use of dams by mining operations, as well as more severe supervision of environmental authorities and public prosecutors. For instance, new regulations were already issued by the DNPM on tailings dams, which contains more requirements to those companies that operate such dams.

A final comment should be made with regard to the social and environmental liability of financial institutions that provide funds for mining and infrastructure projects in general. Although no legal provisions impose such liability, the trend is that such institutions are deemed increasingly responsible for the use of funds borrowed by companies – particularly those that use environmental resources and could potentially create a social and environmental footprint. In 2015, a National Monetary Council regulation involving the liability of
financial institutions started to be implemented. Such regulation requires that each financial institution to put in place a social and environmental policy. It may result in increasing liabilities to financial institutions in the future.

iv Tax considerations

Brazilian legislation does not provide for any tax advantages or incentives to persons engaged in mining activities, or their investors and lenders.

As a general comment, Brazilian corporate income tax (IRPJ) is levied at the rate of 15 per cent on the taxable profits. A 10 per cent surcharge is levied on the actual profits, presumed profits, or profits determined by the tax authorities, in excess of 240,000 reais per year. Taxable profits are ascertained by deducting the operating costs and expenses from the gross income originating from the company’s core activity and incidental businesses. Some of these costs and expenses are not deductible because of their nature or the amount involved. There are also certain events of tax exemption upon ascertainment of the company’s taxable profit.

Moreover, it is worth mentioning that Brazilian legal entities are allowed to carry forward losses indefinitely, which is of paramount importance for companies that undertake exploration, development and later mining activities; however, such losses can only offset 30 per cent of the taxable profits, which can result in deferral of the utilisation of the losses in the event the legal entity happens to have material losses and profits that are not substantial.

In some cases, a legal entity may opt for taxation on presumed profits instead of actual profits. Under the presumed profit regime, the IRPJ’s calculation base is determined upon the application of predetermined rates (that may vary depending on the activity carried out), as set out in the applicable law, over revenues derived by the legal entity from the execution of its operational activities. Expenses are not deductible to the Brazilian company when it is taxed under the presumed profit regime and, in order to be taxed under this system, the company cannot have had a gross income over 78 million reais.

As a general rule, the income, capital gains and other earnings paid, credited, delivered, employed or remitted by a Brazilian source to a foreign-based individual or legal entity are subject to withholding tax at a general rate of 15 per cent. As from 1 January 2017, the tax rates on capital gains of Brazilian individuals or non-residents (both individuals and companies) would be: (1) 15 per cent for the part of the gain that does not exceed 5 million reais; (2) 17.5 per cent for the part of the gain that exceeds 5 million reais but does not exceed 10 million reais; (3) 20 per cent for the part of the gain that exceeds 10 million reais but does not exceed 30 million reais; and (4) 22.5 per cent for the part of the gain that exceeds 30 million reais. The rates above may reach 25 per cent for income paid to a person residing in a jurisdiction deemed a tax haven or privileged tax regime for Brazilian tax purposes (i.e., a country or territory where income is not taxed or subject to taxation at a maximum rate lower than 20 per cent, or does not disclose information about the ownership or beneficial owner of the company’s income). When it comes to countries and regimes aligned with international standards of fiscal transparency, in accordance with rules established by the Brazilian tax authorities (on a par with OCDE standards), such minimum threshold of 20 per cent is decreased to 17 per cent.

The social contribution on net profits (CSL) applies to Brazilian companies (including financial institutions), and is calculated on the net profits before the allowance for income tax, adjusted by the additions, exclusions and offsets prescribed by tax law. The CSL rate is 9 per cent and the figures paid are not deductible from the income tax base (actual profits).
The profit participation programme contribution (PIS) and the social security financing contribution (COFINS) are levied at the combined rate of 9.25 per cent, assessed over the gross billings of the company.

The tax on financial transactions (IOF) is a tax on foreign exchange, securities, credit, gold and insurance transactions. The Minister of Finance sets the rates of the IOF tax, subject to limits set out by law. The IOF/Exchange is currently imposed on a variety of foreign-exchange transactions. Currently, for most exchange transactions, the rate of IOF/Exchange is 0.38 per cent.

The tax on distribution of goods and services (ICMS) is a state VAT levied on the circulation of goods (thus covering the entire chain of trades from the manufacturer to the end consumer) and on the provision of intrastate and interstate transportation and communications services. Normally, the transaction value serves as the ICMS tax base. The ICMS is paid by the trader or provider of carrier or communications services.

The ICMS is a non-cumulative tax and, as such, generates a tax credit to be offset by the product or service recipient against the tax payable on future transactions. Each Brazilian state is free to establish its own ICMS rates (generally between 17 and 18 per cent). The ICMS tax exemptions, breaks and incentives are granted or cancelled via agreements entered into among the Brazilian states; however, these states often grant ICMS tax breaks and incentives to attract investment without the approval of other states, generating a ‘tax war’.

The tax on services (ISS) is assessed on the services provided by a company or independent contractor or professional, in accordance with a list of services attached to a federal supplementary law. This tax is levied by the local municipality at a rate of 2 to 5 per cent on the service value.

Mining activities are subject to a statutory royalty (CFEM), which was increased a few weeks before the finalisation of the article to up to 3 per cent – depending on the substance, but in most of the cases the applicable rate is 2 per cent – of the revenue arising from the sale of the mineral product. In the most dramatic case, the rate for diamonds increased from 0.2 per cent to 3 per cent. Gold had its rate increased from 1 per cent to 2 per cent, and iron ore saw the rate changing from 2 per cent to a sliding scale where the 4 per cent rate can apply when iron ore prices are above US$100.00 per tonne according to the Platts Iron Ore Index.

The government also enlarged the calculation basis of CFEM so as to restrict deductions only to those taxes that levy on the sale of the products. External transportation and insurance costs are no longer deductible, which will increase significantly the CFEM payable by those producers that have logistics associated to their businesses. For those companies that use the mineral substance in their industrial process to create an industrialised product, the statutory royalty shall be calculated based on current market prices or a reference price, both to be defined by the National Mining Agency.

The recent changes to Brazilian mining laws also introduced a new charge, namely the Mining Activity Inspection Fee to be calculated annually on a ‘per-mining title’ basis. It ranges from US$ 300 to US$ 1500 depending on the stage of the mineral rights.

It is worth noting that, over the past few years, three states (Minas Gerais, Pará and Amapá) also created ‘inspection fees’. A close review of these state fees, however, shows that they are actually proportionate to the mine production and are tantamount to an additional royalty.
As a measure to foster regional development, exports and the development of infrastructure, there are a number of tax breaks and incentives that investors should consider. Legislation provides for the reduction of IRPJ for industries that are established in the Amazon region or in the north east of the country as a measure to industrialise those regions.

Exports generally enjoy tax breaks in terms of ICMS and export taxes. Likewise, there are incentives for the import of machinery with no equivalent in the domestic market that will be used in the production of goods for exportation.

Finally, the government has granted tax benefits to ‘infrastructure debentures’ so as to reduce taxation on the income paid from debentures issued by special purpose companies created to invest in infrastructure projects (logistics, transportation, energy, telecommunications, sanitation or irrigation). Since many mining projects require associated logistics, these tax benefits should be taken into account by investors.

III DEVELOPMENTS

In the fifth edition of The Mining Law Review, we stated that ‘any changes to be proposed by [President Temer’s] government will not depart significantly from the current system (as opposed to the bill sent to Congress by Ms Rousseff’s government). So one can expect reforms to the mining sector that are more market-driven, although conversely there will probably be an increase in mining royalties.’ In fact, a couple of weeks prior to the conclusion of this article, the President of the Republic enacted three Provisional Measures to amend existing mining legislation. The first Provisional Measure (MP 789) altered the method to calculate the base value of CFEM – from net income to gross income – and changed applicable rates to different minerals. The second Provisional Measure (MP 790) amended around 30 provisions of the Mining Code seeking to modernise and address regulatory inconsistencies. Finally, the third Provisional Measure (MP 791) created the National Mining Agency (ANM) to replace the DNPM; and instituted an ‘inspection fee’ to be paid annually by holders of mineral rights. Provisional measures are executive orders with immediate effect, but that need to be reviewed by Congress within 120 days. Congress can approve, amend or reject each of the Provisional Measures.

The changes to CFEM enacted through MP 789 did not move towards strengthening the mining sector. The increase of the calculation base and the increase in royalty rates (as described above) augmented significantly the government-take (particularly for some substances e.g., diamonds, gold and iron ore, the latter depending on market prices). Although mineral royalties in Brazil may still be low if compared to other large mining countries – as claimed by the government – the overall tax burden of a mining operation in Brazil shows a higher government-take compared to other mining jurisdictions.

The ‘inspection fee’ described above was clearly created for collection purposes and will probably be used to finance the new National Mining Agency. However, the new Agency would already be feasible had the CFEM share to which the DNPM is already entitled not been withheld by the Treasury, as it has happened in past years – and never actually reached the final recipient, i.e., the DNPM. Instead of solving the contingency issue, the government chose to assign the burden over to the industry by means of the ‘inspection fee’.

The amendments to the Mining Code presented by MP 790 bring some beneficial propositions to the industry. The increase of maximum exploration term from six years to eight years, added by the possibility of continuing exploration after submission of the final exploration report, are useful measures to deal with the transition from exploration to mining.
However, the opportunity has been lost (at least for the time being) to propose developments on important matters, such as measures to facilitate mining finance, mechanisms to regulate access to public and private areas for exploration and mining, recognising mining rights as a property right (‘in rem right’ or ‘real right’), updating the Mining Cadastre, among others matters. In short, the government was very timid in introducing changes and new measures that could actually benefit the investor and the mining sector.

The creation of ANM to replace DNPM, as provided for in MP 791, places the mining industry into the same management model that has been applied to the oil and gas, power and telecommunications sectors for two decades in Brazil. ANM will have a board made up of five members with fixed terms of office in an attempt to reduce political influence and give higher independence to the regulatory agency. The practice adopted for other regulatory bodies – where decisions are made jointly, sessions are public, proposed regulatory changes go through public consultations at which the agency must review and provide its opinions and suggestions, and procedures become more transparent – may bring significant gains for the industry if actually put in place. The key, however, is that ANM does not exclusively represent a name change, but it will be endowed with budgetary funds to implement the new administrative framework and meet the purposes expected from a regulatory body. Creating a new agency with the same low budgets as those of DNPM may mean an aesthetic measure only.

On a final note, it is worth mentioning that the Congress has to review the three Provisional Measures until the end of November 2017 (the deadline is 28 November 2017). Amendments will probably be made and, as of the time of preparation of this article, around 500 suggested amendments had been presented. This means that the second half of 2017 and first half of 2018 will probably be regarded as a transition period into a new model that will have a new mining agency in place, some new rules, and increased charges. The precise rules will only be known once Congress concludes its review and the President of the Republic sanctions (or vetoes) the amendments to be made by Congress. Hence, there is still an opportunity for adjusting the framework laid down by MPs 789, 790 and 791 towards a more attractive environment to mining investment.
I INTRODUCTION

More mining companies are listed on the Toronto Stock Exchange (TSX) and the TSX Venture Exchange (TSXV) than on any other stock market in the world. Each year, more equity capital is raised in Canada for mining exploration and development than in any other capital market.

This is the case even though many of the companies listed in Canada have all or nearly all of their mining and exploration activities outside Canada. Canada’s mining capital markets are comprised of Canadian issuers with projects in Canada and abroad, and foreign issuers with projects in Canada or with no affiliation to Canada other than their Canadian listing. Canada is where the world comes to finance mining exploration and development.

As an overview of the Canadian securities regulatory system, in general, regulatory standards imposed by Canadian securities regulators and stock exchanges are typically comparable to US standards (although when it comes to mineral disclosure, Canada and the US have very different rules). The most important thing to understand about the structure of the Canadian securities regulatory framework, however, is that it is largely the responsibility of the governments of Canada’s 10 provinces and three territories. While there have been ongoing efforts to create the equivalent of a national securities regulator with responsibility over a single set of national securities laws and regulations, certain provinces have resisted on constitutional grounds. As a result, Canada does not have a national securities law or a national securities regulator. Rather, the laws themselves are provincial and territorial, and many substantive aspects of securities regulation, such as registration and prospectus requirements, and exemptions and continuous disclosure requirements, are harmonised through the use of ‘national instruments’ or ‘national policies’, which are adopted by each of the provincial and territorial regulators. In addition, the national electronic filing system (SEDAR) and the passport system encourage regulators to delegate responsibilities to one another, effectively creating a system of ‘one-stop shopping’ for issuers and registrants for most issues.

As the home jurisdiction for the TSX and the principal regulator for a majority of Canadian reporting issuers, the Ontario Securities Commission (OSC) has generally taken a more active role in the development of securities law in Canada through the introduction of various regulatory instruments, policies and rules. As such, the OSC tends to exercise a very broad regulatory and disciplinary jurisdiction, and is arguably the nearest equivalent in Canada to the Securities and Exchange Commission in the US. Given the importance of

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mining in the Canadian capital markets, the OSC is active in the formulation and application of mining disclosure rules in Canada. In addition, given that many mining and exploration companies are based in Vancouver, the British Columbia Securities Commission is also active in this area.

Canada’s mining capital markets benefit from the presence of a large community of bankers, lawyers, engineers and other professionals with deep experience in mining activities.

II CAPITAL RAISING

i General overview of the legal framework

Capital raising in the Canadian capital markets is governed in particular by the securities laws and regulations of each of the provinces and territories of Canada, the rules of the stock exchange applicable to listed companies and the corporate law applicable to the issuer.

Prospectus offerings and private placements

The securities laws and regulations provide that distribution of shares, debt securities and other securities must be preceded by the filing of a prospectus to be cleared with the principal securities regulator of the issuer, which is typically the regulator of the province where the head office of the issuer is located. Subsequent to an initial public offering or listing, issuers can proceed with follow-on offerings in an efficient manner through the use of short-form prospectuses that incorporate by reference the latest financial statements and other continuous disclosure documents of the issuer. Issuers in the Canadian capital markets have also made extensive use of a public offering financing method known as a ‘bought deal’, whereby underwriters commit to purchasing an entire offering at a fixed price immediately before the offering is announced and before any marketing efforts, thereby providing a quick and efficient method to raise capital without execution risk.

There are exemptions from the prospectus requirements of Canadian securities laws that allow capital to be raised on a private placement basis. These are applicable whether or not the issuer is based in Canada. For example, distributions of securities to investors who qualify as ‘accredited investors’ and purchases of securities, by investors who are not individuals, for cash at a purchase price of at least C$150,000 are exempt from the requirement to file a prospectus.

In addition to prospectus requirements, any individual or entity who is in the business of trading in securities must be registered as a dealer, subject to exemptions. There are exemptions that apply to, among other circumstances, distributions in Canada of securities of non-Canadian entities by non-Canadian dealers who are registered in a similar capacity in their jurisdictions.

In addition to obtaining a listing in connection with an initial public offering, mining projects can also obtain a listing through a reverse takeover pursuant to which an existing listed shell company acquires a mineral project in consideration for the issuance of a number of shares that results in the existing owners of the project controlling the listed company.

Continuous disclosure requirements

Once a company completes an initial public offering by way of a prospectus filed in a province of Canada, or lists its shares on a Canadian stock exchange, such company becomes a ‘reporting issuer’ under applicable securities laws and is subject to continuous disclosure requirements.
The Ontario Securities Commission has stated that, as a general principle, the purpose of continuous disclosure is to promote equality of opportunity for all investors in the market. Disclosure achieves this by advising the investors, promptly, of all of the material facts that might reasonably affect an investment decision. The filing of a prospectus is the first link in the chain of disclosure, but it must be followed up with the continuous reporting of information and developments that might affect investment decisions.

Two kinds of reporting are required under Canada’s continuous disclosure regime: ‘periodic’ and ‘timely’. Periodic reporting requires the reporting issuer to prepare and file continuous disclosure documents such as financial statements, management’s discussion and analysis, proxy circulars and annual information forms. Timely reporting provisions require the reporting issuer to disclose material changes as they occur through press releases and material change reports. Reporting issuers are also required to file business acquisition reports and material contracts in a timely fashion. ‘Reporting insiders’, a category that includes members of senior management or the board, key personnel and significant shareholders, must also report trades in the reporting issuer’s securities, as well as interests in related financial instruments and changes in economic exposure, to the reporting issuer, generally within five days.

**Disclosure for mineral projects**

Although the Canadian capital markets, the TSX and TSXV continue to lead global mining equity finance, this pre-eminent position could have been permanently ended by the infamous Bre-X scandal in 1997. In an effort to restore confidence in Canadian capital markets following Bre-X, the Canadian securities regulators, stock exchanges and mining industry participants worked together to introduce new regulatory standards. The result was National Instrument 43-101 – Standards of Disclosure for Mineral Projects (NI 43-101), which provides specific rules for mining disclosure. Canadian and foreign mining companies accessing the Canadian capital markets, whether by way of a public offering or through the exempt market, are of course subject to the general regime of securities laws applicable to all issuers, but in addition they must adhere to NI 43-101. Accordingly, in this chapter we will deal primarily with NI 43-101.

NI 43-101 applies to all disclosure, written and oral, made in Canada by every issuer (all private and public companies) with respect to a ‘mineral project’ on each property ‘material’ to such issuer. A ‘mineral project’ means ‘any exploration, development or production activity, including a royalty interest or similar interest in these activities, in respect of diamonds, natural solid inorganic material, or natural solid fossilized organic material including base and precious metals, coal and industrial minerals’.

The disclosure regime under NI 43-101 is founded upon three fundamental pillars:

a. disclosure standards: rules prohibiting certain mineral disclosure and prescribing mineral disclosure standards;

b. qualified persons: rules requiring that a ‘qualified person’ (who, in many circumstances, must be ‘independent’, but for established producing issuers need not be independent) prepare or supervise all of an issuer’s disclosure of scientific and technical information relating to each mineral project on a property material to the issuer. In most instances, the qualified person must certify the disclosure and will be liable for any misrepresentations; and

c. technical reports: the requirement that all scientific and technical information relating to a mineral project on each property material to the issuer contained in a prospectus.
(or another type of disclosure document set out in NI 43-101) be based upon and supported by a technical report in prescribed form (a ‘technical report’) authored and certified by a qualified person (who again for established producing issuers need not be independent).

**Disclosure standards**

Under NI 43-101, the general principle is that an issuer may only make disclosure of a quantity and grade of mineralised material if such disclosure describes the material within certain categories of either ‘mineral reserves’ or ‘mineral resources’. Mineral resources are defined within categories based upon the level of confidence and certainty as to the quantity and grade of the material being described, where ‘inferred resources’ are the least certain, ‘indicated resources’ reflect greater confidence based upon more extensive exploration results and ‘measured resources’ are most certain based upon even more comprehensive results and data. Mineral reserves are mineral resources to which feasibility-level economic analysis has been applied, such that on the basis of at least a ‘preliminary feasibility study’, the mineral resources have been shown to have economic feasibility. Mineral reserves are defined in two categories, ‘probable reserves’ and ‘proven reserves’, again relating to the level of certainty of the material being described.

The introduction of these categories resulted in a level of standardisation in mineral disclosure from one company to the next. On the other hand, it is important to recognise that all such categorisations are, nonetheless, the result of determinations made by the qualified persons generating the disclosure, having regard to all relevant factors in light of the given facts, including geology, metallurgy and a host of other considerations. As a result, while there may be some level of comparability (for example, comparing indicated resources of silver at one deposit to indicated resources of silver at another), a variety of factors may also make any such comparison one of apples to oranges, rather than apples to apples.

In general, disclosure of quantities and grades can only be made if stated with attribution to any of the five categories of reserves and resources.

There are disclosure exemptions, one of which is for ‘exploration targets’. This exemption is very narrow and must follow the strict guidelines set out in NI 43-101. An issuer may make disclosure of a potential quantity and grade of a mineral deposit that is to be the target of further exploration if:

- the issuer expresses the estimate of the quantity and grade in terms of ranges for both quantity and grade;
- the issuer explains how the estimate was made; and
- the disclosure includes a statement to the effect that ‘the potential quantity and grade is conceptual in nature, there has been insufficient exploration to define a mineral resource and it is uncertain if further exploration will result in the exploration target being delineated as a mineral resource’.

Another exemption is that issuers may make disclosure of mineral reserves and mineral resources in accordance with certain sets of disclosure standards accepted in other countries. While certain international codes, such as the JORC Code, are very similar to NI 43-101 and typically require little to no reconciliation, other codes are less similar and reconciliation with NI 43-101 is more complicated.
Qualified persons

NI 43-101 introduced the requirement that all disclosure of a scientific or technical nature (including resources and reserves) disclosed by an issuer in respect of a mineral project on any of its material properties be based on information either prepared by, or the preparation of which has been supervised by, a qualified person. Under NI 43-101, a ‘qualified person’ means an individual who:

- is an accredited engineer or geoscientist;
- has at least five years of experience in mineral exploration, mine development or operation or mineral project assessment;
- has experience relevant to the subject matter of the mineral project and the technical report in respect thereof;
- is in good standing with a self-regulatory professional organisation acceptable under NI 43-101; and
- in the case of a professional organisation in a foreign jurisdiction, has a certain minimum membership designation.

If the disclosure described above is written disclosure, the qualified person must be identified in the disclosure and must disclose how he or she verified the data.

Technical reports are required to be prepared by or under the supervision of one or more qualified persons, and such qualified persons are required to sign and file with the securities regulatory authorities a certification and consent. In addition, in connection with the preparation of a technical report, at least one qualified person responsible for preparing or supervising the preparation of such technical report must complete a current personal inspection of the property that is the subject of the technical report.

Qualified persons must complete certifications and consents (addressed to the applicable securities regulatory authorities) to each technical report before it is filed on SEDAR. When filing a technical report, if the information in the technical report is also included in a disclosure document, the qualified person must also complete and file a consent confirming that the qualified person has read the disclosure, and that it fairly and accurately represents the information in the technical report.

The general rule in NI 43-101 is that qualified persons are required to be ‘independent’ of an issuer, but a non-independent qualified person is entitled to act for a ‘producing issuer’. A producing issuer is an issuer that has had gross revenues derived from mining of at least C$30 million in its most recently completed financial year and at least C$90 million aggregate in the three most recently completed financial years. For the purposes of NI 43-101, a qualified person is ‘independent’ of the issuer ‘if there is no circumstance that could, in the opinion of a reasonable person aware of all relevant facts, interfere with the qualified person’s judgment regarding the preparation of the technical report’.

Technical reports

Technical reports are of fundamental importance in Canada, as the information they contain will form the basis of all of the issuer’s disclosure about its material mineral projects. Subject to certain narrow exemptions, technical reports are required to be prepared by qualified persons who are independent of the issuer (and accordingly, the preparation of technical reports can have a significant impact on the timeline of any listing or financing transaction).
An issuer is required to prepare and file a technical report in the circumstances set out in NI 43-101. In general terms, NI 43-101 requires an issuer to file a technical report to support disclosure of scientific or technical information in any of a number of public disclosure documents, notably:

a. a long-form prospectus;
b. a short-form prospectus that contains a first-time disclosure of a preliminary assessment, mineral reserves or mineral resources on a property material to the issuer and where such disclosure constitutes a material change in respect of the affairs of the issuer; or a change in a preliminary assessment, mineral reserves or mineral resources on a property material to the issuer and where such disclosure constitutes a material change in respect of the affairs of the issuer.
c. an annual information form;
d. a management information circular in which such information is presented and describing a transaction in which securities are to be issued; and
e. a takeover bid circular in which a first time disclosure is made of a preliminary assessment, mineral reserves or mineral resources in respect of a property material to the offeror and in which the offeror is offering its securities as consideration in the bid.

Usually, the technical report must be filed not later than the time the disclosure document containing the information it supports is filed or made available to the public.

An issuer is also required to prepare and file a technical report to support disclosure in a press release or other written disclosure where such disclosure is either:

a. a first-time disclosure of a preliminary assessment, mineral reserves or mineral resources on a property material to the issuer and where such disclosure constitutes a material change in respect of the affairs of the issuer; or
b. a change in a preliminary assessment, mineral reserves or mineral resources on a property material to the issuer and where such disclosure constitutes a material change in respect of the affairs of the issuer.

However, an important distinction to be made in respect of press releases is that the technical report is to be filed within 45 days of the issuance of the press release.

The form and content of technical reports are prescribed in Form 43-101F1. Technical reports are all required to exactly follow the form requirements (headings, contents). Additionally, technical reports are required to be prepared for a mineral project on each property ‘material to an issuer’.

A key issue in respect of the technical report requirement is the meaning of the phrase ‘material to an issuer’. Essentially, the determination of what is ‘material’ to an issuer is a determination to be made by management of the issuer, and not by a securities regulator. It is a determination to be made ‘in the context of the issuer’s overall business and financial condition, taking into account qualitative and quantitative factors, assessed in respect of the issuer as a whole’. In other words, materiality in the context of technical reports will clearly be specific to a given issuer and its own circumstances – what would be material to one issuer may not be material to another.

In the context of public offering transactions by way of prospectus, the securities regulatory authority or regulator (each a ‘securities commission’) in the relevant Canadian jurisdictions will review and may comment upon the preliminary prospectus. The contents of technical reports will also be subject to detailed review and comment by the securities
commissions. Geological and mining engineers with significant expertise and experience in mineral disclosure matters on staff with certain securities commissions in particular will examine, in detail, an issuer's technical reports and mineral disclosure. An issuer will be required to file an amended and restated technical report to address all comments, and, given that the issuer's prospectus disclosure will be based upon the technical report, significant amendments and restatements can result from a review. Typically, NI 43-101 experienced legal counsel will be engaged directly with the qualified person and the issuer in the preparation of the technical report well in advance of filing it with the securities commissions and applicable stock exchange, in order to minimise regulatory comments and issues, deficiencies and time delays.

Corresponding with the high level of activity by exploration and mining issuers in the Canadian capital markets, the securities commissions and stock exchanges have also increased their own levels of activity. As mineral disclosure reviews and comments are occurring at an unprecedented level of frequency and detail, it is important that issuers focus on NI 43-101 and the quality of their mineral disclosure from the outset in connection with all of their continuous disclosure filings, and when preparing for any Canadian capital markets or public company transaction.

Foreign investment

The direct acquisition of control of a Canadian mining business by a World Trade Organization (WTO) investor that is not a state-owned enterprise (SOE) would be reviewable under the Investment Canada Act (ICA) if the enterprise value of the investment is above a certain threshold. In June 2017, this threshold was set at C$1 billion. Starting in 2019, the threshold will be adjusted annually according to a formula based on the change in Canada's nominal gross domestic product. As part of the implementation of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union, the threshold for review is expected to be increased to C$1.5 billion in enterprise value for non-state-owned enterprises from CETA and other trade agreement investors.

The review threshold for the direct acquisition of control of a Canadian business by a WTO SOE is based on the book value of the assets of the target (C$379 million in 2017). The thresholds for direct and indirect acquisitions where neither the investor nor the persons who control the vendor are from WTO countries are also based on book value of the target's assets but are considerably lower (C$5 million and C$50 million, respectively). Indirect acquisitions of control of a mining business by or from WTO investors are exempt from review.2

Market overview

Canada's two principal stock exchanges, the TSX and the TSXV, cater to the needs of domestic as well as foreign mining concerns. The TSX is Canada's stock exchange for large capitalisation issuers. The TSXV attracts companies with smaller capitalisations. There are also alternative trading systems and smaller stock exchanges providing a certain level of competition to the TSX and TSXV.

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2 Additional information relating to the ICA and foreign investment restrictions in Canada is provided in Section V of the Canada mining law chapter.
The investors that are generally active in the Canadian capital markets include institutional money managers, pension funds, exchange-traded funds, mutual funds, hedge funds and arbitrage funds. A number of these funds are focused solely on the mining and resource sectors. In addition, retail investors are actively involved in Canada’s capital markets and public offerings. Canadian underwriters will typically allocate to retail investors a relatively significant proportion of a public offering compared to the established practice in other markets such as the UK or US capital markets.

iii Structural considerations

Structural considerations relating to capital raising in Canada will typically revolve around the choice of a debt or equity investment, together with an evaluation of the tax residency of the issuer, and the resulting application of withholding taxes on any dividends or interest being paid to the non-Canadian investors. The different treatment of debt and equity investments and related Canadian tax rules pertaining to deduction of interest and taxation of dividends, capital gains and interest payments in the hands of the recipient is outside of the scope of this chapter. However, summary information relating to withholding taxes on interest payments and dividends by Canadian mining companies to non-Canadian residents is discussed below.

In addition, important structural considerations apply at the time of the acquisition of a publicly listed Canadian company, which can be achieved by acquiring the shares of the company from its shareholders or by acquiring all or a portion of the project and other business assets from the company.

The principal non-tax reason for preferring an asset purchase in Canada is the ability to choose the assets to be acquired (although tax attributes cannot be purchased from the company) and the liabilities to be assumed (although certain liabilities may flow by operation of law to the buyer, such as environmental liability, which generally flows with the land and, in most jurisdictions, collective agreements relating to unionised employees). Share sales also have a number of non-tax advantages, including simplicity from a conveyancing perspective, fewer third-party consents and simplicity in dealing with employees.

The sale of all or substantially all of the assets of a Canadian company will require prior shareholder approval. Accordingly, it is typical for the acquisition of a publicly listed Canadian company to be effected through the purchase of its stock through a takeover bid made to its public shareholders, or a plan of arrangement, the Canadian equivalent of the UK ‘scheme of arrangement’.

iv Tax considerations

Mining exploration is fraught with risk and mining production is capital intensive. To compensate for this, the Canadian tax system has adopted a number of measures designed to provide tax relief to companies engaged in the mining sector, including:

- favourable deduction of Canadian exploration expenses and Canadian development expenses;
- accelerated depreciation for certain types of tangible property;
- tax credits for certain intangible property expenses;
- 20-year operating loss carry-forward period; and
- indefinite carry forward for capital losses.

In addition, tax advantages are provided to investors in Canadian resources companies. In particular, flow-through shares, a form of equity financing, allow an issuer to issue new shares
to investors at a higher price than it would ordinarily receive for similar shares. While there are a number of requirements and conditions to be satisfied, essentially, the investors and the company agree that the investors will purchase flow-through shares, the company will incur expenditures on Canadian exploration expenses within a specific period, and the company will renounce such expenses in favour of the investors, for their use. Investors are paying a premium for flow-through shares because they acquire and deduct some of the company’s Canadian exploration expenses (and in some cases Canadian development expenses), thereby reducing their Canadian taxes. Flow-through shares financing is typically conducted by companies that do not have taxable income and therefore have no immediate need to deduct the expenses.

In addition, a number of relevant tax structuring considerations apply to the acquisition of a Canadian mining company. From a tax perspective, a share purchase is the sole means of permitting a buyer to preserve significant tax attributes of the target company, such as tax-loss carry forwards and other tax accounts. The share purchase will result in a change of control for income tax purposes, and will thus trigger a taxation year-end and an obligation to file a tax return in respect of such year, and will also result in restrictions on the utilisation of certain tax attributes of the company in the future. An asset purchase transaction, on the other hand, will permit the allocation of the purchase price among the purchased assets – inventory (full deductibility); depreciable capital property and tax goodwill (partial deductibility through ‘tax depreciation’); and non-depreciable capital property (e.g., land).

In either case, a foreign purchaser will typically establish a subsidiary company incorporated in a Canadian jurisdiction to act as the acquisition vehicle. The use of a Canadian acquisition vehicle is beneficial for three basic reasons:

\(a\) to facilitate the deduction of any interest expense associated with the bid financing against the Canadian target’s income;

\(b\) in most cases, to maximise the amount of funds that can be repatriated from Canada to a foreign jurisdiction free of Canadian withholding tax; and

\(c\) in the event of a share acquisition, to possibly accommodate a tax cost step-up of the Canadian target’s non-depreciable capital property (e.g., shares of a subsidiary company and other capital assets).

Canada does not provide for tax returns on a consolidated basis (as in the US) and does not otherwise provide group relief. Accordingly, if the Canadian acquisition vehicle is capitalised with any interest-bearing debt (either third-party debt or debt from within the corporate group), the Canadian acquisition vehicle and Canadian target company are often amalgamated immediately following the completion of the acquisition so that the interest expense on the debt can be used to offset or shelter the income generated by the business.

To this end, Canadian thin-capitalisation rules restrict or limit the deduction of interest paid by Canadian companies to ‘specified non-residents’ to the extent that the ratio of interest-bearing debt owed to such specified non-residents exceeds equity (basically retained earnings, contributed surplus and capital) by more than a prescribed threshold.

A non-public company may generally return or repatriate cross-border capital to a non-resident shareholder free of Canadian withholding tax and there is no requirement that income be returned before capital. However, any such return of capital is subject to applicable corporate solvency tests and may impact thin-capitalisation limitations (see above).

There is no Canadian withholding tax on interest paid by a Canadian resident to foreign arm’s-length lenders (provided the interest is not participatory). Interest paid to a
non-arm's length lender is subject to Canadian withholding tax at a rate of 25 per cent, but this rate may be reduced under the terms of an applicable income tax convention or treaty (the withholding tax rate on interest is typically reduced to 10 per cent under the terms of a majority of Canada's international tax treaties).

A dividend paid by a Canadian company to a non-resident shareholder is subject to Canadian withholding tax at the rate of 25 per cent, but this rate may be reduced under the terms of an applicable income tax convention or treaty (the withholding tax rate on dividends is typically reduced to 5 per cent in circumstances where the non-resident shareholder owns a significant or controlling interest in the Canadian company paying the dividend).

The majority of Canada's reciprocal tax treaties provide favourable tax withholding rules in respect of distributions and other payments received from Canadian companies, and possibly relief from capital gains tax upon a disposition of the shares of a Canadian company that derives its value principally from real property interests situated in Canada where such property is property in which the business of the Canadian company is carried on. Therefore, a foreign investor, after considering its broader multinational network of companies, may wish to consider structuring its investment in Canada through a jurisdiction that has a favourable tax treaty with Canada.

### III DEVELOPMENTS

As a result of the resurgence in commodity prices since 2015, there has been increased interest in the mining sector and Canada has seen increased activity in mining capital markets. Mining companies have been in a better position to raise capital in the markets, in particular precious metal producers with proven management teams. Markets participants are also optimistic that we may see the return of IPOs in the mining sector in Canada.

There was also ongoing M&A activity although companies remain cautious on value due to the excesses of prior years that led to destructive M&A transactions for a number of large mining companies. There have also been a number of privatisations of companies listed on the TSX and TSX-V in the past year, in particular in sectors where commodity prices did not rebound. Demand by junior and development companies for alternative financing options continues, include royalty and streaming arrangements, pre-payments against off-take commitments, equity investment from strategic investors and joint venture arrangements with strategic investors.
UNITED KINGDOM

Kate Ball-Dodd and Connor Cahalane

I INTRODUCTION

London is a leading financial market for international mining companies seeking to access the equity capital markets. The London Stock Exchange’s Main Market is the listing venue for many of the world’s largest mining groups by market capitalisation, including Anglo American, BHP Billiton, Glencore and Rio Tinto. The London Stock Exchange’s growth market, AIM, also remains a popular listing venue for junior mining companies seeking to raise capital for exploration and development projects.

As at 30 June 2017, there were 40 mining companies admitted to trading on the Main Market and on the AIM market there were 122 mining companies admitted to trading as at 30 June 2017.2

i New issues

In the 12-month period from 30 June 2016 to 30 June 2017, one new mining company was admitted to the Main Market of the London Stock Exchange, Rainbow Rare Earths Limited, an exploration and development company focused on rare earth elements in Burundi. At the time of its IPO in January 2017, Rainbow Rare Earths had a market capitalisation of £15.2 million.

Two new mining companies were admitted to trading on AIM during the same period – Jangada Mines PLC and Phoenix Global Mining. Jangada Mines PLC is an exploration and development company with a platinum group metals project in Brazil. It had a market capitalisation of £9.9 million at the time of its IPO in June 2017. Phoenix Global Mining PLC was admitted to AIM in July 2017 following the merger of Andes Energia PLC, Trefoil Holdings and the production business of Mercuria Energy Group Limited. Phoenix Global Mining is a US-focused base metal explorer and developer with a copper project in Idaho, USA.

ii Secondary offerings

The largest Main Market secondary offering in the period from 30 June 2016 to 30 June 2017 was by Kenmare Resources PLC, an Irish incorporated mining company, which raised £188.5 million through an open offer that completed in July 2016 as part of the company’s capital
Restructuring. Kenmare Resources’ principal activity is the operation of the Moma Titanium Minerals Mine in Mozambique, which contains deposits of heavy minerals that include the titanium minerals ilmenite and rutile, as well as the zirconium silicate mineral, zircon.

During the same period, the largest secondary offering on AIM was by Sirius Minerals PLC, fertilizer development company with a polyhalite project in North Yorkshire, UK. Sirius raised £370 million in November through a placing and open offer.

II CAPITAL RAISING

i General overview of the legal framework

Under the UK listing regime, different admission criteria and listing rules will apply depending on whether a company is seeking to have its shares (or other securities) admitted to a regulated market governed by the EU Prospectus Directive,3 such as the Main Market, or to AIM, which has a more flexible regulatory structure.

Official List

In order to be admitted to the Main Market, a company must first apply to the UK Listing Authority (UKLA), a division of the UK’s Financial Conduct Authority (FCA), to join the Official List.

Mineral companies

For the purposes of the Listing Rules (LR), which set out the admission requirements for the Official List, a mineral company is a company with material mineral projects (not just those whose principal activity is the extraction of mineral resources). The materiality of projects is assessed having regard to all the company’s mineral projects relative to the company and its group as a whole. Mineral projects include exploration, development, planning or production activities (including royalty interests) in respect of minerals, including:

- a metallic ore, including processed ores such as concentrates and tailings;
- b industrial minerals (otherwise known as non-metallic minerals), including stone such as construction aggregates, fertilisers, abrasives and insulators;
- c gemstones;
- d hydrocarbons, including crude oil, natural gas (whether the hydrocarbon is extracted from conventional or unconventional reservoirs, the latter to include oil shales, oil sands, gas shales and coal bed methane); and
- e solid fuels, including coal and peat.

Admission requirements

The Official List is divided into two segments: standard listings and premium listings. A standard listing is one that satisfies the minimum requirements laid down by the EU Prospectus Directive. A premium listing denotes a listing that meets more stringent criteria that are not required by the EU Prospectus Directive but that are seen as providing additional investor protections. A mineral company may apply for either a premium or standard listing provided it complies with the relevant admission requirements.

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Standard listing

A mineral company seeking a standard listing must comply with the general admission requirements set out in the LR. These include a requirement that the company is duly incorporated (either within the UK or, if a non-UK company, in the company’s place of incorporation), and that the securities to be listed must be free from any transfer restrictions (subject to certain exceptions). If the company is making an offer of new securities, any necessary constitutional, statutory or other consents required must be obtained prior to listing. The expected market capitalisation of the securities to be listed must be at least £700,000 in the case of shares and £200,000 in the case of debt securities. While the UKLA has a discretion to admit a company with a lower market capitalisation if it is satisfied there will be an adequate market, from a practical perspective it is likely that the market capitalisation would need to be significantly higher for a listing to be economical. While there is no requirement for a company seeking a standard listing to confirm to the UKLA that it has sufficient working capital to meet the requirements of the business for the next 12 months, if the company is also producing a prospectus (which is likely to be the case – see below), it will be required to include a working capital statement in the prospectus confirming whether the business has sufficient working capital for that period.

Premium listing

If a mineral company is seeking an admission of its shares to the premium segment of the Official List, in addition to the minimum requirements applicable to all listings set out above, the company must confirm to the UKLA that it has sufficient working capital available to meet the requirements of the business for the next 12 months. At least 25 per cent of the class of the company’s shares to be listed in the premium segment must be in the hands of the public in one or more EEA countries at the time of admission. Where the company is already listed in a non-EEA country, shareholders in that country may be taken into account. For this purpose, ‘public’ means shareholders other than those holding 5 per cent or more of the class of shares being admitted, and also excludes shares held by the directors of the company or any persons connected to the directors.

Mineral companies are exempt from the premium listing requirement (which would otherwise apply) to have at least 75 per cent of their business supported by a historic revenue earning record. If a mineral company seeking a premium listing cannot comply with the requirement to have published accounts covering at least three full years because it has been operating for a shorter period, then it must have published or filed historical financial information since the inception of its business.

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4 LR 2.
5 LR 2.2.4R. For example, this does not prevent the company’s shareholders from entering into agreements among themselves restricting their ability to transfer shares.
6 LR 2.2.2R.
7 LR 2.2.7R and LR 2.2.8G.
8 LR 6.1.16R.
9 LR 6.1.19R.
10 LR 6.1.9.
11 LR 6.1.8.
Controlling shareholders and relationship agreements

Where an applicant for a premium listing will have a controlling shareholder on admission, the issuer must have in place a written and legally binding relationship agreement with the controlling shareholder and have a constitution that allows the election and re-election of independent directors to be conducted in accordance with a dual voting structure set out in the LR.\(^{12}\)

A controlling shareholder is defined as any person who exercises or controls (on their own or together with any person with whom they are acting in concert) 30 per cent or more of the voting rights.\(^{13}\)

The relationship agreement must include provisions to ensure that the controlling shareholder complies with the following undertakings:

\(a\) transactions and arrangements with the controlling shareholder (or any of its associates, or both) will be conducted at arm’s length and on normal commercial terms;

\(b\) neither the controlling shareholder nor any of its associates will take any action that would have the effect of preventing the new applicant or listed company from complying with its obligations under the LR; and

\(c\) neither the controlling shareholder nor any of its associates will propose or procure the proposal of a shareholder resolution that is intended or appears to be intended to circumvent the proper application of the LR.

Independent business

All applicants for a premium listing must now be able to demonstrate that they will be carrying on an independent business as their main activity.\(^{14}\) The LR set out the following guidance on factors that will indicate when a company will not be considered to have an independent business:

\(a\) a majority of the revenue generated by the new applicant’s business is attributable to business conducted directly or indirectly with a controlling shareholder (or any associate thereof) of the new applicant;

\(b\) a new applicant does not have:

- strategic control over the commercialisation of its products;
- strategic control over its ability to earn revenue; or
- freedom to implement its business strategy;

\(c\) a new applicant cannot demonstrate that it has access to financing other than from a controlling shareholder (or any associate thereof);

\(d\) a new applicant has granted or may be required to grant security over its business in connection with the funding of a controlling shareholder or a member of a controlling shareholder’s group;

\(e\) except in relation to a mineral company (which has specific eligibility requirements in relation to its interests in mineral resources – see below), a new applicant’s business consists principally of holdings of shares in entities that it does not control, including entities where:

- the new applicant is only able to exercise negative control;

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\(^{12}\) LR 6.1.4B.

\(^{13}\) LR 6.1.2A.

\(^{14}\) LR 6.1.4.
• the new applicant’s control is subject to contractual arrangements that could be altered without its agreement or could result in a temporary or permanent loss of control; or

a controlling shareholder (or any associate thereof) appears to be able to influence the operations of the new applicant outside its normal governance structures or via material shareholdings in one or more significant subsidiary undertakings.\(^{15}\)

**Prospectus**

As well as complying with the above admission requirements, a company seeking admission to the Official List (to the standard or premium segment) or making a public offer of securities in the UK must publish a prospectus setting out sufficient information to enable investors to make an informed assessment of the assets and liabilities, financial position, profits and losses, and prospects of the company.\(^{16}\) The company must also confirm in the prospectus whether it has sufficient working capital to meet the requirements of the business for the next 12 months. The prospectus must be submitted for review by the UKLA, which will assess whether the document complies with the disclosure requirements set out in the Prospectus Rules (PR). A prospectus must not be published unless it is approved by the UKLA.\(^{17}\) In the case of an offer of shares, the company and its directors must take responsibility for the contents of the prospectus, and may be liable for any inaccurate or misleading information in the document or for failure to comply with the relevant disclosure standards.\(^{18}\)

**Specific eligibility requirements for mineral companies**

In addition to the independent business requirements set out above, if a mineral company seeking admission to the Official List (to the standard or premium segment) does not hold a controlling interest in a majority by value of the properties, fields, mines or other assets in which it has invested, the company must be able to demonstrate to the UKLA that it has a reasonable spread of direct interests in mineral resources and has rights to participate actively in their extraction, whether by voting or through other rights that give it influence in decisions over the timing and method of extraction of those resources.\(^{19}\)

**Specific content prospectus requirements for mineral companies**

In March 2013, the European Securities and Markets Authority (ESMA) published an updated edition of its recommendations for the consistent implementation of the EU Prospectus Directive, with revised recommendations as to the content requirements for prospectuses published by mineral companies.\(^{20}\) When reviewing a prospectus, the UKLA will take into account these recommendations, which in effect supplement the requirements of LR and PR.

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15 LR 6.1.4A.
16 Section 87A(2), Financial Services and Markets Act 2000.
17 A company that has its home Member State in a Member State other than the UK may also have a prospectus approved by the competent authority in that jurisdiction and seek to have the prospectus ‘passported’ into the UK pursuant to Articles 17 and 18 of the EU Prospectus Directive.
18 PR 5.5.
19 LR 6.1.10.
The recommendations recognise that mineral companies are distinct from other companies in that a key factor in the assessment of their value relates to their reserves and resources. The recommendations seek to ensure that appropriate levels of transparency and assurance over the reserves and resources figures are made available to investors by setting out a framework for the additional disclosure of reserves and resources information, including the following information segmented using a unit of account appropriate to the scale of the company’s operations (rather than on a per-asset basis):

- details of mineral resources and, where applicable, reserves and exploration results and prospects;
- anticipated mine life and exploration potential or similar duration of commercial activity in extracting reserves;
- an indication of the duration and main terms of any licences or concessions, and legal, economic and environmental conditions for exploring and developing those licences or concessions;
- indications of the current and anticipated progress of mineral exploration or extraction, or both, and processing, including a discussion of the accessibility of the deposit; and
- an explanation of any exceptional factors that have influenced the foregoing items.

**Competent persons report**

A competent persons report (CPR) is also required for all initial public offering prospectuses regardless of how long the company has been a mineral company. A CPR may also be required for secondary issues, but not where the company has previously published a CPR and has continued to update the market regarding its resources, reserves, results and prospects in accordance with one of the recognised reporting standards.

The CPR must be prepared by a person satisfying the competency requirements of the applicable codes or of the organisation set out in the recommendations, or who is a professionally qualified member of an appropriate recognised association or institution with at least five years of relevant experience.

The content requirements for the CPR are set out in the ESMA 2013 recommendations. These requirements vary depending on whether the CPR relates to a company with oil and gas projects, or a company with mining projects. The CPR must be dated not more than six months prior to the date of the prospectus, and the company must confirm that no material changes have occurred since the date of the CPR that would make it misleading. A list of acceptable internationally recognised reporting and valuation standards is also set out in the recommendations. The mining reporting codes are aligned with the Committee for Mineral Reserves International Reporting Standards (and do not include US SEC Industry Guide 7 on mining, or the Russian or Chinese standards).

**Depository receipts**

Companies incorporated outside the EU seeking admission to the Main Market often choose to do so through an issue of depository receipts. This is particularly the case for companies located in jurisdictions with restrictive foreign exchange controls where requirements to pay dividends in the local currency could make an investment in the company’s shares less attractive to international investors. Depository receipts are negotiable instruments that represent an ownership interest in a specified number of the company’s shares. The underlying shares are issued to a depository, which in turn issues depository receipts that can be denominated in a
currency other than the issuer’s local currency. Dividends received by the depositary can then be converted from the local currency into the currency of the depositary receipts. Depository receipts may only be admitted to the Official List through a standard listing.

**High Growth Segment**

The High Growth Segment is a third category of listing on the Main Market that sits alongside the premium and standard segments and provides an alternative route to market for European companies. As the High Growth Segment is an EU-regulated market, companies listed on this segment must comply with certain EU standards, including the FCA’s Disclosure Guidance and Transparency Rules and the Prospectus Rules. However, as companies on the High Growth Segment are not admitted to the Official List, the LR do not apply and instead companies must adhere to the London Stock Exchange’s High Growth Segment Rulebook.

The High Growth Segment is intended to attract medium and large high-growth companies that do not meet the eligibility criteria of the premium segment, in particular in relation to the free float requirement. However, the eligibility criteria for the High Growth Segment requires all companies seeking admission to be revenue-generating trading businesses, and mineral resource companies at the exploration stage are expressly listed as being ineligible for admission to the High Growth Segment.

**AIM**

AIM is the London Stock Exchange’s market for smaller and growing companies. Due to its status as an ‘exchange regulated market’ for the purposes of the EU Prospectus Directive, AIM is governed by a more flexible regulatory regime than the Main Market.

**Role of the nomad**

The London Stock Exchange oversees the regulation of AIM and compliance with the AIM Rules. Each company seeking admission to AIM must appoint a corporate finance adviser that has been approved by the London Stock Exchange to act as a nominated adviser or ‘nomad’. The company’s nomad is responsible for assessing whether the company is an appropriate applicant for AIM, and for advising and guiding the company on its responsibilities under the AIM Rules.

**Admission requirements**

Unlike the Official List, there are generally no minimum market capitalisation requirements for a company seeking admission to AIM. However, investment companies must raise a minimum of £6 million in cash through an equity fundraising to be eligible for admission to AIM.

There are also no express minimum requirements as to the applicant company’s trading history or the number of shares in public hands, although the nomad will consider this when assessing the company’s suitability for listing. The shares must, however, be freely transferable and eligible for electronic settlement.

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21 Guidance Note 2 to Rule 2.1 of the High Growth Segment Rulebook.

22 Rule 8, AIM Rules for Companies. For this purpose an ‘investing company’ is any company that has as its primary business or objective the investing of its funds in securities businesses or assets of any description.
**AIM Designated Market route**

Companies that are already listed on certain other exchanges may qualify for AIM’s fast-track admission process, known as the AIM Designated Market Route, in which case the company will not be required to produce an admission document.\(^\text{23}\) To be eligible for fast-track admission, a company must have its securities traded on an AIM designated market\(^\text{24}\) for at least the past 18 months, and should also have substantially traded in the same form during this period. Examples of mining companies who have used the fast-track process include Wolf Minerals Limited, which is also listed on the ASX and was admitted to AIM in November 2011, and Central Rand Gold Limited, which transferred its listing from the Main Market to AIM using the fast-track process in August 2013.

**Admission document**

A company seeking admission to AIM (other than an AIM Designated Market applicant) is required to publish an admission document. The company’s nomad will be responsible for assessing whether the admission document complies with the content requirements set out in the AIM Rules. While these requirements are less onerous than those that apply to a prospectus, a company preparing an admission document is subject to a general requirement to disclose any information that the company reasonably considers necessary to enable investors to form a full understanding of the assets and liabilities, financial position, profits and losses, and prospects of the applicant and its securities for which admission is being sought, the rights attaching to those securities and any other matter contained in the admission document.\(^\text{25}\)

Due to the less onerous disclosure requirements, and as the admission document is reviewed and approved by the company’s nomad rather than the UKLA, the process and timetable for admission to AIM can often be shorter and more flexible than the process for admission to the Official List.

**Prospectus requirement for AIM companies**

Although AIM is not a regulated market for the purposes of the EU Prospectus Directive, where a company seeking admission to AIM is also making an offer of its securities to the public in the UK, the admission document may also need to be approved as a prospectus by the UKLA unless it can avail of an applicable exemption. Where a company is offering its shares through a private placement, it will usually seek to rely on an exemption available for offers addressed solely to qualified investors, or fewer than 150 natural or legal persons per EU Member State (i.e., other than qualified investors).

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\(^{23}\) However, as with any company seeking admission to AIM, a fast-track applicant may be required to produce a prospectus under the EU Prospectus Directive where, for example, an offer of securities is made to the public and no relevant exemption is applicable.

\(^{24}\) These include the top tier markets of the Australian Securities Exchange, Deutsche Börse Group, NYSE Euronext, Johannesburg Stock Exchange, NASDAQ, NYSE, NASDAQ OMX Stockholm, Swiss Exchange, TMX Group and the UKLA Official List.

\(^{25}\) Schedule 2(k), AIM Rules for Companies.
Specific content requirements for mineral companies

In addition to the general requirements set out in the AIM Rules, a mining company seeking admission to AIM is required to comply with the AIM Guidance Note for Mining, Oil and Gas Companies (the Guidance Note). The Guidance Note states that nomads are expected to conduct full due diligence on mining companies seeking admission to AIM, including by carrying out site visits and personal inspections of the physical assets where it is practical to do so. A formal legal opinion from an appropriate legal adviser is also required on the incorporation status of the company and any relevant subsidiaries, as well as the company’s title to its assets and the validity of any licences.

Competent persons report

A mining company seeking admission to AIM is required to include in its admission document a CPR on all of its material assets and liabilities. The CPR must comply with the disclosure requirements set out in the Guidance Note and the company’s nomad is responsible for ensuring that the scope of the CPR is appropriate having regard to the applicant’s assets and liabilities.

The CPR must be prepared no more than six months prior to the date of the admission document by a person who meets the minimum requirements for competent persons set out in the Guidance Note. These require the competent person to be a professionally qualified member of an appropriate association, independent of the applicant and to have at least five years of relevant experience.

Where information is extracted from the CPR for inclusion elsewhere in the admission document, that information must be presented in a manner that is not misleading and provides a balanced view. The Guidance Note also requires that the competent person must review the information contained elsewhere in the admission document that relates to the information in the CPR, and confirm in writing to the applicant and the nomad that the information is accurate, balanced, complete and not inconsistent with the CPR.

Lock-in for new mining companies

The Guidance Note and the AIM Rules require that, where a mining company seeking admission to AIM has not been independent and earning revenue for at least two years, all related parties (which include the directors and any shareholders holding 10 per cent or more of the voting rights) and applicable employees must agree not to dispose of any interest in the company’s securities for at least one year from the date of admission to AIM.

ii Tax considerations

In general terms, the UK tax regime does not distinguish between domestic mining companies and overseas mining companies that are subject to UK tax (for example, as a result of being tax resident in the UK or carrying on a trade through a permanent establishment in the UK).

The basic UK tax regime for mining companies is similar to that for other companies – the main rate of corporation tax is 19 per cent (set to reduce to 17 per cent from 1 April 2020), and there is currently no limit on the period for which tax losses can be carried forward and set off against future profits (although new legislation expected to apply with effect from 1 April 2017.

26 AIM Guidance Note for Mining, Oil and Gas Companies (June 2009).
27 Specific tax rules for the oil and gas sector are not addressed here. This section focuses solely on mining companies involved in exploration for and extraction of minerals other than oil and gas.
will, once formally enacted, change the treatment of carried forward losses by, among other things, restricting the amount of a company’s or group’s profit that can be relieved by carrying forward losses to 50 per cent where carried forward losses exceed £5 million in an accounting period), and the usual withholding taxes regime applies. In broad terms, withholding tax applies at a rate of 20 per cent (subject to any applicable double tax treaty and certain other exemptions) to interest and royalty payments. There is no withholding tax on normal dividends.

The usual capital allowances regime for long-life assets and integral features (8 per cent writing down allowance per annum) and other plant and machinery (18 per cent writing down allowance per annum) applies to mining companies. In addition, persons engaged in mining activities can benefit from the mineral extraction allowance (at a rate of 25 per cent or 10 per cent on a reducing balance basis), which is a form of capital allowance available to those who carry on a mineral extraction trade (a trade consisting of, or including, the working of a source of mineral deposits) and incur qualifying expenditure. Qualifying expenditure for these purposes can include expenditure on mineral exploration and access, and expenditure on acquiring mineral assets (defined as mineral deposits, land comprising mineral deposits, or interests in or rights over such deposits or land).

A major advantage offered to mining companies by the UK is that there are no specific mining or mineral taxes (although excise duty is payable on mineral oils, at varying rates, unless an exemption applies). There is also, generally, no UK VAT on exports. However, mining companies’ activities may render them subject to the following indirect taxes:

- a climate change levy: a tax on taxable supplies of energy, with a variable rate depending on the nature of the fuel used. Reduced rates are available for energy intensive businesses that have entered into a climate change agreement with the Environment Agency;
- b aggregates levy: a tax on the commercial exploitation (which includes both extraction and importation) of gravel, sand and rock, currently charged at £2 per tonne – this is subject to various exemptions, including exemptions for spoil from any process by which coal or another specified substance has been separated from other rock after being extracted from that rock, for material that is more than half coal, and for spoil from the smelting or refining of metal; and
- c landfill tax: a tax on the disposal of waste to landfill, currently charged at the standard rate of £86.10 per tonne or the lower rate of £2.70 per tonne (set to increase annually in line with RPI rounded to the nearest five pence), depending on the material being disposed of; there is an exemption for the disposal of naturally occurring materials extracted from the earth during commercial mining or quarrying operations, provided that such material has not been subjected to and does not result from a non-qualifying process carried out between extraction and disposal. From 1 April 2015, disposals in Scotland have been subject to the Scottish landfill tax, and Wales will impose its own landfill disposals tax from April 2018.

Apart from the mineral extraction allowance, there are no special allowances or incentives for persons engaged in mining activities, or their investors or lenders.

### III DEVELOPMENTS

#### i UK vote to leave the EU

In June 2016, the UK held a referendum that resulted in a vote to leave the EU. Although the main rules governing public offers of securities and applications for admission to trading on
regulated markets in the UK (including the Main Market) are derived from EU law, principally the EU Prospectus Directive, this directive itself closely follows the UK rules that were in place prior to the introduction of the Prospectus Directive in 2003. While leaving the EU might lead to an overhaul of the relevant UK rulebooks to remove references to EU legislation, in practice there is unlikely to be a material change in the regulatory framework and practice governing equity capital market transactions in the UK, at least in the short term. In addition, the FCA has a history of ‘gold plating’ many of the rules derived from EU capital markets legislation, which has led to the UK very much having its own bespoke listing regime, which runs alongside the harmonised EU rules (for example, the different admission criteria and continuing obligations applicable to standard listings as opposed to those applicable to premium listings).

One of the intended benefits of a common European framework for the approval of prospectuses is the issuers’ ability to use a prospectus approved by a competent authority in one Member State to market securities in another Member State through the Prospectus Directive’s ‘passport’ regime. Leaving the EU will mean that a prospectus approved by the FCA will no longer be able to be passported to another EU country. However, only a minority of prospectuses approved in the UK need to be passported out as they are used to market securities only to qualified investors in other EU countries.

**ii Market abuse regulation**

At the EU level, concerns of market distortion arising through regulatory arbitrage have led to the introduction of new harmonising measures in the form of an EU Regulation on Market Abuse (MAR), which has a direct effect on all EU Member States, including the UK, and most of its provisions came into force on 3 July 2016. Part of the reason for moving to a regulation-based regime is to have a single European rulebook that is directly enforceable. Directives have to be implemented in each Member State, which can lead to variations in how things are done in different countries. MAR seeks to establish a more uniform interpretation of the market abuse framework, which more clearly defines rules applicable to insider dealing, market manipulation and unlawful disclosure of inside information in all Member States.

Mining companies with shares listed on the Main Market or admitted to trading on AIM are required to comply with MAR, including in particular the provisions relating to:

- **a** prohibition on insider dealing;
- **b** restrictions on unlawful disclosure of inside information;
- **c** safe harbour rules relating to market soundings procedures to be followed when ‘wall crossing’ investors for transactions;
- **d** restrictions relating to market manipulation;
- **e** requirement on issuers to publicly disclose inside information as soon as possible, subject to limited exceptions where the issuer may be permitted to delay disclosure if certain conditions are met;
- **f** requirement to maintain insider lists with details of persons with access to inside information; and
- **g** requirements for persons discharging managerial responsibilities and persons closely associated with them to disclose their transactions in an issuer’s securities and a prohibition on such persons conducting transactions during a closed period of 30 calendar days before the announcement of an interim or a year-end financial report.
Appendix 1

ABOUT THE AUTHORS

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Ola Alokolaro is a partner and heads the energy and infrastructure group at Advocaat Law Practice. He studied at the University of Buckingham, UK and holds a master’s degree in natural resources law and policy from the Centre for Energy, Petroleum, Mineral Law and Policy, University of Dundee.

He has, over the years, advised and continues to advise several oil exploration and production companies, oil service contractors, mining companies, independent power producers, banks and other financial institutions, high net worth clients as well as state and federal governments and their agencies on a wide range of assignments.

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Kate Ball-Dodd is a partner in the corporate department of Mayer Brown International LLP. She has a wide-ranging corporate practice that encompasses corporate finance, mergers and acquisitions (including public takeovers), equity fund raisings, joint ventures and corporate governance. She advises a number of quoted companies and financial intermediaries on the UKLA Listing Rules and Disclosure Guidance and Transparency Rules, the Prospectus Rules, the AIM Rules, the Takeover Code and general company law. Ms Ball-Dodd speaks regularly at external conferences on corporate governance and takeovers.

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Robert A Bassett is a mining attorney at Holland & Hart, LLP in Denver, Colorado, a full-service law firm with offices throughout the western US and in Washington, DC. Holland & Hart has one of the largest mining law practice groups in the nation. Mr Bassett has nearly 30 years of experience in mining law, and provides clients with practical solutions for financing and developing mining projects.

Mr Bassett has published numerous articles for the Rocky Mountain Mineral Law Foundation, where he chairs the International Committee and the International Bar Association Section on Energy and Natural Resources Law, where he coordinated the Model Mine Development Agreement Project.
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Stéphane Brabant is the co-chairman of the firm’s Africa practice, co-head of the crisis management group, co-head of the mining group and co-head of the firm’s business and human rights group. Mr Brabant lived and worked in Gabon for seven years and has advised almost exclusively in relation to matters across the whole of francophone Africa over the past 25 years (although he has also worked on matters in France, Cambodia, Yemen and Afghanistan), principally in the energy, mining and infrastructure sectors. In addition to his experience as a ‘projects’ lawyer, focusing in particular on the structuring of complex investments between multinationals and states (legal, tax, human rights, financing and bankability, etc.), Mr Brabant has also developed a strong practice in recent years in relation to risk mitigation, compliance and crisis management, and negotiating with African governments to find solutions to contentious issues without resorting to arbitration. His experience includes appearing before local courts in Africa.

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Maria Alejandra Cabrera is an associate in Holland & Knight’s Bogotá office and focuses on the structuring of projects related to real estate, infrastructure, public services and natural resources. Ms Cabrera is experienced in the draft, review and negotiation of a wide range of agreements, including pledges, purchase and sales, leases, concessions, easements and trusts. She is well-versed in the analysis of urban and environmental requirements, as well as applicable regulations for projects in Colombia and helps clients obtain permits and licences for such projects. In addition, Ms Cabrera has a significant knowledge of rural and urban development.

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Connor Cahalane is a partner in the corporate and securities group of Mayer Brown International LLP. He advises on international and UK corporate and commercial transactions with a particular focus on public and private mergers and acquisitions and equity capital markets transactions for mining companies. He also advises on general company law and corporate governance matters.

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Rodrigo Borja Calisto has been legal director of several foreign companies operating in Ecuador, mainly dealing with subjects such as mortgage portfolio securitisation, hydrocarbons and mining, among others. He has a deep knowledge of the hydrocarbons and mining industry, both from internal operations and state regulation and control perspectives. Wide experience
with transnational companies enable him to advise local and foreign companies throughout their different stages, from the incorporation of the company to the exploration, assessment, negotiation of contracts with the state and vendors, design, construction, development and closing of operations. He has been a member of the executive and administrative committees of the companies where he served as legal director. Has been part of the negotiations teams in several negotiation processes with the Ecuadorian government (Petrobras, Kinross Gold Corp., Lundin Gold Inc., and INV Minerals). He is a member of the negotiation team for the mining exploitation contract and the investment protection agreement for the Fruta del Norte project in charge of Lundin Gold Inc and the Loma Larga Project in charge of INV Minerals.

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Alban Dorin is a counsel in the finance practice of Mayer Brown in Paris.

He regularly advises on international project finance transactions, in particular in francophone Africa.

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Daniel Fajardo Villada is an associate in Holland & Knight’s Bogotá office. He practises in the area of oil and gas and mining law, as well as litigation and dispute resolution. Mr Fajardo primarily represents oil and gas and mining companies, as well as other types of corporations. He advises clients in contracting, due diligence, and mergers and acquisition matters, and also has experience with both litigation and arbitration. Mr Fajardo graduated from Universidad del Rosario and holds an LLM in oil and gas law and policy from Dundee University.

**RUBEN FEDERICO GARCIA**

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Rubén Federico graduated from the Escuela Superior de Comercio y Administración del Instituto Politécnico Nacional in 1986. With more than 36 years of practice, his experience is focused on corporate tax services, which include advisory and tax compliance. This experience in corporate tax services has been achieved through the years of working in accounting firms, always in the tax department.

Mr Federico has been involved in the organisation of new corporations, as well as the reorganisation of several national and foreign legal entities, always providing the best possible scenario outcome given the tax burden established by the Mexican tax authorities.

He has participated in the due diligence process of several important entities from different industries in Mexico and abroad. As part of the due diligence process, he has experience in the tax implications and procedures related to the sale and purchase of shares, and the establishment of dividend policies.
Mr Federico has been speaker in several training programmes related to tax matters in different institutions such as Colegio de Contadores Públicos de México, A.C., Instituto Mexicano de Ejecutivos de Finanzas, A.C., Cámara Nacional de la Industria Restaurantera, CONCANACO Servytur, etc.

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William Freire is an attorney with a law degree from the Federal University of Minas Gerais. He is a professor of mining law on several graduate-level courses. He is an arbitrator at the Brazil Business Arbitration Chamber (CAMARB) and Minas Gerais Business Arbitration Chamber (CAMINAS), and is the director of the Legal Department of Mines and Energy at the Institute of Attorneys of Minas Gerais. He is also the President of the Brazilian Institute of Mining Law.

In 2017 he achieved more than 100 published papers and 100 lectures. Mr Freire is also the author of numerous books including: *Annotations on Brazilian Mining Code; Brazilian Environmental Law; Fundamentals of Mining Law; Environmental Law Applied to Mining; Legal Nature of Exploration Consent, Exploitation Consent and Mine Claims in Brazilian Law; Environmental Crisis and Negotiation Management; Mining Law Dictionary; and Annotated Mining Code and Complementary Mining Legislation*, among others.

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Thibaut Hollanders is part of the corporate and finance practice group of Liedekerke. Since January 2015, Thibaut has headed up the activities of Liedekerke’s DRC subsidiary, Liedekerke Africa SASU, based in Kinshasa. He advises international and national clients in relation to multi-jurisdictional and cross-border transactions in the areas of M&A (including private equity) and corporate (re)structuring (outside insolvency), with a particular focus on mining (including extensive experience on francophone Africa).

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Jennifer Honeyman is a partner in the Vancouver office of Stikeman Elliott. She specialises in mergers and acquisitions (both public and private), securities and corporate finance and is a member of the firm’s global mining group. She advises both public and private companies on a wide range of transactions and corporate matters related to mergers and acquisitions, equity capital markets, joint ventures and general corporate matters. She has extensive experience in mining, with a focus on cross-border transactions. Prior to joining Stikeman Elliott in 2008, Ms Honeyman spent seven years practising in the United Kingdom, six of them at a magic circle firm in London. She has been a member of the British Columbia Bar since 1999 and is admitted to the Roll of Solicitors (England and Wales) (non-practising).
KAROL KAHALLEY  
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Karol Kahalley has been a mining attorney with the firm of Holland & Hart, LLP in Denver, Colorado for 20 years. As a leading expert on US mining law, Ms Kahalley has successfully represented clients in acquiring mineral properties and developing mining operations throughout the United States, including on tribal lands. Her work includes hard rock minerals, oil and gas, oil shale, potash, uranium, coal, rare earth minerals and geothermal resources. She is a recognised expert on the creation and interpretation of mining royalties.

Ms Kahalley has been a lecturer at and published numerous articles for the Rocky Mountain Mineral Law Foundation. She is an adjunct professor at the University of Denver College of Law in international mining law and policy.

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Mr Mouhamed Kebe is the managing partner of GENI & KEBE, a full-service law firm based in Senegal with affiliate offices in 15 African countries. GENI & KEBE is the only law firm with an office in the first mineral region of Senegal (Tambacounda), to assist mining clients located there.

Mr Kebe’s practice focuses on corporate and investment law, with a particular interest in the mining sector. He has an in-depth and practical knowledge of the law in Senegal and throughout the region, and has advised on many landmark mining transactions. He is top-ranked in Chambers Global; named in *Who’s Who Legal: Mining* and is profiled as a Leading Lawyer in *IFLR1000* for his energy and infrastructure work.

Mr Kebe holds a master of laws with merit from the University of Essex, a master and bachelor of laws from the University of Dakar Anita Cheikh Diop and a certificate, of international commercial and investment arbitration from the University of London.

Mr Kebe has been seconded to major law firms in Paris and London. He speaks English, French, Wolof and Arabic, and is a member of the Senegalese Bar Association, International Bar Association and the Law Society of England and Wales (international division).

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Geoff Kerrigan is a senior associate in Herbert Smith Freehills’ corporate group and has broad experience in mining and resources transactions, including domestic and international acquisitions and divestments, joint ventures and off-take agreements. He is also experienced in advising on a range of various project and development agreements, including construction and procurement contracts, state agreements, port access and transportation agreements, infrastructure use agreements and commodity marketing agreements.

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Jay Leary is a partner and the Global Co-Head of Mining at Herbert Smith Freehills. Jay’s energy and resources experience includes acquisitions and sales (private M&A), joint ventures, project development (including EPC and EPCM agreements and procurement
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contracts), operation and maintenance (including O&M agreements, contract mining agreements and gas transportation agreements), commodity sales agreements and agency agreements. Jay's port and rail experience includes acquisitions and sales (private M&A), access regimes, state agreements, rail and port agreements, infrastructure leases, rail and port development and expansion, rail connection agreements, rail user funding arrangements, rail haulage agreements, supply chain coordination arrangements, port authority rules, marine and channel arrangements.

Jay is considered one of the leading resources and infrastructure lawyers. Several industry bodies have profiled Jay as a leading lawyer, including Chambers & Partners (‘Band 1’ category), ALB, Doyle’s Guide (‘Pre-Eminent’ category), and Best Lawyers from 2009 to 2017. He was named Australian Energy and Resources lawyer of the year in 2011, 2015 and 2017 by ILC.

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Executive director and founder at Josh and Mak International, Barrister Aemen Zulfikar Maluka (a member of the Lincoln’s Inn) has an LLM in oil and gas from the University of Aberdeen in Scotland, and another LLM in corporate and media law from the University of London. She is a member of the Islamabad Bar Association and an advocate of the High Court, Punjab Bar Council. She has drafted and advised several local and international companies and organisations regarding LNG, hydrocarbon, and mining and energy projects. Her area of expertise is the vetting, editing and drafting of legal and technical energy and mining documents, particularly LNG Gas, Mining and Hydrocarbon Agreements.

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Mr Massé worked in the London office of Stikeman Elliott in 2007 and 2008. He is President of the Cercle finance et placement du Québec, a networking organisation for Quebec public companies and bankers, analysts, advisers and other professionals involved in Quebec's financial markets. He is a member of the Quebec Bar.
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Mr Montembault, who is qualified in France, has 25 years of experience advising international businesses, whether new entrants to the Africa market or established operators on the continent, on various aspects of their operations and projects in francophone Africa, mainly in the mining, oil and gas and infrastructure sectors. He lived and worked in Gabon for two years prior to joining the firm and has an excellent knowledge of francophone Africa's local and regional legal systems, including OHADA.

Mr Montembault relocated to the Johannesburg office in October 2016, having previously led the firm’s energy and mining practice in Paris for a number of years.

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Mr Olivares obtained a master’s degree in tax law at the Law School of the University of Chile. In 2009 he obtained a master of laws degree (LLM) in natural resources and environmental law and policy from the Sturm College of Law at the University of Denver, specialising in mining and energy. He was a participant in the 2008 Program of Instruction for Lawyers at Harvard Law School.

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ERIK RICHER LA FLÈCHE

Erik Richer La Flèche is a partner in the Montreal office of Stikeman Elliott specialising in commercial transactions in Canada and abroad, including natural resource projects. He has led large projects in more than 35 countries. From 1981 to 1984 he was seconded to Anderson Mōri Tomostune (Tokyo).


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Mr Rosholt joined Minter Ellison’s Sydney office in September 2008 and has been based in the Ulaanbaatar office since January 2014 and as managing partner since July 2016. Prior to joining Minter Ellison, he worked for a top-tier corporate law firm in Johannesburg.

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Rui has been primarily involved in negotiating international acquisitions and public offerings in the mining sector, and has also provided advice to junior and senior mining companies on applications and negotiations for exploration and prospecting licences; exploitation concessions; renegotiation of concessions; and negotiation of grants for mining exploration projects.

Legal counsel for the current major foreign investor group in mining business in Portugal (since 1998), Rui has also been the legal adviser – of the buyer investor – in the major privatisation transaction regarding the acquisition of the major copper mining project in Portugal (Sominor Sociedade Mineira de Neves Corvo SA) – and in the acquisition and recent sale transaction of the Zinc/Cooper Mining Project in Portugal (Pirites Alentejanas, SA) and has been the chairman of the shareholders’ general meeting of this company between 2004 and 2016 and director of Belo Sun Mining (BSX:TSX) between 2006 and 2015.

As well as advising on several recent high-profile transactions in Portugal, Rui has also been involved in mining transactions in Portugal, Angola, East Timor and Brazil.

He has extensive experience in arbitration, mostly as an arbitrator, in several domestic and international arbitrations.

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Alberto M Vázquez is a graduate of Universidad La Salle, where he obtained his law degree in 1996 with a thesis entitled ‘Expropriation as a Right Derived from Mining Concessions’.

With more than 20 years of experience, his practice is focused on corporate law, mining, migration, foreign investments and community relationships.

Mr Vázquez is involved in the establishment of Mexican companies and the corporate management of mercantile companies, as well as drafting agreements in general and representing important corporate foreign groups with business in Mexico.
In relation to mining issues, he has carried out important negotiations to access superficial lands where concessions are located; in addition, he has vast experience in drafting and negotiating contracts that involve mining concession rights, as well as in dealing with mining corporations in general and building community relationships.

Mr Vázquez is also a skilled lawyer in migration matters, including the obtainment of immigration documents for foreign executives from different jurisdictions who have come to work in Mexico.

He is an active partner of the Mexican Mining, Metallurgy and Geology Engineer Association AC, and is a member of work groups organised by the Mexican Mining Chamber (CAMIMEX) and the General Direction of Mining Promotion in the Ministry of the Economy.

He has been invited as a speaker to local and international seminars related to mining law issues, and has written several articles for magazines specialising in mining and environmental law.

Mr Vázquez has also been recognised by Who’s Who Legal as one of the world’s leading practitioners in the mining sector. He was also nominated by Who’s Who of Professionals for ‘Advisor of the Year’ for 2012–13.

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Raphaël Wagner is a French-qualified lawyer, of counsel, who works within the energy and infrastructure practice at international law firm Herbert Smith Freehills, based in the firm’s Paris office. His practice focuses primarily on the provision of M&A and general corporate and commercial advice (joint ventures, shareholder arrangements, restructurings, etc) to international clients in the context of their projects and ongoing operations in the energy and natural resource sectors in Francophone Africa (north and sub-Saharan) and France.

Mr Wagner’s experience in the mining sector includes advising a number of international clients on the drafting and negotiation of mining conventions in the Ivory Coast, the Republic of Mali, the Republic of Congo and the Republic of Guinea. He has also advised on a range of other mining and oil and gas matters throughout Francophone Africa (the Democratic Republic of Congo, Mali, Senegal, Guinea, Gabon, Tunisia, Benin, etc), including the sale and divestment of mining assets and the negotiation of oil production sharing contracts.

Mr Wagner holds a master’s degree in business law from Université Robert Schuman, Strasbourg, and a post-master’s degree in European business law from Institut d’Etudes Européennes Université Libre de Bruxelles.
JOSE VICENTE ZAPATA

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An equity partner at Holland & Knight in Bogotá, Mr Zapata has been recognised as one of the lawyers with the highest level of expertise in oil and gas, mining and environmental matters in Colombia. Similarly, he is one of the most recognised lawyers in projects and negotiations in the mining and oil and gas sectors, both upstream and downstream, throughout Latin America. With over 20 years’ experience in natural resources, he has been an officer and legal representative of various oil and gas, mining and environmental corporations, as well as serving as president of Columbus Energy Sucursal Colombia, a leading venture company successfully set up in Colombia with 11 blocks in the Llanos and Putumayo basins in Colombia covering nearly 1 million acres of gross acreage. Similarly, Mr Zapata has been legal counsel in the structuring of foreign investment transactions, mergers and acquisitions, as well as reorganisation of corporations in Colombia. Mr Zapata has been member of various boards of directors of multinational corporations in the automotive, energy, telecommunications, industrial and food sectors. He is a professor at the Javeriana, Rosario and Externado de Colombia Universities for environmental, oil and gas, corporate responsibility, environmental liability and sustainable development. Mr Zapata graduated from Universidad Javeriana and holds an LLM from McGill University.
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