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**PREFACE**

Erik Richer La Flèche

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### Mining Law

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I am pleased to have participated in the preparation of the eighth edition of *The Mining Law Review*. The *Review* is designed to be a practical, business-focused ‘year in review’ analysis of recent changes, developments and 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 19 chapters, each dealing with mining in a particular jurisdiction. These countries were selected because of the importance of mining to their economies and to ensure a 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 the book has three chapters that focus 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.

At the time of writing, world macro-economic conditions remain generally good for the mining industry as a whole. Economic growth continues, albeit at a slower pace, and the demand for minerals is steady, even rising in the case of precious metals and rare earths. But will this Goldilocks scenario continue?

The world appears to have entered an environment where well-established economic laws no longer apply. Rising private debt and government deficits, negative or miniscule interest rates in all time scales, low inflation bordering on deflation, lower unemployment levels in many economies, all appear to coexist amiably without adverse consequences. This runs counter to economic orthodoxy and more and more experts question aloud whether this is sustainable.

Gold and other precious metals have greatly benefited from this novel economic environment and are experiencing a renaissance as a hedge against the unknown. This in turn has led to some headline-grabbing M&A activity among major gold miners as they seek to replenish reserves.

Trade frictions have also played a role in improving circumstances for some minerals. For example, China has implied that exports of its rare earths could be curtailed for non-economic reasons, leaving the US, Japan and Europe to take inventory of discovered resources and funding new exploration.

All this to say that the mining industry is likely to be affected unevenly as the next 12 months unfold.
As you consult this book, you will find more on topics apposite to jurisdictions of specific interest to you, and I hope you will find the book useful and responsive.

**Erik Richer La Flèche**  
Stikeman Elliott LLP  
Montreal  
September 2019
Part I

MINING
I OVERVIEW

Angola is one of the greatest diamond producers in the world and has extensive reserves of valuable natural resources, notably diamonds, gold, iron ore, phosphates, copper, manganese and many other mineral resources. Unfortunately, the civil war (1975–2002) had a tremendous impact on the mining industry, which was basically put to sleep during the conflict. Major investors ceased or suspended their operations in the country for almost 30 years, which explains why most of the country’s reserves are yet to be discovered and explored.

The government has recently embarked on a campaign to attract foreign and national investment. This strategic focus is one response to the economic crisis caused by the severe drop in oil prices that has been weakening the national economy since 2008.

Despite all the diversification efforts, Angola continues to be strongly dependent on oil revenues. Particularly in regard to the mining industry, there has been substantial investment in artisanal and semi-artisanal mining of diamonds and other minerals, notably gold, copper and construction materials, with hundreds of new concessions being awarded to foreign and national entrepreneurs (whether associated or not with foreign investors). Nevertheless, Angola’s second-largest export continues to be gems and precious metals, diamonds in particular.

Foreign direct investment is one of the cornerstones of the Angolan economy and a constant concern of the government. In fact, the government actively encourages foreign investment, seeking to attract mining companies to Angola and aiming to increase the contribution of the mining industry to the country’s gross domestic product. Most of the major mining companies have operations in Angola. Even those that ceased mining operations during the civil war are now resuming their investments and are strongly motivated to pursue the projects that were inadvertently put on hold. This all suggests that after some years of scarce investment in the Angolan mining industry, new investments are flourishing, no doubt inspired by the remarkable results announced by some of the most profitable mining projects in the country (e.g., the Catoca and Lulo projects).

Associated with this investment-friendly regime is the political stability achieved in recent years and unquestionably accomplished during the 2017 presidential election period, which resulted in the steady transition of power from an executive who was in office for more than 30 years. After many years of no faith in the country’s political stability, all now seems to indicate that Angola is on the right path towards becoming a key player on the international scene and one of the most promising African countries to which to direct investments.

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1 João Afonso Fialho is a partner and Ângela Viana is a senior associate at Vieira de Almeida.
II LEGAL FRAMEWORK

The mining sector is primarily governed by the Mining Code, approved by means of Law 31/11, of 23 September 2011 (the Mining Code), which covers most of the rules applicable to the mining industry and mineral operations, from exploration to mining beneficiation, and the marketing of all sorts of minerals.

Complementary to the rules of the Mining Code are key rules and regulations in other ancillary pieces of legislation, in particular the following:

- a) Presidential Decree 85/19, of 21 March 2019, which approves the regulations for semi-industrial mining of diamonds;
- b) Presidential Decree 35/19, of 31 January 2019, which approves the technical regulations for marketing of rough diamonds;
- c) Presidential Decree 175/18, of 27 July 2018, which approves the new rough diamonds sale and marketing policy;
- d) Executive Decree 346/17, of 14 July 2017, which sets forth the criteria for delimitation of concession areas for mining of construction materials;
- e) Joint Executive Decree 316/17, of 27 June 2017, which approves the list of equipment for use in exploration and mining activities exempted from customs duties and fees;
- f) Presidential Decree 231/16, of 8 December 2016, which classifies rare metals and rare earth elements as strategic minerals;
- g) Presidential Decree 158/16, of 10 August 2016, which approves the mineral administrative offences and relevant penalties regime;
- h) Order 255/14, of 28 January 2014, of the Ministry of Geology and Mines, on monitoring of posting of bonds and payments of surface fee and royalties under the Mining Code; and
- i) Order 2/03, of 28 February 2003, of the National Bank of Angola, which establishes the foreign exchange regime for diamond producers and other holders of mineral rights.

In addition to the above industry-specific key legal statutes, there are other miscellaneous statutes applicable to the mining industry on a subsidiary basis, most notably the Private Investment Law (Law 10/18, of 26 June 2018), the General Labour Law (Law 7/15, of 15 June 2015), the Foreign Exchange Law (Law 5/97, of 27 June 1997) and the Environmental Law (Law 5/98, of 19 June 1998), to name but a few.

The political and administrative organisation of the Angolan state dictates that all laws and regulations are issued at state level and apply throughout the country (there are no relevant local or regional regulations).

At an international level, Angola has bilateral cooperation treaties for the mining sector with Democratic Republic of the Congo, South Africa and Mozambique. Angola is a party to the Kimberley Process Certification Scheme (KPCS) for rough diamonds and many international environment instruments that are expressly recognised under the Mining Code.

The main regulatory bodies with controlling and supervisory powers and authority over the mining industry are the head of the government, the Ministry of Mineral Resources and Petroleum (MMRP), the Ministry of Finance and the National Bank of Angola.

Reference must also be made to key state-owned companies and public authorities that have a particularly relevant role in the Angolan mining industry, namely:

- a) the National Diamond Company of Angola – Endiama, EP (Endiama): the national concessionaire for diamonds, rare metals and rare earth elements;
b the National Iron Company of Angola – Ferrangol, EP (Ferrangol): the national concessionaire for noble materials, ferrous and non-ferrous metals; and
c the Diamond Trading Company of Angola – Sodiam, EP: the single channel for the marketing of all diamond productions extracted from Angola.

The Market Regulatory Agency for Gold was recently extinguished by means of Presidential Decree 291/18, of 3 December 2018, with all its powers and authority now vested in the MMRP. This amendment falls within the reform of Angola’s mining sector that the government has been carrying out, which comprises, among others, the setting-up of the National Agency of Mineral Resources, a new body of the MMRP presumably to take up certain roles of the national concessionaires for the mining industry (the former Market Regulation Agency for Gold, Endiama, EP and Ferrangol, EP). The National Agency of Mineral Resources is yet to be incorporated.

III MINING RIGHTS AND REQUIRED LICENCES AND PERMITS

i Title

The Constitution of the Republic of Angola sets forth that natural resources are the property of the state, which shall define the relevant conditions for the award of exploration and mining rights thereof, presently established under the Mining Code.

The Mining Code further emphasises that ‘mineral resources existing in the soil, subsoil, territorial sea, continental shelf, exclusive economic zone, and in other areas of the territorial or maritime domain under the jurisdiction of the Republic of Angola are originally owned by the state and are comprised within its public domain.’.

Without prejudice to the above, minerals and other products mined and extracted in accordance with the rules of the Mining Code and ancillary legislation are the property of the holders of the relevant exploration and mining titles granted under the terms provided for in the respective concession contracts. Specific rules and conditions for the award of mineral rights are set forth in the Mining Code, which adopts a single-contract model under which all mineral rights are granted, from the outset, for the whole mineral process, that is to say, exploration, evaluation, reconnaissance, mining and marketing.

ii Surface and mining rights

Mineral rights are awarded by the state by means of a mineral investment contract (MIC). The award may follow a spontaneous application or a public tender procedure. Public tenders may be optional or compulsory, depending on the geological potential of the relevant area or the classification of the mineral to be exploited as strategic or non-strategic.

Minerals may be classified as strategic by the government because of their economic relevance, their use for strategic purposes or other specific technical mining aspects. Other relevant criteria for classifying a mineral as strategic are rarity, impact on economic development, demand on the international market, impact on job creation, technological relevance, impact on the balance of payments and relevance for military purposes.

The procedure for awarding mineral rights varies according to the mineral in question and the industrial or artisanal nature of the mineral operations. Strategic minerals are subject to more complex award procedures and may take some months to be negotiated and awarded (particularly when a national concessionaire is involved, such as Endiama or Ferrangol).
Diamonds, gold and radioactive minerals are expressly qualified as strategic minerals under the Mining Code. Presidential Decree 231/16, of 8 December 2016, classifies rare metals and rare earth elements as strategic minerals.

In the absence of a mandatory public tender procedure, mineral rights shall be awarded on a first come, first served basis to the applicant who provides sufficient evidence of the technical and financial capability required to carry out the relevant mineral activities.

While the single contract model allows all mineral rights to be formally awarded from the outset by means of a MIC, the holder of the mineral rights must obtain an exploration title (following approval of the MIC) and a mining title (following approval of a technical, economic and financial feasibility study (TEFS)).

At an industrial scale, exploration rights are awarded for an initial term of up to five years, extendable for two additional one-year terms and one year expressly for completion of the TEFS. Mining rights are awarded for an initial term of up to 35 years, extendable for one or more 10-year terms. Different time limits apply to semi-industrial and artisanal mining, and exploitation of civil construction minerals and mineral-medicinal waters.

As a rule, no local content requirements apply to the mining industry. Thus, mineral rights may be awarded to and exercised by foreign entities provided they meet all the statutory formalities and criteria to do business and operate in the country. However, there are some exceptions, as in the case of artisanal mining activities, which may only be carried out by Angolan citizens, and mineral rights for exploitation of civil construction and mineral-medicinal waters, which may only be granted to either Angolan citizens or legal entities having at least two-thirds of share capital owned by Angolan citizens.

As regards diamonds, Endiama – in its capacity as national concessionaire – has been consistently engaged in projects as both a member of unincorporated joint ventures for the exploration stage and shareholder of companies incorporated for the mining stage, either directly (prior to the enactment of the Mining Code) or through an Angolan subsidiary company wholly owned by Endiama. More recently, Endiama has also become the national concessionaire for rare metals and rare earth elements.

Ferrangol is a state-owned company and the national concessionaire for noble materials, ferrous and non-ferrous metals. Ferrangol associates itself with both national and foreign partners, through either unincorporated or incorporated joint ventures.

iii Additional permits and licences
In addition to exploration and mining licences, holders of mineral rights are required to apply for all standard commercial and operation permits and registrations as required by law to conduct business in Angola (e.g., company registration, tax registration, commercial operations permit, environmental licence, import and export licences). Holders of mineral rights are also required to register with the MMRP and obtain a mineral registration certificate attesting that the applicant has the capacity to carry out mining activities in the country.

iv Closure and remediation of mining projects
Holders of mineral right are statutorily and contractually bound to carry out mineral activities with the least environmental and social impact. All projects that by nature, dimension or location may have an impact on the environment and social balance and harmony are subject to an environmental impact assessment (EIA). As regards the mining industry in particular, holders of mineral rights are required to complete and obtain approval of a mandatory EIA prior to moving on to the mining phase.
Holders of mineral rights are statutorily obliged to restore the land and landscape upon completion of each mineral project. Before the definitive abandonment of the concession area, holders of mineral rights must request the MMRP to inspect the mineral operations area (this inspection must be carried out in accordance with the plan for closure and abandonment of the mineral operations approved by the MMRP as provided for in the Mining Code and the EIA, where applicable).

Mining companies are also statutory obliged to create (1) a legal reserve in an amount of 5 per cent of the capital invested in the relevant project for mine closure and environmental restoration, and (2) a provision to cover the cost of environmental restoration or reclamation, as a result of damage caused by geological and mineral activities and the useful life of mining (the relevant rates and limit of the provision will be set in accordance with the EIA).

With the exception of artisanal mining, entities carrying out mining activities shall be further subject to the payment of a contribution to the state to be used to set up an environmental fund.

In addition to the foregoing, holders of mineral rights at an industrial scale are also required to post a bond to guarantee compliance with their contractual obligations (environmental commitments included). The amount of the bond in the reconnaissance, exploration, evaluation and appraisal stages shall be of up to 2 per cent of the investment amount, whereas in the mining stage, the bond shall be set for up to 4 per cent of the investment amount. The bond shall be posted prior to signing the MIC and shall be refunded as soon as the reconnaissance, exploration, evaluation and appraisal stages are concluded, or when at least 35 per cent of the investment in the mining stage is made, as applicable.

IV ENVIRONMENTAL AND SOCIAL CONSIDERATIONS

i Environmental, health and safety regulations

One of the expressed goals of the Mining Code is to ensure the protection of the environment by reducing the negative impact that geological-mineral operations may have on the environment, as well as by repairing such harmful effects as may be caused. Mineral resources shall be mined in a sustainable manner and to the benefit of the national economy, in strict compliance with the rules on safety, economic use of the soil, rights of the local communities, and the protection and defence of the environment.

Holders of mineral rights shall therefore take all reasonable steps to preserve and protect nature and the environment and comply with the specific rules on environmental preservation in mineral activities to be approved by the Minister of the Environment and the MMRP (yet to be enacted). Holders of mineral rights shall also take into account the specific rules on environmental preservation resulting from international instruments ratified by Angola including, without limitation, the Convention on Biodiversity, the Cartagena Protocol, Agenda 21 and the International Convention on Waste.

Pending the enactment of environmental rules specific to mineral activities, mineral resources shall be exploited in compliance with the general environmental law, the water law, the law on biological and aquatic resources, and the rules on environmental impact assessment.

Health and safety are also expressly regulated by the Mining Code. As an example, the MMRP may order the suspension of mineral operations in the event of serious risk to the life or health of the population, to the safety of the mines, to healthy conditions in the workplace, to the environment, wildlife and flora. Without prejudice to the provisions of the Mining Code and of other applicable legislation, holders of mineral rights shall adopt measures to
ensure hygiene, health and safety at work, and to prevent occupational hazards and accidents at work, as set forth in specific regulations from the relevant bodies to be approved by the MMRP, the Ministry of Public Administration, Employment and Social Security, and the Ministry of Health.

Training is also a concern. Holders of mineral rights shall promote the required training activities in hygiene, health and safety at work, and the correct use of machinery, materials and working tools.

ii Environmental compliance

All projects that by nature, dimension or location may have an impact on the environment and social balance and harmony are subject to an EIA. In the case of the mining industry, holders of mineral rights are required to complete and obtain approval of a mandatory EIA prior to moving on to the mining phase (i.e., the approval of the EIA constitutes a condition precedent to the award of mineral rights for the mining stage). The principle of implicit approval of the EIA does not apply to the mining industry.

An environmental licence must be obtained for all activities subject to an EIA procedure under the general environmental rules and regulations (installation licence and operation licence).

iii Third-party rights

The definition of mineral policies should always take into account the tradition of local communities and contribute to their sustainable economic and social development. According to the Mining Code, the MMRP, in coordination with the local state authorities and the holders of mineral rights, shall create consultation procedures allowing the local communities affected by mineral projects to take an active part in decisions relating to protection of their rights, within the constitutional limits.

Local communities in the area where mineral projects are implemented are guaranteed the right to be informed, whenever the EIA indicates that the relevant project may affect the environment of the area where they reside, of the measures that the holder of mineral rights will adopt to avoid or mitigate possible adverse effects deriving from the mining of mineral resources. Local communities are entitled to the following statutory rights:

a Relocation – local communities that suffer housing losses requiring their relocation or the disturbance of their normal housing conditions are entitled to be relocated by the relevant concession holder. The relocation process shall respect the uses, customs, traditions and other cultural aspects inherent to the communities, provided that these are not contrary to the Constitution.

b Preferential workforce – holders of mineral rights shall ensure the employment and training of Angolan technicians and workers, with preference being given to those residing in the areas of the mineral concession.

c Protection of national market – holders of mineral rights shall give preference to the use of Angolan materials, services and products, provided that their quality is consistent with the economy, safety and efficiency of the mineral operations, that their prices are not more than 10 per cent higher and that the delivery time is not more than eight business days longer.

The award of mineral rights does not imply the transfer of ownership over the areas awarded for geological mineral investigation or over the land where mineral occurrences are located,
but grants the holder of the relevant mineral rights the right to use and exploit the land against payment of surface fees. In the case of privately owned land and areas in the private domain of the state or a public entity, the holder of mineral rights may only use the land after obtaining the consent of the legitimate owners or possessors (consent is deemed to be granted upon deposit of the annual rent and the posting of a provisional bond). If the holder of mineral rights fails to reach an agreement with the legitimate owners or possessors during the mining phase, operations may not commence until the land is acquired by the holder of mineral rights or expropriated by the state on the grounds of public interest. Holders of mineral rights are entitled to request the creation of easements for the full exercise of their rights, rights of way included.

As regards resettlement of the population residing in restricted or protected areas, the holder of the respective mineral rights shall build (1) suitable accommodation, in no event of lesser quality than that previously possessed by the relocated persons, and (2) social and community infrastructures, including without limitation, schools, health centres, community centres, temples, water supply and other systems, offering conditions at least equivalent to those that existed in the previous settlements.

Specific commitments in this particular matter are typically governed and undertaken under the MIC.

V OPERATIONS, PROCESSING AND SALE OF MINERALS

i Processing and operations

Holders of mineral rights are subject to an industry-specific customs regime provided for in the Mining Code. Thus, imports of equipment or machinery intended for exclusive and direct use for mineral exploration, evaluation, reconnaissance, mining and processing operations shall be exempt from duties and the service charge relating to general customs fees, except for stamp duty, the statistical 1/1000 fee and other associated charges for services rendered.

Equipment and machinery may be imported on a temporary basis, with no bond being required, and their subsequent export will be exempt from customs charges, except stamp duty on customs clearance documents and the charges normally payable for the provision of services.

The list of equipment and machinery that may benefit from the industry-specific customs exemption is detailed in a list approved and updated by a joint executive decree of the Ministry of Finance and the minister responsible for the mining sector (Joint Executive Decree 316/17, of 27 June 2017).

This industry-specific customs exemption shall not apply when the equipment or machinery is produced in Angola to the same or a similar quality and is available for sale and delivery in due time, provided that the price is not more than 10 per cent higher than the cost of the imported item, prior to customs charges being applied but after transport and insurance costs are included using the valuation method of the World Trade Organization.

When equipment or machinery is imported, the customs authorities shall be presented with a solemn statement from the importer stating that the equipment or machinery is to be used exclusively for mining operations. Any deviation from the rule of exclusive use in mining operations and the disposal of any equipment or machinery imported under the industry-specific customs regime, must be previously sanctioned by the Minister of Finance. In the case of clearance, the charges due on such goods shall be payable. The use of equipment
or machinery imported under this industry-specific customs regime for any purposes other than those envisaged and authorised shall qualify as customs duty evasion, provided for and punishable under the terms of the customs legislation in force.

Equipment or machinery imported under this exemption regime cannot be sold in the Angolan territory without the prior authorisation of the Customs National Service. If authorised, the relevant duties and other customs charges shall become payable.

Exports of mineral resources by a mineral rightholder shall not be subject to payment of duties or other customs charges, including service fees, except for stamp duty and the customs officers’ personal fees. This exemption shall not apply to mineral resources exported without processing, which shall be subject to a tax on the export of unprocessed minerals at a rate of 5 per cent on the market value of the mineral in question.

Enhancement of local processing and beneficiation is one of the expressed medium-term goals of the government for developing the mining industry. One of the prerogatives expressly set forth under the Mining Code to that effect is the state’s right to purchase local productions at market prices in order to direct it to local industry. Whenever the relevant minerals have a strategic interest for national security, the state’s right of requisition shall apply regardless of whether the production is used in the local mineral industry or not. Additionally, the government may authorise special tax and customs exemptions to Angolan companies exclusively engaged in the processing, dressing and cutting of minerals extracted in Angola.

There is no restriction on the use of foreign labour (except for artisanal mining). Nevertheless, holders of mineral rights shall ensure the employment and training of Angolan technicians and workers, with preference being given to those residing in the immediate areas of the mineral concession. Under the Angolan Labour Law, at least 70 per cent of the workforce of any entity employing more than five workers must be Angolan citizens.

Preference should also be given to the use of Angolan materials, services and products, provided that their quality is consistent with the economy, safety and efficiency of the mining operations, and that their prices are not more than 10 per cent higher and the delivery time does not exceed eight business days.

ii Sale, import and export of extracted or processed minerals

Holders of mineral rights have the right to market, process and export their productions, in accordance with the conditions set forth in the Mining Code for the marketing of minerals and the provisions of the relevant MIC and sale and purchase contracts.

The marketing of strategic minerals may be promoted by an institution created by the Executive to serve specifically as public marketing body. The public marketing body shall promote the sale of the producers’ strategic minerals, and shall have the following duties:

a to organise the sales system by creating rules for the implementation of the marketing system in force, as well as to guarantee physical conditions for the efficient involvement of purchasers and sellers in the marketing process;

b to ensure the producers’ commercial interests, by means of an efficient sales advertisement and promotion system;

c to ensure the security of transactions, by means of the application of rules of conduct, business ethics and fraud prevention;

d to preserve, by means of appropriate commercial measures, the stability of prices on the international market;

e to issue the certificate of origin of the minerals intended for export; and

f to prepare, store and disclose statistical data on the marketing of strategic minerals.
The marketing of diamonds is subject to specific rules established under the Mining Code, Presidential Decree 175/18 of 27 July 2018 (which approves the policy for the marketing of rough diamonds) and Presidential Decree 35/19, of 31 January 2019 (which approves the technical regulations for marketing of rough diamonds). According to Presidential Decree 175/18 and Presidential Decree 35/19, all rough diamonds extracted from the Angolan territory must be sold through the Single Marketing Channel, which is overseen by Sodiam, EP. According to the recently enacted diamond marketing policies, producers may now sell, directly or indirectly, their production in the national or international market subject to the following marketing quotas: (1) up to 60 per cent to buyers elected pursuant to the technical regulations, (2) from 15 per cent to 20 per cent to Sodiam, EP and (3) up to 20 per cent to local cutting and polishing industry.

Exports of minerals extracted in Angola are subject to licensing by the relevant body of the Ministry of Commerce and to customs clearance by the Customs National Service, with the MMRP being duly notified. Prior to export, strategic minerals shall be valued and sorted using, whenever the circumstances or the nature of the mineral so require, an internationally reputed appraiser retained for that purpose. All minerals extracted in and exported from Angola shall have a certificate of origin issued by the relevant entity. As a party to the KPCS, Angola has adopted the international system of certification of rough diamonds for export.

The introduction of any mineral in the national territory shall be subject to the prior opinion of the MMRP. When permitted, the operation shall be subject to standard customs clearance under the general terms of the law and to licensing by the Ministry of Commerce.

iii Foreign investment

Foreign investment in domestic mining companies and projects is deemed a special private investment operation subject to the investment rules of the Mining Code. The Private Investment Law shall only apply to mining projects on a subsidiary basis.

Whenever the investment entails the import of external capital or the granting of benefits and exemptions, the MMRP shall send a copy of the MIC and relevant title to the Ministry of Finance and to the national authority entrusted with the supervision of private investments in the country (currently AIPEX), so that the latter issues the relevant private investment registration certificate (CRIP).

In addition to all the statutory rights recognised to investors under the Mining Code, which include, inter alia, the right to mine the mineral resources discovered during exploration without any restrictions, the right to freely dispose of and market the mining products, etc., foreign investors and holders of mineral rights may also benefit from the statutory rights and privileges of the Private Investment Law or bilateral treaties (where applicable).

Angola has a stringent foreign exchange regime pursuant to which most cross-border transactions are subject to some level of scrutiny and control by Angolan authorities.

The Mining Code does not establish an industry-specific foreign exchange regime. However, reference must be made to the foreign exchange rules and regulations for diamond producers and other holders of mineral rights approved by Order 2/03 of 28 February 2003 of the National Bank of Angola (not repealed by the Mining Code). According to this special foreign exchange regime, diamond producers and other holders of mineral rights are entitled to apply for a special foreign exchange regime under the relevant MIC and request the National Bank of Angola’s clearance for the opening and operation of offshore bank accounts for the purpose of reimbursing finance agreements.
VI CHARGES

The Mining Code establishes a special tax regime applicable to all entities that carry out mineral reconnaissance, evaluation, exploration and mining activities in the national territory (the General Taxation Code and other sundry legislation relating to taxation and administrative matters shall apply on a subsidiary basis).

The industry-specific tax regime does not exclude other taxes or charges payable by law in respect of activities that are supplemental or incidental to mineral activities, except when they are expressly exempted.

The ring-fencing principle mandates that the tax obligations relating to a given mineral concession shall be independent from any other concession for the same mineral right-holder. In other words, the taxable income shall be calculated, and the respective tax charges assessed, separately for each mineral concession.

Holders of mineral rights may obtain investment premiums (uplift), grace periods for the payment of income tax and other types of tax incentives provided for by law. The specific tax exemptions or benefits are discussed and negotiated during the contractual stage of the investment procedure and incorporated in the MIC.

i Royalties

As a general rule, royalties are levied on the value of minerals extracted at the mine head or, when processing takes place, on the value of concentrates, at the applicable rate:

- strategic minerals: 5 per cent;
- precious stones and precious metallic minerals: 5 per cent;
- semi-precious stones: 4 per cent;
- non-precious metallic minerals: 3 per cent;
- semi-industrial and artisanal diamonds: 3 per cent; and
- construction materials of mining origin and other minerals: 2 per cent.

ii Taxes

Income tax

The income tax rate on mineral activities is 25 per cent (the general rate is 30 per cent). The Mining Code sets out a long list of deductible costs and losses for the purposes of determining the net taxable income of entities subject to income tax (e.g., costs of basic, incidental or supplemental activities relating to mineral production, such as those relating to materials used, manpower, energy and other manufacturing, maintenance and repair overheads; financial charges, including interest on loan capital invested in the undertaking, discounts, premiums, transfers, foreign exchange fluctuations, borrowing costs, debt collection and issue of shares and bonds, and reimbursement premiums). Special rules on tax reinstatement or depreciation also apply.

Investment income tax

Dividends distributed by companies or other business entities and resulting from revenues earned in mining operations are subject to investment income tax under the general terms of the law.
**Personal income tax**

Foreign workers, resident or otherwise, hired by concessionaires or by anyone who lawfully conducts evaluation, exploration or mining of mineral resources, as well as all those hired to provide technical, scientific or artistic services not subject to another tax, shall be subject to personal income tax on the terms and conditions established in the law.

**iii  Duties**

Holders of mineral rights are required to pay an annual contribution to an environmental fund (artisanal mining excluded) and a mineral development fund.

**iv  Surface fees**

For the initial five-year term of the reconnaissance, exploration, evaluation and appraisal title, the respective holder shall be subject to payment of a surface fee in legal currency, per square kilometre of the area corresponding to each title, as follows:

- **a** diamonds: US$7 to US$40;
- **b** remaining strategic minerals: US$5 to US$35;
- **c** precious stones and metals: US$5 to US$35;
- **d** semi-precious stones: US$4 to US$20;
- **e** non-precious metallic minerals: US$3 to US$18; and
- **f** construction materials and other minerals: US$2 to US$15

For each extension of the initial five-year term, the surface fee rate shall be double the value of the fifth year for each extension year or, if the mineral-right holder decides to retain the whole exploration area, three times the amount established for the fifth year, for the part of the concession area not relinquished.

**v  Artisanal fees**

Entities carrying out artisanal mining of non-strategic minerals shall be liable to pay an artisanal fee to be set by executive decree as proposed by the Ministers of Finance and Mineral Resources and Petroleum.

**VII  OUTLOOK AND TRENDS**

Aside from the ongoing reform in the petroleum sector that caught much of the public’s attention in 2018, the Angolan mining sector has also been subject to significant innovations, most of them aimed at enhancing the performance, transparency and potential for growth of the mining sector.

Indeed, one notable trend of the Angolan mining industry is the continuing search for diversification of the industry, with serious efforts being made with the aim of boosting national and foreign investment, and artisanal and semi-industrial projects.

However, despite the government’s efforts in diversifying and promoting investment within the mining sector, the focus still lies in the diamond subsector, as evidenced by the approval of a new diamond marketing policy, technical regulations for the marketing of diamonds and the new semi-industrial mining of diamonds regulations.
In this context, we expect to see a substantial increase in diamond production, as forecast in the recently enacted 2018–2022 National Development Plan, and more investments in local cutting and polishing facilities, as a consequence of the marketing quotas’ regime established by the new diamond marketing policy.

In addition, further legislation is to be passed with regard to the diamond marketing policy, including the approval of the National Sample Parcel Regulations, the Benchmark Pricing List Regulations, the Provisional Benchmark Pricing List, the Public Diamond Reserve Management Regulations, Endiama, EP and Sodiam, EP Fees and Charges Chart, the Guidelines for Marketing of Artisanal Production and the Guidelines for Marketing of Industrial Production.

On the other hand, the National Agency of Mineral Resources is expected to be set up and become fully operational in 2019, and we look forward to seeing what changes the National Agency of Mineral Resources will effectively cause to the existing supervision and governance over mineral resources.

All in all, one may conclude that the current political environment, which is marked by a more ‘investor friendly’ approach, associated with the vast amount of untapped natural resources, shows that Angola has potential for prosperity and that there is massive potential for expansion and growth of the country’s mining sector.
I OVERVIEW

The year 2018–2019 has seen continued success for the Australian mining sector across a range of commodities, with sustained increases in commodity prices (particularly for coking coal, higher grade thermal coal and iron ore) and productivity improvements, the combination of which has allowed the sector to realise significant economic gains, driven by structural change and improvements to industry-wide productivity during the difficult economic climate of previous years.

These increased economic returns have supported repayment of debt and returns to shareholders (both through dividends and share buy-backs), and new capital investment in the sector, with construction of BHP’s US$3.4 billion South Flank iron ore expansion project (Western Australia) and Fortescue Metals Group’s Eliwana mine and rail project (US$1.275 billion) commencing and Rio Tinto obtaining environmental approvals and awarding key contracts for its Koodaideri project (US$2.2 billion).

Significant investments were also made in the battery minerals sector, including construction of Ablemarle and Tianqi’s lithium hydroxide conversion plants in Western Australia and related expansion of the Greenbushes lithium project. The 300,000 ounces per annum Gruyere Gold Mine commenced production in Western Australia in June 2019, less than six years after discovery of the deposit.

Government policy 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. Australia also has a significant mining equipment, technology and services (METS) sector, supporting the local mining industry.

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 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 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) and various state and territory governments. The Constitution also reserves exclusive 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 (environmental, employment, foreign ownership and native title) and certain state and territory laws (i.e., resource royalty obligations and stamp duty).

ii Government policy

The current federal government, led by a Liberal-National party coalition, was re-elected in May 2019 for a third consecutive term of government. Federal governments in Australia have three-year maximum terms before another election must occur, meaning the next federal election must occur no later than May 2022. Government policy at all levels aims to provide a relatively well-defined system of laws and procedures governing the development of mining projects, and a proactive foreign investment regime. Regardless of political persuasion, all governments are aware that a favourable foreign investment culture provides impetus for the 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 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. The government of each state and territory 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 the various legislative regimes have at least two common stages – exploration and mining – with some 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:

**Mining Law: Australia**

<table>
<thead>
<tr>
<th>Exploration licence</th>
<th>Retention licence</th>
<th>Mining lease</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Purpose</strong></td>
<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>
</tr>
<tr>
<td><strong>Typical term</strong></td>
<td>Usually granted for an initial term of five years (with right to renew). Often subject to compulsory surrender or relinquishment requirements each year during the term.</td>
<td>Usually granted for an initial term of five years (with right to renew).</td>
</tr>
<tr>
<td><strong>Rights</strong></td>
<td>Entry to land to carry out exploration operations. Extracting certain quantities of minerals for assessment. Right to apply for conversion into 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>
</tr>
<tr>
<td><strong>Features</strong></td>
<td>Minimum annual exploration expenditure commitments apply to ensure proper appraisal and 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 not feasible (but can subsequently become commercially feasible). Yearly rental payments are required.</td>
</tr>
</tbody>
</table>

A decision by the High Court of Australia in 2017 raised concerns regarding the validity of certain mining tenure granted in Western Australia.\(^4\) In response, the Western Australian State Parliament tabled the Mining Amendment (Procedures and Validation) Bill 2018. The Bill proposes to validate certain mining tenements, as well as amending the Western Australian Mining Act to ensure security of mining tenure in the future.\(^5\) However, corresponding amendments to the Commonwealth native title legislation remain outstanding.

### ii Mineral reporting requirements

Generally, most tenements impose conditions requiring the holder to provide the government with annual resource delineation reports, and information about operations being 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 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, and the Corporations Act 2001 (Cth)) in relation to both their operations and mineral resource reporting, to ensure fair and informed market participation. A range of disclosure obligations is 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.

\(^4\) [Forrest & Forrest Pty Ltd v. Wilson (2017) HCA 30.](#)

\(^5\) [Explanatory Memorandum, Mining Amendment (Procedures and Validation) Bill 2018 (WA)].

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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). A company must promptly report on any material changes in its mineral resources or ore reserves (as defined in the JORC Code), and this report 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). The key requirements include the following:

- the maiden reporting of mineral reserves or resources (or material changes to previously reported reserve or resource estimates) must include prescribed supporting information and the ‘competent person’ must consent to the form of the disclosure;
- the consent of the ‘competent person’ is not required for subsequent disclosure of the same material;
- a listed mining company must include a mineral resource or reserve report in its annual reports, and provide quarterly reports to the market on its activities;
- a feasibility or pre-feasibility study must be carried out prior to the declaration of an ore reserve; and
- a mining company can only release production targets, financial forecasts or income-based discounted cash flow valuations if the entity has a ‘reasonable basis’ for the statement. The Australian Securities and Investment Commission (ASIC) has indicated that this requires (among other things) having ‘reasonable grounds’ for any assumptions made regarding the availability of funding (if funding is yet to be secured). The assumptions upon which the forecasts are based must be disclosed and the market must be updated if the assumptions materially change or are proven to be inaccurate.

III MINING RIGHTS AND REQUIRED LICENCES AND PERMITS

i Title

The default legal position in Australia 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 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, which is responsible for 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.

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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.

If a tenement holder seeks to engage in these activities on private land, there is an obligation to consult the private landowner 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 is the volume of government 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 with developing new projects. Definitive plans and policies have not yet been finalised, but Australia has frequently contemplated moving to a centralised approvals system and abolishing the multiple state-based regimes that cause delay and duplication. However, progress towards this goal has so far 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 (a 55 million-tonne per annum greenfield iron ore project) required an estimated 4,000 separate government approvals to reach the final commissioning and construction phase.

In July 2019, the Western Australia Environmental Protection Authority (EPA) granted BHP a Strategic Proposal approval covering its future Pilbara iron ore operations for the next 50–100 years. While individual components of the Strategic Proposal may require further EPA approvals, it is expected to reduce the environmental approval time for future operations by 50 per cent. Herbert Smith Freehills advised BHP on obtaining this ‘Strategic Proposal’ approval.

The issue of ‘Scope 3’ emissions (i.e., indirect carbon emissions through supply chains and end users) was the subject of consideration in New South Wales and Western Australia.

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during in 2019. In February 2019, a development consent for a new open-cut metallurgical coal mine was refused by the New South Wales Land and Environment Court, with the court noting the impact use of the mine’s production would have on climate change as a relevant consideration.11

In March 2019 the Western Australia EPA directed that all emissions-intensive projects should be carbon neutral (for direct emissions) and that ‘Scope 3’ emissions should be considered when assessing approvals. However, the EPA’s direction was promptly withdrawn following consultation between industry, parliamentarians and the EPA.

iv 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.12 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 regular updates if the scope of operations changes. Mining regulators in Australia are vigilant in their 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 a nominal consideration and assumption of rehabilitation obligations.

IV ENVIRONMENTAL AND SOCIAL CONSIDERATIONS

i 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:

a minimisation of the effects on flora, fauna, land or habitat;
b environmental pollution and contamination of land; and
c management and use of water resources, including protections against contamination of groundwater.

11 See: Herbert Smith Freehills, ‘Climate Change Impacts Used To Reject New NSW Coal Mine’ (https://www.herbertsmithfreehills.com/latest-thinking/climate-change-impacts-used-to-reject-new-nsw-coal-mine). The proponent’s decision not to appeal the New South Wales Land and Environment Court decision means that the matters raised in the judgement regarding ‘Scope 3’ emissions will not be tested in the New South Wales Court of Appeal.

12 Note that Western Australia dispensed with this requirement in July 2013, moving completely to a mine rehabilitation fund model, and a hybrid rehabilitation fund and surety bond scheme commenced in Queensland in April 2019.
Health and safety issues are governed by occupational health and safety legislation administered by each state and territory through statutory bodies with wide-ranging powers. The structure of the legislative framework differs across Australia. Many states regulate health and safety at mine sites through a specific piece of legislation that differs from 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 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 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.

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 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 government 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 affect ‘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 matters that affect Commonwealth lands, waters, protected flora and fauna and other 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 and one that causes significant delays in some projects.

iii Third-party rights

Until 1992, the legal system did not recognise that Australia’s indigenous inhabitants had any rights or interests in relation to land or waters. The Mabo decision of the High Court of Australia13 recognised that the ‘native title’ rights of Aboriginal people survived the acquisition

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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), which aims to:

- protect and recognise native title rights;
- provide for the validation of past acts and intermediate past acts;
- establish ways in which future acts affecting native title may proceed; and
- 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. These 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.

In March 2019, the High Court of Australia delivered the first judicial assessment on how native title compensation is to be calculated. In particular, the High Court of Australia confirmed that native compensation includes both economic and non-economic loss factors (such as cultural or spiritual loss) and that (in some cases) cultural loss can be a significant portion of the overall compensation.\(^1\)

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 in respect of certain land independent of any native title rights that may arise, and there are defined mechanisms (usually enshrined in state and territory legislation) that govern this.

V OPERATIONS, PROCESSING AND SALE OF MINERALS

It is rare for governments or government 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 because of the threat it can pose to the environment by introducing soil, plant

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\(^1\) Northern Territory of Australia v. Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples [2019] HCA 19.
material and other quarantine risks. The Australian Quarantine and Inspection Service is responsible for monitoring importation and use of such mining machinery. Typically, new machinery does not require an import permit 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.\textsuperscript{15}

Port and rail infrastructure is typically privately owned (often by mine operators) and access to infrastructure is regulated by state and federal competition laws. A recent example of this is the successful Federal Court proceedings taken by Glencore to have the Port of Newcastle ‘declared’ for the purpose of national competition law, allowing the national competition regulator to arbitrate prices and access terms.\textsuperscript{16}

\textbf{ii} \hspace{1cm} \textbf{Sale, import and export of extracted or processed minerals}

There are generally very few legislative restrictions 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 that are also signatories to that treaty (although India is a recent exception to this general rule), 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 exports to certain countries. Certain Australian states have prohibitions on 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.

\textbf{iii} \hspace{1cm} \textbf{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 a proposal, 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 case by case, recognising that national interests change over time.


\textsuperscript{16} \textit{Port of Newcastle Operations Pty Ltd v. Australian Competition Tribunal} [2017] FCAFC 124.
and flexibility is necessary to account for variable economic and industry conditions. This flexibility has been brought into focus with the recent decision by the Australian Treasurer to block proposed bids for a 99-year lease of 50.4 per cent of the New South Wales electricity distributor Ausgrid by Chinese state-owned company State Grid and Hong Kong-based Cheung Kong Infrastructure (CKI) and CKI’s more recent proposed acquisition of gas pipeline and energy business APA Group, although a previous acquisition of a gas pipeline business by CKI (DBP) was approved.

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, data protection, competition, and other government 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 Canada, China, New Zealand, the United States, Chile, Japan, Mexico, South Korea, Singapore, Thailand and Vietnam) 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</td>
</tr>
<tr>
<td></td>
<td>Mining or production tenure: A$0</td>
</tr>
<tr>
<td></td>
<td>Acquisitions in operational or producing mining projects: A$58 million</td>
</tr>
<tr>
<td>Agreement country investors</td>
<td>Exploration tenure: approval generally not required</td>
</tr>
<tr>
<td></td>
<td>Mining or production tenure: United States, New Zealand and Chile – A$1.154 billion; all others – A$0</td>
</tr>
<tr>
<td></td>
<td>Acquisitions in operational or producing mining projects: A$1.154 billion</td>
</tr>
<tr>
<td>Foreign government investors</td>
<td>Exploration tenure: A$0</td>
</tr>
<tr>
<td></td>
<td>Mining or production tenure: A$0</td>
</tr>
<tr>
<td></td>
<td>Acquisitions in operational or producing mining projects: A$0</td>
</tr>
</tbody>
</table>

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, these interests must be taken into account in considering if an entity in which a foreign investor is proposing to acquire securities is an Australian land corporation.

In addition, if 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$1.154 billion for agreement country investors and A$58 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, an application for a new mining tenement (or a transition from an exploration to a mining tenement) 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, to acquire an interest in tenements directly from the Australian government or to acquire an interest of at least 10 per cent in the securities of a mining, production or exploration entity.

VI CHARGES

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

ii Taxes
General duties and taxes are payable in the same manner as for 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 has recently introduced a Junior Mineral Exploration Tax Credit, which allows tax losses from greenfield exploration to be distributed as a refundable tax credit to Australian resident tax shareholders who subscribed for shares in the entity during the relevant income year. The total exploration credits available for issue during the scheme is capped at A$100 million over a four-year period. The scheme has been over-subscribed every year it has been offered.  

VII OUTLOOK AND TRENDS

i Competitiveness and productivity
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 2018, foreign direct investment in Australia across all sectors increased by 6 per cent to A$3,514.4 billion, drawing on capital inflows from major trading partners such as the United States, the United Kingdom, Belgium, Japan, Hong Kong and Singapore.

A combination of productivity improvement, cost reduction and investment in output has started delivering economic benefits to the mining sector thanks 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. Exploration expenditure has also increased, with

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the seasonally adjusted estimate for mineral exploration expenditure increasing by 3.9 per cent (A$21.7 million) to A$581.7 million in the March 2019 quarter, an increase of 11.9 per cent from the March 2018 quarter estimate.19

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 larger mining operations, with Rio Tinto recently completing its first delivery of iron ore using its ‘Autohaul’ autonomous train system.20 In 2018, Rio Tinto proposed to double its autonomous drilling systems at its mines in Western Australia.21 We expect this trend to continue and that the use of mining technology will become more widespread as 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 outcomes, including damage to a company’s reputation, equipment or profits, production and workforce challenges or delays to change, as well as serious safety and security problems. Large companies are particularly vulnerable targets owing to their significant role in global supply chains and national economies. Many mining companies have adopted vigilant cybersecurity policies and, in response, have educated staff on managing risks to enhance cybersafety.

iii  Commodity prices and demand
The markets for Australia’s key mineral exports, coal and iron ore have recovered from previous historic lows and, combined with sustained increases in gold 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 seeking higher grade products to achieve productivity and environmental targets in their own operations (and a corresponding decrease in demand for lower grade iron ore and thermal coal products). Demand for lithium and other battery minerals, of which Australia is one of the world’s major suppliers, continues to be driven by investment and research and development by battery producers and carmakers 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 daily net asset value of the VanEck

Vectors Australian Resources Exchange Traded Fund increasing from A$26.38 to A$29.77 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 greenfield mining projects continues to be challenging, although there have been a number of successful project financings for Australian gold and lithium developments. 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. Oftake partners have also been a source of debt and equity funding for greenfield development projects (particularly in the lithium space).

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 M&A transactions within the sector, although the number of mining projects acquired or funded by specialist mining private equity funds has increased, particularly in the coal and gold sectors.

Corporate consolidation in the mining sector
Two key trends in mining M&As continued during 2018, namely offshore investment and consolidation in 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). Significant mining M&A transactions in the Australian mining sector during 2018 and 2019 included Wesfarmers’ acquisition of Kidman Resources Ltd (A$800 million), Rio Tinto’s divestment of its Queensland coal assets to Glencore (US$1.7 billion), EMR Capital/Adaro Energy (US$2.25 billion) and Whitehaven Coal (US$200 million), Wesfarmers’ divestment of its 40 per cent interest in the Bengalla Joint Venture to New Hope Corporation (A$860 million) and South32’s acquisition of a 50 per cent interest in the Eagle Downs Joint Venture. In addition, Coronado Coal listed on the Australian Securities Exchange (ASX) in September 2018. Herbert Smith Freehills acted for either the buyer, the seller, a potential buyer or key stakeholder in relation to each of these transactions.

Sustainability and community
As automated technologies and lean business models are introduced to reduce costs and improve productivity, access to capital becomes limited and the market adjusts to lower commodity prices, which will affect the communities built around mining.

Stakeholders are calling for increased transparency in the way mining companies work with communities and manage the environmental effects of operations. Mining companies withdrawing from communities and scaling down operations will need to manage potential reputational damage and how this affects local economies, including social dislocation. Activist organisations are increasingly litigious and savvy with their use of social media and other corporate accountability mechanisms, such as 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 outcomes and collaborate with a range of stakeholders.
Chapter 3

BRAZIL

Alexandre Sion

I  OVERVIEW

Mining has had a major role in Brazil’s economic development since colonial occupation by the Portuguese in the early 18th century. According to official government statistics, the mining sector (which comprises both extractive and processing industries) contributed to 22 per cent of the country’s exports in the first semester of 2019, or approximately US$23.8 billion, increasing 3 per cent comparing to first semester of 2018.2

Brazil is a global major player and holds vast mineral wealth. In 2016, the country accounted for 17.22 per cent of the world’s iron ore production, 13.77 per cent of the world’s bauxite production and 13.03 per cent of the world’s vermiculite production.3 According to the World Mining Data 2018, Brazil was the eighth-largest ore producer in the world in 2016, with the majority mined in the states of Minas Gerais and Pará (86.9 per cent of the total metallic mineral production in 2016).4

Despite its geological attractiveness, a survey conducted by the Fraser Institute in 2017, to establish how mining company executives perceive investment attractiveness around the world, ranked Brazil 65th of 91 jurisdictions.5 These results can be explained in part as a result of legal uncertainty and the lack of structure of the bodies responsible for managing mining activity in the country, as well as the need to modernise industry standards.

In 2017, after several years of discussion and expectation, the government launched the Brazilian Mineral Industry Revitalisation Programme, which promised to update the industry’s legal framework and attract more investment.

1 Alexandre Sion is a founding partner of Sion Advogados.
Recently, the government and Congress have been under pressure to renew and enact new and modern legislation to the mineral sector, mainly due to the second major dam break in early 2019 in Brumadinho, State of Minas Gerais.

II LEGAL FRAMEWORK

i Constitutional framework and general overview of Brazilian mining law

Brazil is a federal republic and its Federal Constitution considers mining as a national policy matter, which must be developed in the national interest. Therefore, the federal government has exclusive jurisdiction and power over legislation within the sector. For the same reason, the Constitution states that all mines and mineral resources are owned by the federal state (the Federation) and are separated from the land’s ownership. Conversely, the mining right-holder owns the product from the mining, although the landowner is entitled to receive a share of it.

The Federation controls the exercise of prospecting and mining operations under a system of concessions, licences, permits and authorisations in which it has the power to grant mining titles to private holders, who must be Brazilian citizens or companies incorporated under Brazilian laws, with headquarters and management offices in the country.

The Constitution also deals with issues relating to environmental liabilities, mining in indigenous or bordering areas, among others.

ii Main mining legislation and recent changes

In addition to the Federal Constitution, the mining industry is mainly regulated by the Brazilian Mining Code, which dates from 1967. The government and mining companies have agreed that mining legislation needs amendments to bring it in line with the current context of the market and technological development. Opinions differ on whether the amendments should be limited to specific aspects or involve more detailed modifications.

After several years of discussion in Brazilian legislative houses and new Mining Code bills, the former federal government launched the Mineral Industry Revitalisation Programme in July 2017, enacting Law No. 13,540/2017 and Law No. 13,575/2017, which provide for modifications to the mining royalties legal framework and the creation of the ANM, respectively.

The federal government issued Decree No. 9,406/2018, revoking the previous Mining Code Regulation (Decree No. 62,934/1968) and approving a new one, with substantial amendments concerning regulatory matters.

Besides the Brazilian Mining Code and its recently amended Regulation, there are various pieces of legislation and regulatory provisions governing the sector, including, but not limited to:

a Law No. 13,575/2017, which abolished the DNPM and created the ANM;
b Law No. 7,990/1989, Law No. 8,001/1990, Decree No. 01/1991 and Law No. 13,540/2017, dealing with matters related to mining royalties (CFEM); Law No. 6,567/1978, concerning the mineral licensing regime;

6 The Brazilian Constitution expressly provides that the Federation holds the ownership of mines and mineral resources. Nevertheless, it is a matter of controversy whether it refers to a real ownership status or a sovereignty relationship.
Since 25 January 2019, a number of administrative acts and regulations on dams and mining tailings disposal were issued by the federal government in response to the failure of a certain tailings dam, in Brumadinho, State of Minas Gerais.

a. ANM Official Notice, which requests all mining companies to (1) daily inspect their upstream tailings dams; (2) update their emergency action plans for all tailings dams, regardless of the constructive method, by mapping of all facilities located in the area of influence of the dams, assessing the necessity of relocation of these installations and quantifying the potential people affected in the self-saving area (SSA); (3) inform what measures were taken to reinforce the safety of the respective tailings dams; among others.

b. ANM Normative Resolution No. 04/2019, which establishes:
   - the prohibition of upstream tailings dams, as constructive or raising method;
   - the prohibition of the existence of installations, works, services, facilities and dams in the SSAs of mining dams contemplated by the National Policy on Dams Safety, admitted certain exceptions (up to the filling of the reservoir dam and to serve employees);
   - the de-characterisation of all upstream mining dams;
   - performance of reinforcement works before the de-characterisation of the dam;
   - installation of automated siren system in the SSA (which is a problem due to the requirement of obtaining authorisation from landowners to access the land); and
   - imposition of more restrictive conditions and procedures based on the opinion of an external auditor, that, in practice, is very critical.

In addition, the State of Minas Gerais, historically one of the most important states to the mineral sector, has also enacted new legislation, such as Law No. 23,291/2019, which establishes the Minas Gerais State Policy for Dams Safety (PESB). The PESB broadens up the cases of application of the Dams Safety norms. Although the National Dams Safety Policy – Federal Law No. 12,334 from 2010 applies to tailings with a height of 15 metres or above and volume of 3 million cubic metres or above, the PESB applies to dams with a height of 10 meters or above and volume of 1 million cubic metres or above. The PESB brings important changes in the regulations respecting tailings dams in the state of Minas Gerais.

It is important to highlight that mining activities are subject to a huge range of administrative rules, ordinances and regulations, mostly issued by the ANM and by the Ministry of Mines and Energy, which complement mining legislation.

Apart from that, specific rules regulate the exploration and exploitation of particular mineral resources, such as petroleum, gas, nuclear minerals, mineral waters and fossil substances of archaeological interest.

Finally, mining activities may be significantly affected by other related legislation concerning the environment, labour rights, the acquisition of real estate and landholding regularisation.
iii Administrative competence and regulatory bodies

In general, the Ministry of Mines and Energy (MME) and the National Mining Agency (ANM), which extinguished the former National Department of Mineral Production (DNPM), share most of the administrative competences regarding the Brazilian mining sector.

The MME is a public administration body directly subordinated to the federal government. It is the highest authority in mining matters, although there is no real relationship of subordination or hierarchy between the MME’s and the ANM’s agents or authorities. The Ministry represents the interests of the federal government by formulating mining policies and supervising their implementation. It is also the competent body for granting mining concessions, granting prior consent for assignments and transfers of mining concessions and claim-stake mines, and for declaring the extinction or invalidity of mining concessions and claim-stake mines subject to its competence.

The ANM is a federal authority. The regulatory agency, which is associated to the MME, assumes the powers previously attributed to the ANM, and is responsible for the management, regulation and supervision of mining activities in the country. It is also incumbent upon the ANM to implement mineral policy, to establish rules and standards for the use of mineral resources, to apply sanctions to regulated agents, to grant exploration licences and other mining titles that do not fall within the competence of the MME, among others.

In addition to the powers previously attributed to the DNPM, the ANM will be responsible for declaring public utility for the purpose of establishing mineral easements or expropriation of properties, and for the promotion of competition among economic agents. The Brazilian Geological Service, a federal authority associated to the MME, is responsible for subsidising the formulation of mineral and geological policies, cooperating with public and private entities to carry out research and studies aimed at the exploitation of mineral resources in the country, among other things.

III MINING RIGHTS AND REQUIRED LICENCES AND PERMITS

i Title

According to the Federal Constitution, deposits and mineral resources belong to the Federation. Thus, the exploration and mining of mineral resources are carried out, by means of either ‘authorisation’ or ‘concession’, by Brazilians or companies incorporated under Brazilian law and having their registered office and administration in the country.

Because they are assets that belong to the Federation, the economic exploitation of mineral resources without the corresponding authorisation constitutes a crime against economic policy, without prejudice to applicable administrative and criminal sanctions, including environmental sanctions.

Mining rights are unilateral administrative acts, granted by the federal government through the ANM or the MME, depending on their respective competencies. In spite of
the recent reform, which culminated in a new edition of the Mining Code Regulation, the granting of mining rights remain unilateral, without the existence of contracts for concessions of mining rights in Brazil.

There is no deadline for granting mining rights defined by law. Administrative granting processes are often time-consuming owing to the lack of ANM and MME resources, which may be aggravated in cases when environmental permits or licences are required, since the environmental agencies in Brazil also face the same problem.

According to the Mining Code, the use of mineral resources occurs through different regimes, as will be seen below, and observes the principle of priority. Thus, Brazil adopts the first come, first served principle, which determines that the first individual to apply for an area will have priority in obtaining the mining right, as long as the legal requirements are met. Thus, areas that have not yet been requested and are not subject to mining rights already granted to third parties (unrestricted areas) are subject to the priority right.

In general terms, the acquisition of mineral rights can take place in a primary or secondary form. A primary acquisition takes place upon submission of an application by an individual, expressing to the ANM his or her interest in an unrestricted area, with the consequent initiation of an administrative proceeding and subsequent granting of the mining right.

Secondary acquisition concerns the assignment or transfer of an existing mining right by its owner to a third party. These acts, however, are subject to prior approval by the DNPM/ANM or the MME, depending on the type of mining right.

Finally, in exceptional cases of loss or waiver of a mining right by its holder, it is possible to acquire it by means of bidding procedures (availabilities).

ii Surface and mining rights

Soil and subsoil (deposits and mineral resources) property are separated in administrative terms. Thus, while the deposits and mineral resources are owned by the Federation, the land is regarded as private property. Therefore, even if the owner of a property discovers that there are mineral resources on his property, he can only explore them and extract them if the respective mining right is granted by the state. On the other hand, the holder of a mining right may exploit the mineral resources regardless of who owns the property, although the landowner is entitled to a share of the mineral production.

Access to land is regulated by private agreements between landowners and mining right-holders. In the event that it is not possible to reach an agreement, the Mining Code provides for a specific judicial proceeding to allow access to the area, guaranteeing payment of compensation to the property owner. The difficulty of negotiating with the owner to enter an area is a factor that often affects or delays the start of activities by the miner.

Claim-stake mines

Claim-stake mines are an exception in Brazilian mining law and result from a transition rule. According to the 1891 Federal Constitution, the ownership of land included ownership of mineral resources, allowing those owners to exploit mineral resources without the need for authorisation or concession by the Federation.

However, the 1934 Federal Constitution established the current system for separation of land and mineral resources, the latter being transferred to the Federation. Thus, to safeguard the rights of those who already had consolidated legal positions, those mines that were
registered during the transitional period were considered, exceptionally, as private property. In spite of this, mine manifests are also subject to the regulatory rules of the sector, preserving the peculiarities inherent in the title.

**Exploration permit and mining concession**

The exploration permit and mining concession regime is a double-title system, divided into two phases, each with a different title.

**Phase I: Exploration**

An exploration permit guarantees to the owner, individual or legal entity, the power and duty to carry out research work in the entitled area. The title is applicable to all mineral substances regulated by the Mining Code and is valid for one to three years. According to the new rules, which are expected to enter into force very soon, an exploration permit may be extended only once, except in cases where it is not possible to access the area to start activities or there has been a failure to obtain the necessary environmental permit or licence, provided that the title-holder proves not to have contributed to this situation.

An exploration permit does not grant the holder the right to extract mineral substances. During the research work, extraction will only be allowed in exceptional circumstances, with a specific title issued by the ANM. The extraction of mineral substances during the research phase, without the corresponding mining title, constitutes illegal production and subjects the agent to criminal, civil and administrative liabilities.

At the end of the research stage, the holder of the mining right must present a Final Exploration Report with the results obtained from the work. In addition, during the effective term of the exploration permit, the holder is subject to a series of obligations; non-compliance with these obligations may be subject to sanctions ranging from warnings, fines and even loss of the mining right.

**Phase II: Exploitation**

The mining concession guarantees to the owner the power and duty to explore the deposit until it is exhausted, without a definite term, and is applicable to all mineral substances regulated by the Mining Code. The title may be acquired only by mining companies and only after undertaking the authorised exploration through an exploration permit and subsequent approval of the Final Exploration Report.

One of the essential documents for requesting a mining concession is the Plan for Economic Development, which must demonstrate the technical and economic viability of the project and indicate, among other information, the method of mining, the scale of production initially planned and the mine closure plan.

It is important to note that a mining concession allows the holder to extract only the substance or substances indicated in the title. Thus, if the holder verifies the occurrence of another substance and has an interest in taking advantage of it economically, the title-holder should follow the specific administrative procedure, stating the new substance in the mining...
title. In addition, the miner will be subject to a series of obligations, including complying with the plan and the requirements occasionally formulated by the ANM. Failure to comply may be subject to sanctions ranging from warnings, fines and even the loss of mining rights.

**Mineral licence**

A mineral licence\(^\text{12}\) is applicable to specific substances, such as those for immediate use in civil construction, as provided for in Law No. 6,567/1978, and is restricted to a maximum area of 50 hectares. As a rule, this system grants the holder the right to mineral extraction regardless of previous research, owing to the nature, spatial limit and economic use of the mineral substances.

Unlike the exploration permit and mining concession systems, this licensing system depends on the granting of a specific licence issued by the competent administrative authority of the municipality where the area is located. In addition, the mineral licence shall be granted only to the owner of the land or to whoever holds his or her express authorisation, except in the case of real estate belonging to the state.

**Small-scale mining permit**

A small-scale mining permit\(^\text{13}\) allows the immediate use of the mineral substance, including non-compacted material, exclusively in the alluvial, elluvial and colluvial forms. Similarly to the mineral licence, the small-scale mining permit generally allows mineral exploitation without the need for previous research, taking into consideration the nature, spatial limit, location and economic use of the mineral substances included in the system.

A small-scale mining permit is valid for five years and may be renewed successively.

**iii Additional permits and licences**

The above-mentioned mineral research and exploitation are also subject to environmental legislation. For this reason, depending on the hypothesis, it will be necessary to obtain the requisite environmental licences and permits for research or mining,\(^\text{14}\) including those related to suppression of vegetation, intervention in specially protected areas or natural cavities, among others.

In addition, the Mining Code deals with two further exceptional cases.

**Mineral extraction records**

The direct public administration bodies and autonomous institutions are entitled to apply for an extraction permit. This sets up the possibility of extracting certain substances for immediate use in civil construction, exclusively for use in public works, but prohibits any sale, mining by third parties or transfer to private companies. The title is limited to a maximum area of five hectares and will be valid for up to five years, allowing a single extension.

\(^{12}\) Regime de Licenciamento.

\(^{13}\) Permissão de Lavra Garimpeira.

\(^{14}\) Mineral exploitation will always depend on a valid environmental licence, issued by the competent environmental agency.
Borrow pits
In the event of a real need for earth-moving and dismantling of *in natura* materials for the purpose of opening up transport routes, general earthworks and buildings, the Mining Code exceptionally allows the use of these materials. However, this is an exceptional hypothesis and two mandatory requirements must be met:

- the real need to carry out earth-moving work and dismantling of *in natura* materials for the purpose of opening up transport routes, general earthworks and buildings; and
- prohibition of the commercialisation of the material.

In the event of non-compliance with these requirements, the work will be considered as illegal mining by the ANM.

Mining on borders
The country’s border area is considered indispensable to national security, and constitutes an internal area that is 150 kilometres wide, parallel to the terrestrial line dividing the national territory, under the terms of Law No. 6,634/1979.

Therefore, any research, mining, exploration or exploitation of mineral resources in the country’s border area will necessarily be dependent on prior approval by the National Security Council. The same rule applies even if the company establishes itself in such an area.

In addition, mining companies wishing to operate or settle in the border area should meet the following requirements:

- at least 51 per cent of the capital must belong to Brazilians;
- at least two-thirds of the workers must be Brazilians; and
- the administration or management should, for the most part, be Brazilians, and they should hold the predominant administrative powers.

iv Closure and remediation of mining projects
The Federal Constitution expressly provides that the exploitation of mineral resources subjects the agent to the recovery of the damaged environment, ‘according to a technical solution required by the competent public agency’.

Thus, a miner in Brazil is subject to compliance with mining and environmental obligations in relation to mine closure and recovery of the area. In the case of mining concession requirements, for example, the company is required to submit a mine closure plan as well as an economic development plan. As regards the environmental aspects, the miner must present a recovery plan for the damaged area.

Several bills foresee the implementation of an insurance obligation to guarantee the necessary closure of the mine. However, at present, there is no obligation to provide collateral or insurance related to the closure of a mine and the recovery of the damaged area.

IV ENVIRONMENTAL AND SOCIAL CONSIDERATIONS

i Environmental, health and safety regulations
According to the Federal Constitution, the Federation, the states and the Federal District have legislative competence in environmental matters. In addition, it is the responsibility
of municipalities to legislate on matters of local interest. Therefore, Brazilian environmental legislation has an enormous diversity of laws and administrative acts, which affect mining activity, among other things.

In particular, we list the following main environmental laws:

- Law No. 6,938/1981, which provides for the National Environmental Policy;
- Law No. 9,605/1998, which deals with crimes and environmental administrative offences;
- Law No. 12,305/2010, which provides for the National Policy on Solid Waste;
- Law No. 9,985/2000, which deals with the National System of Conservation Units (environmentally protected areas); and
- Complementary Law No. 140/2011, which provides for administrative competence in environmental matters.

In this regard, it is important to note that the legislative competence competing among the federation’s environmental bodies creates different scenarios depending on the location of the mining project. Thus, the degree of complexity in obtaining an environmental licence and the associated requirements and obligations – and the time it will take to obtain the necessary environmental authorisations and licences – may vary according to the Brazilian state in which the project is located.

In relation to labour laws, which provide for occupational safety and health conditions, the legislative competence is federal. Thus, there are no major discrepancies between the rules applicable to workers on projects located in different states.

With regard to the rules applicable specifically to occupational health and safety in mining, we point out Regulatory Rule No. 22 – Occupational Health and Safety in Mining, issued by the Ministry of Labour and Employment, and Ordinance No. 237/2001, issued by the DNPM (current ANM), which approves the Mining Regulatory Standards.

Regulatory Rule No. 22 provides for the responsibilities of the employer and the employee, and deals with aspects related to the transport of people and mining materials, safety and ventilation systems in underground activities, among other things.

The Mining Regulatory Standards set out provisions for the protection of workers, workplace organisation, emergency operations and the need for training.

ii Environmental compliance

Any activities that involve environmental resources or are considered as effectively or potentially polluting, or those that may cause environmental degradation, are subject to environmental licensing. To obtain the relevant environmental licence, it may be necessary to prepare environmental studies, which may be less or more complex, depending on the case. Administrative powers concerning environmental matters are regulated by the Federal Constitution and Complementary Law No. 140/2011, which establishes that the competence for environmental licensing will depend on the predominance of the interest, which may be municipal, state or federal. As a rule, mining is licensed by state environmental agencies, but exceptionally may be licensed by the federal environmental agency or by municipal environmental agencies, in accordance with the laws in force.

Other permits or licences may be necessary, such as those required for intervention in preservation units (environmentally protected spaces) and natural cavities, the suppression of vegetation, among others.
The procedures for obtaining permits and authorisations vary according to the competent environmental agency. In addition, different procedures and types of licences may be applied to different projects, depending on the size and the actual or potential impacts caused. Thus, it is not possible to indicate a specific term or procedure for obtaining an environmental licence and any additional permits or authorisations. However, in general, environmental agencies throughout Brazil face operational difficulties owing to the lack of structure, a factor that usually negatively influences the deadlines for issuance of these licences and authorisations.\textsuperscript{15}

\textbf{iii Third-party rights}

In the first place, it is important to highlight that the Federal Constitution does not prohibit but only sets forth specific conditions concerning the exploration of natural resources within indigenous areas. However, these conditions have not yet been implemented and, consequently, mineral activities in indigenous areas are still not possible. Despite that, the country faces a high level of illegal mining in indigenous protected areas.

Pursuant to Article 231 of the Federal Constitution, mineral exploration and exploitation in indigenous areas is dependent on authorisation from the National Congress, the enacting of a law regulating the activity and conducting public consultations or inquiries that involve participation by the local communities.\textsuperscript{16}

\textbf{V OPERATIONS, PROCESSING AND SALE OF MINERALS}

\textbf{i Processing and operations}

Mining processing and beneficiation of mined minerals are subject to a legal framework and regulations, especially the Mining Regulatory Standards. Other than that, these activities require environmental licences granted by the competent environmental body.

There are no specific rules concerning the use of foreign labour in mining,\textsuperscript{17} except for those concerning activities developed in frontier areas (i.e., at least two-thirds of the workers must be Brazilians and most of the administration or management positions must be held by Brazilians, who must hold the predominant administrative powers).

\textbf{ii Foreign investment}

The Brazilian legal framework does not make a distinction between foreign and national investors, although the Profit Remittance Law\textsuperscript{18} states that foreign direct investment and certain financial transactions are subject to prior registration by the Central Bank of Brazil (BACEN). BACEN is responsible for registering any foreign capital, which shall also be registered by the receiving party in their accounting statements.

\textsuperscript{15} In addition, civil society participation in environmental licensing procedures and frequent prosecution involving these procedures are factors that may delay the granting of an environmental licence.

\textsuperscript{16} Article 231 also establishes that indigenous people are entitled to a share of the product of mining activities held on the lands they live.

Brazil is a signatory to Convention No. 169 of the International Labour Organization, which also provides for the requirement of a public inquiry in which indigenous and local communities are represented.

\textsuperscript{17} However, it is important to note that foreigners may obtain work visas in order to work in Brazil.

\textsuperscript{18} Law No. 4,131/1962
In general, Brazil does not have restrictions on foreign investments. However, for national security reasons, some activities are subject to special conditions. This is the case for mining in frontier areas, and for the acquisition, rural lease or other rights over real estate properties located within frontier areas (150 kilometres), which require prior approval by the National Security Council.

It is important to highlight that the acquisition of rural lands by foreign companies, or Brazilian companies controlled by foreigners or with the majority of its capital controlled by foreigners or foreign companies, is subject to specific legal requirements and certain legal restrictions.\(^\text{19}\)

Finally, only Brazilians citizens or companies incorporated under Brazilian laws, with headquarters and management offices in the country, are allowed to mine in Brazil.

VI CHARGES

i Royalties

Mining right-holders are required to pay financial compensation for mineral exploitation (CFEM), a non-tax nature charge resulting from the activity of mining and due in the event of sales, consumption, transformation or use of mineral resources. Rates vary from 1 per cent to 3.5 per cent, depending on the mineral exploited.

The mining royalty legal framework underwent major changes after the enactment of Law No. 13,540/2017, which changed the CFEM tax basis and rates, among other things.

ii Duties

Landowners

Pursuant to Brazilian legislation, landowners are entitled to receive various payments during mineral exploration and exploitations. In general, mining right-holders must pay revenues for the occupation and use of the area, and compensation for the damage caused to the landowner’s property. The amounts to be paid must be negotiated between the landowner and the mining right-holder and may be subject to a specific lawsuit procedure in the absence of an agreement.

The landowner is also entitled to a share of the results of the mining, the value of which cannot be less than 50 per cent of the amount paid as a royalty. Therefore, a landowner’s participation will vary depending on the mineral exploited.

iii Other fees

Annual fee per hectare

Exploration permit holders are required to pay a fixed amount per square kilometre of the titled area. The annual fee per hectare is levied annually until the final exploration report is filed and is payable either in January or July, depending on the anniversary of the exploration permit.

\(^{19}\) Business transactions that result in direct or indirect transfer of rural lands are subject to the same restrictions.
iv Environmental compensation

Environmental compensation may be due, depending on the size of the business and degradation potential, the location of the titled area and its specific environmental assets.

For instance, pursuant to Law No. 9,985/2000, which provides for environmentally protected areas (conservation units), in the event of environmental licensing of enterprises with significant environmental impact, the entrepreneur is obliged to spend 0.5 per cent of total costs provided for the business installation in order to support the deployment and maintenance of a conservation unit.

Other environmental compensations may be due, depending on the scale of the project and the existence of negative impacts in especially protected areas or attributes.

VII OUTLOOK AND TRENDS

Considering the general public and government commotion originated by the cases of dam failure in Brazil, there is a clear movement at federal and state levels to definitively ban the usage of upstream tailings dams.

In view of the actions carried out by the authorities and the content of the new regulations, the main focus of concern by the government, public prosecutors, civil society, media and NGOs are upstream dams. According to the new regulations above-mentioned, no new upstream dams will be permitted in Brazil and the ones that currently exist should be de-characterised.

Another important aspect of the new regulation is the prohibition of the presence of installations, facilities, services and operations downstream the dams, in the self-saving areas. This prohibition applies to all kinds of dam, downstream, centre line and upstream, admitted, however, the presence of such facilities up to the filling of the reservoir dam and to the necessary to serve the employees.

Therefore, new regulations are expected to be enacted on short notice, including an amendment to the ANM Normative Resolution No. 04/2019 and other important legislation.
I OVERVIEW

During the past few years, Burkina Faso has achieved a strong economic performance, reflected by a significant increase in gross domestic product (GDP) of 6 per cent in 2018, supported by continuing dynamism in the mining sector despite a challenging national security context.

The proportion of GDP originating from mining activity has increased very significantly in recent years and the mining sector has contributed to 11 per cent of annual GDP in 2018, compared to 8.3 per cent in 2016.

Burkina Faso has rich and varied mining potential, as illustrated by the many current mining projects, including 13 at the exploitation phase (12 gold projects and one zinc project). Roxgold, Iamgold, Endeavour Mining, Teranga Gold Corporation, West African Resources and Semafo are some of the mining companies that are active in the country. In terms of mining exploration investments, Burkina Faso is one of the most dynamic countries in Africa.

Burkina Faso is also the fourth-largest gold producer in sub-Saharan Africa and gold is the top export product, with a continuing increase in production (46.4 tons in 2017 and 52 tons in 2018). Other mineral resources include zinc, diamond, manganese, copper, iron and nickel.

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

The reform of the new Mining Code was aimed in particular at striking a balance between the state’s 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 the creation of a local development fund for areas hosting mining sites, in line with the legislation of other francophone mining jurisdictions.

To promote good governance and transparency in the mining sector, Burkina Faso became a member of the Extractive Industries Transparency Initiative in 2008. Burkina Faso has also expressed an interest in joining the Kimberley Process Certification Scheme but has not yet been admitted.

II LEGAL FRAMEWORK

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

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1 Alban Dorin is a partner at Mayer Brown. This chapter does not constitute legal advice and may not be relied upon as such. Specific advice should be sought in relation to a transaction.
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);\(^2\)
- semi-mechanised exploitation licence for mining substances;\(^3\)
- authorisation for the industrial exploitation of quarry substances; and
- authorisation for the semi-mechanised exploitation of quarry substances.\(^4\)

An exploration licence is required before applying 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.

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2 The mining legislation defines ‘small mines’ notably on the basis of the contemplated volume of production, set at a maximum of 200 tons of gross mineral per day.

3 The mining legislation defines ‘semi-mechanised’ exploitation licences notably on the basis of the contemplated volume of production, set at a 50 tons of crude ore per day.

4 Article 5 of the Mining Code.
**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 to 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.

**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 investor.

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

**ii Surface and mining rights**

As a general principle, mining licences are served on a first-come, first-served basis.

**Exploration licence**

An application for an exploration licence must be filed with the mining registry with specific documents and information, such as information about the applicant, the projected work plan for the first year of exploration and the corresponding budget. 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 payment by the applicant of a fixed duty and a copy of the certificate of registration of the applicant.

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 phase.

**Industrial exploitation licence (large-scale or small-scale mines)**

An application for an industrial exploitation licence must be filed at least 90 days before expiry of the exploration licence relating to the same area and minerals. The applicant must be a company incorporated under Burkinabe laws. The application is filed with the mining registry 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:

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5 Article 6 of the Mining Code.
6 Article 43 of Law No. 036-2015/NTC dated 26 June 2015 relating to the Mining Code of Burkina Faso.
7 Article 28 of Decree No. 2017-036 dated 26 January 2017 relating to the management of mining titles and authorisations.
8 Article 31 of Decree No. 2017-036.
9 Article 32 of Law No. 036-2015/NTC.
10 Article 41 of Law No. 036-2015/NTC.
11 Article 100 of the Mining Code.
Mining Law: Burkina Faso

1. 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);
2. 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;
3. A draft mining convention to be signed with the state;
4. A commitment to transfer to the state 10 per cent of the exploitation company; and
5. A closure and rehabilitation plan.

Once received, the administration must send the application to a specific technical committee within 30 days. It must then be submitted to the Council of Ministers within 60 days of reception of the advice given by said technical committee.¹²

An industrial exploitation licence is granted by a decree of the Council of Ministers based on a report by the Minister of Mines¹³ and officially notified to the applicant.

An industrial exploitation licence confers on its holders the exclusive right of exploitation of the deposits identified in the licence, within the limits of the initial exploration area.¹⁴

While the Mining Code specifies that an industrial exploitation licence is an immovable real property right that can be the subject of a mortgage or pledge, a mortgage is generally preferred, as real property.¹⁵

Semi-mechanised exploitation licence

A semi-mechanised exploitation licence can be granted only to companies created under Burkinabé law. Applications are filed with the mining registry.

Decree No. 2017-036 lists the documents required for an application, which include an environmental impact study and environmental feasibility advice from the Minister of the Environment.

A semi-mechanised exploitation licence is granted by a decision made by the Council of Ministers within 60 days of the application, following the advice of the Minister of the Environment and the Minister of Mines. It confers on its holders the exclusive right to exploit and dispose of the mining substances specified in the licence according to mining regulation.¹⁶

Authorisation for industrial or semi-mechanised exploitation of quarry substances

An application for an authorisation of exploitation of quarry substances is filed with the mining registry with the documents specified in Decree No. 2017-036, which shall include information about the applicant and, depending on the nature of the work, an environmental impact study.

An authorisation for industrial exploitation of quarry substances is granted by an order of the Minister of Mines. It confers on its beneficiaries the exclusive right to exploit quarry substances contained on and below the surface. It also grants several other rights, such as the right to dispose of products on the internal market or to export them.¹⁷

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

¹² Article 72 of Decree No. 2017-036.
¹³ Article 40 of Law No. 036-2015/NTC.
¹⁴ Article 45 of the Mining Code.
¹⁵ Article 47 of the Mining Code.
¹⁶ Article 57 of Law No. 036-2015/NTC.
¹⁷ Article 89 of Law No. 036-2015/NTC.
**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.18

In addition, any holder of an exploitation licence must set up a legal entity governed by Burkinabé 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 the following:

- **Exploration licence**:
  - carry out the exploration programme submitted to the mining administration;
  - produce an annual report of completed work;
  - begin the exploration work at least six months after being granted the licence and pursue it;
  - comply with the environmental regulations;
  - inform local authorities of the nature of work to be undertaken on the territories that are the subject of the exploration licence; and
  - generally, comply with the obligations set out in the Mining Code. 19

- **Exploitation licence**:
  - begin the development work within two years of issuance of the licence; and
  - exploit the deposit in accordance with the feasibility study and the development plan submitted to the Administration of Mines. 20

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 withdrawal of the licence.

**Term of validity of mining rights**

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

An industrial exploitation licence for large-scale mines is valid for an initial 20-year period from its issuance or for the life of the mine (as determined in the relevant feasibility study) if earlier.

An industrial exploitation licence for small-scale mines is valid for an initial 10-year period from its issuance and for the life of the mine (as determined in the relevant feasibility study) if earlier.

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

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

Authorisation for industrial exploitation of quarry substances is valid for five years from its issuance and renewable for three years.

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18 Article 98 of the Mining Code
19 Articles 36 and 37 of the Mining Code.
20 Articles 51 to 54 of the Mining Code.
Authorisation for semi-mechanised exploitation of quarry substances is valid for three years from its issuance and renewable for three years.

Authorisation for artisanal exploitation of quarry substances is valid for two years from its issuance and renewable for two years.

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 approval from the Minister of Mines.21

The procedure for the transfer of a mining title is set out in Decree No. 2017-036, which 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 any industrial exploitation licence holder and the Minister of Mines within six months of the grant of the relevant permit.22 A model of the mining convention (i.e., a standard form of mining convention) is provided by Decree No. 2017-0035 dated 26 January 2017 relating to the model of mining convention.

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

A 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.23

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

The stabilisation of the 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 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 exploitation24 or exploration licences.

Mining titles and authorisations, and mining conventions, shall be published in the Official Gazette of Burkina Faso.25

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21 Article 52 of Decree No. 2017-036.
22 Article 96 of the Mining Code and Article 2 of Decree No. 2017-0035 dated 26 January 2017 relating to the model of mining convention.
23 Article 16 of the Mining Code.
24 Article 169 of the Mining Code.
25 Article 15 of the Mining Code.
**Maximum area of the licence**

The maximum area granted for an exploration licence is 250 square kilometres and 1 square kilometre for a semi-mechanised exploitation licence.\(^\text{26}\)

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.\(^\text{27}\) In practice, the applicant specifies the relevant area in the application and the Decree granting the licence determines the boundaries of the licence.

### iii 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 Administration of Mines.

### iv Closure and rehabilitation of mining projects

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 at the Central Bank of West African States, or at any commercial bank in Burkina Faso, to secure the environment protection and rehabilitation programme costs.\(^\text{28}\)

The rehabilitation programme and estimated rehabilitation costs are submitted each year to a technical committee formed by the Minister of Mines, the Minister of the 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 aforementioned technical committee.

At the end of the exploitation phase, a licence or authorisation holder must carry out rehabilitation work on the mining site in order to be given a discharge that releases them from their obligations. If the holder of a licence or authorisation fails to perform its rehabilitation obligations, the state can dispose of the necessary amounts to undertake the necessary rehabilitation work at the mining site.\(^\text{29}\)

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\(^{26}\) Article 35 of the Mining Code.

\(^{27}\) Article 50 of the Mining Code.

\(^{28}\) Article 141 of the Mining Code.

\(^{29}\) Article 12 of Decree No. 2017-068 dated 15 February 2017 relating to the fund for remediation and closure of mines.
ENVIRONMENTAL AND SOCIAL CONSIDERATIONS

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.30

An industrial exploitation licence and a semi-mechanised exploitation licence for mineral substances are also granted following the advice of the Minister of the Environment based on the social and environmental impact study.31

For the exploration and exploitation of radioactive ores, mining title and authorisation holders are subject to specific regulations relating to environment radiological monitoring.32

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

Each mining title or authorisation may be withdrawn without any compensation by the Administration of Mines after a formal notice has remained unsuccessful for 60 days in the event of non-compliance with the obligations set out in the environmental and social impact study.33

Third-party rights

Local populations have the right to take part in the process of decision, development and implementation of programmes that affect the environment. They also have the right to use natural resources and may indirectly benefit from the profits of exploitation of mineral substances.34

The public authorities shall take the necessary action to satisfy the essential needs of the population in order to prevent problems that may be prejudicial to the environment.35

The mining title and authorisation holders undertaking mining activities shall also be bound to respect the human rights of the affected communities.36

The occupancy of lands by title-holders confers on the landowner or occupiers the right to fair and prior compensation.37

30 Article 139 of the Mining Code.
31 Article 56 of the Mining Code.
32 Article 140 of the Mining Code.
33 Article 112 of the Mining Code.
34 Article 8 of Law No. 006-2013/AN relating to the Environment Code in Burkina Faso.
35 Article 87 of Law No. 006-2013/AN.
36 Article 20 of the Mining Code.
37 Article 123 of the Mining Code.
Local development and mining funds
The Mining Code has created funds that may require a contribution from the holders of mining titles, including:

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

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

V OPERATIONS, PROCESSING AND SALE OF MINERALS

i Processing and operations
The processing of mineral substances is subject to a specific administrative authorisation by the Administration of Mines (which does not imply the granting of the mining title).\(^{38}\)

Any individual or legal entity undertaking operations for the processing of mineral substances is required to make a biannual declaration to the Minister of Mines.\(^{39}\)

Use of foreign labour and services
Use of foreign labour
The Mining Code provides that mining title-holders, their suppliers and subcontractors must give priority employment to Burkinabe executives of equal qualification and irrespective of their gender, having the skills required for the effective conduct of mining operations.\(^{40}\)

The company shall submit a training plan for local executives to the Administration of Mines in order to replace expatriated staff gradually. The employment contracts for foreign employees shall also be covered by labour administration.\(^{41}\)

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.\(^{42}\)

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38 Article 11 of the Mining Code.
39 Article 172 of the Mining Code.
40 Article 101 of the Mining Code.
41 Article 102 of the Mining Code.
42 Article 101 of the Mining Code.
ii Sale, import and export of extracted or processed minerals

Any individual or legal entity taking part in the operations of purchase, sale, import or export 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 by the Administration of Mines.43

Furthermore, undertaking the purchase, holding, processing, sale and export of handcrafted gold is subject to prior approval granted only to companies registered in Burkina Faso for purposes relating exclusively to the purchase, sale and export of gold or other precious fully or partially handcrafted minerals.44, 45

The grant of this approval is conditional upon:

a payment by the applicant of 5 million CFA francs as approval right; and

b lodging a security of 5 million CFA francs with the Public Treasury to be recovered in the event of permanent cessation of activities.46

Any artisanal or industrial operator who does not keep in its head office, or in its purchasing centre, records relating to production, sale or export, or does not establish records for its operations, may be subject to a fine amounting to twice the value of the gold or other precious mineral that has not been recorded.

This fine shall in any case not exceed:

a 2 million CFA francs for an artisanal operator; and

b 20 million CFA francs for an industrial operator.47

Furthermore, pursuant to WAEMU Regulation No. 09/2010/CM, the import and export of gold from or to foreign countries is subject to prior authorisation by the Minister of Finances.48 Note that repatriation requirements also apply (see below).

iii Foreign investment

Exchange control regulations are applicable, in particular WAEMU Regulation No. 09/2010/CM on external financial relations of member states of 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 are within the CFA franc zone.

43 Article 11 of the Mining Code.
44 Article 4 of Law No. 028-2017 dated 18 May 2017 relating to the trade of gold and other precious minerals in Burkina Faso provides that precious minerals include precious metals such as gold, precious stones such as diamond and semi-fine stones.
45 Article 2 of Decree No. 2018-0249 dated 29 March 2018 relating to the grant and renewal of approval for the trade of gold and other precious minerals from artisanal or semi-mechanised production.
46 Articles 5 and 6 of Decree No. 2018-0249.
48 Article 9 of WAEMU Regulation No. 09/2010/CM/ of 1 October 2010 on external financial relations of members of WAEMU.
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 WAEMU regulations, onshore and offshore accounts in a foreign currency held by Burkinabe entities are subject to the approval of the Minister of Finance (acting with the prior consent of the Central Bank of West African States). In practice, the opening of offshore or onshore accounts in a foreign currency can prove difficult.

All revenues from the sale of minerals must be repatriated to Burkina Faso 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-holder or authorisation holder during the period of validity of the title or authorisation, such as:

- the right to transfer abroad the funds intended for the repayment of debts contracted abroad and for the payment of foreign suppliers;
- 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.

**VI CHARGES**

Articles 143 et seq. of the Mining Code set out specific taxes and duties to be paid by mining title-holders and authorisation holders, which include the payment of fixed and proportional duties. Fixed duties, as specified by Decree No. 2017-023, are paid prior to the issuance, renewal, transfer, farm-out transaction and extension of mining titles or authorisation, or any amendment to a development and exploitation plan for mines and quarry substances.

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

**i Royalties**

The proportional duties are specified by Decree No. 2017-023 and include a surface tax, to be paid annually by any title-holder 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:

- for the first five years: 7.5 million CFA francs per square kilometre per year;
- from the sixth to the 10th year: 10 million CFA francs per square kilometre per year;
- and from the 11th year: 15 million CFA francs per 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.
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 diamond and other precious stones;
c) between 3 and 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 title-holders benefit from a specific tax regime at the exploration and exploitation phases.

**Exploration phase**

Mining title-holders are exempt from paying VAT during the exploration phase on the import and acquisition of goods required to carry out the geological or mining activities, with certain exceptions.

Mining title-holders also benefit from an exemption on:

a) industrial, business, agricultural profit or corporate tax;
b) minimum flat-rate perception tax;
c) contribution of business licensing tax;
d) tax instalments;
e) apprenticeship tax; and
f) registration fees of capital increase.

**Exploitation preparatory works**

Holders of exploitation licences or authorisations for exploitation of quarries are exempted from payment of VAT as specified by Article 154 of the Mining Code when:

a) the preparatory work is carried out by the licence or authorisation holder; and
b) 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. The benefit of the exemptions shall end on the date that commercial production commences.

**Exploitation phase**

Holders of exploitation licences are liable to pay:

a) tax on profits at the standard rate; and
b) tax on securities income at a rate of 6.25 per cent.

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53 Article 157 of the Mining Code.
Holders of exploitation licences benefit from a tax exemption for seven years on:

a  minimum flat-rate perception;

b  contributions of business licensing tax;

c  apprenticeship tax; and

d  mortmain tax.\(^{54}\)

However, if the term of an exploitation licence is less than 14 years, the exemption period shall not exceed half of the valid term. The exemptions are applicable from the date of the first commercial sale.

### iii  Duties

During the exploration phase, any import of equipment intended for exploration activities is subject to the payment of the following duties or charges based on its value:

a  a custom duty of 5 per cent;

b  a statistical charge of 1 per cent;

c  a community solidarity levy of 1 per cent;

d  a community levy of 0.5 per cent; and

e  any other community levy.\(^{55}\)

This taxation is also applicable to spare parts for imported machines and equipment, the value of which may not exceed 30 per cent of the cost, insurance and freight import value of the machines and equipment imported.

Exploration title-holders benefit from the temporary admission regime for any imported materials, professional equipment and machines intended for exploration activities.\(^{56}\)

During the three years of exploitation preparatory work, holders of industrial exploitation licences are exempted from the payment of duties for the import of equipment intended for the production of energy and for the operation of special vehicles.\(^{57}\)

As regards importing 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 the import of equipment intended for the production of energy and for the operation of special vehicles.\(^{58}\)

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

### iv  Other fees

The issuance, renewal, extension and transfer of a 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 a mining title.

\(^{54}\) Article 162 of the Mining Code.

\(^{55}\) Article 149 of the Mining Code.

\(^{56}\) Article 151 of the Mining Code .

\(^{57}\) Article 155 of the Mining Code.

\(^{58}\) Article 164 of the Mining Code.
VII OUTLOOK AND TRENDS

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

Twelve gold mines have been built in the past 10 years and a number of new projects are in the development or production phase. In 2018, 52 tons of gold were produced in Burkina Faso (against 45.6 in 2017), representing an increase of 1,040 per cent over 10 years.
Chapter 5

CANADA

Erik Richer La Flèche, David Massé and Jennifer Honeyman

I OVERVIEW

Canada is a constitutional monarchy with a Westminster-style parliamentary democracy. It 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 relating 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 towards mining and provide a comparatively stable and well-developed legal framework for mining.

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II LEGAL FRAMEWORK

Jurisdiction over mining 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 owns the land or minerals. For example, on federal lands 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 northern 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 northern 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)

Lands and minerals in Canada 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 20th 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 those 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 extraction
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 exercising 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 extraction 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. This 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. This right is not subject to government discretion if all 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, authorities in Quebec 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 list comprehensively here. However, they include:

- prospecting permits or licences required in most provinces prior to commencing prospecting work; and
- environmental permits and licences, as well as the surface rights permits and licences necessary to carry out exploration work (particularly if the work is accompanied by extensive surface disturbance) or extraction 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). 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 government 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 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 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 that 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 the affected aboriginal group and, through that 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 interact directly 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. Some 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 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 the affected aboriginal group
and, through that 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 that 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, annually, 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 requirements relating to permitting, licensing and continuous compliance. While increased processing of minerals in Canada is a stated objective of most governments in Canada, they 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, it 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 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 2019, the threshold was C$1.045 billion. The threshold is increased to C$1.568 billion in enterprise value for certain trade agreement investors (i.e., investors ultimately controlled in EU Member States, the United States, Mexico, Chile, Peru, Columbia, Panama, Honduras or South Korea) that are not state-owned enterprises. Starting in 2019, the foregoing thresholds will be adjusted annually according to a formula based on the change in Canada’s nominal gross domestic product.

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$416 million in 2018). 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 effects 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 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 the following: 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 at the stage of first production, 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 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 an 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 a 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 in which the following thresholds are exceeded:

a. ‘size of the parties’: the parties to the transaction, 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 (2018);

b. ‘size of the transaction’: the book value of the assets in Canada being acquired, or the gross annual revenue from sales in or from such assets, exceeds C$92 million (2018); and

c. shareholding: 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 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 mining taxes. There are few mining taxes or royalties based solely on production or extraction. Most are calculated on a net smelter return, net mine profit or some other net mine proceeds basis, in which 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 a 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, customs duties on imports 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 include the desire of the federal government and several provincial governments to ensure that environmental impact assessments and other regulatory processes 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, is compliant with all laws, particularly environmental laws, and is financially beneficial to the province or territory wherein it is located. This represents a considerable change from the situation of 15 to 25 years ago, particularly in central and eastern Canada.

In September 2018, the Canadian Criminal Code was amended to implement a Remediation Agreement Regime (RAR), which functions similarly to deferred prosecution regimes in other jurisdictions. Under the RAR, remediation agreements will be entered into by the government and organisations accused of committing certain economic-crime offences (e.g., foreign corruption, fraud, bribery). Any remediation agreement will be subject to court approval. If the remediation agreement is complied with, the charges will be stayed and a criminal conviction avoided. The objectives of the RAR include encouraging voluntary disclosure of wrongdoing and holding organisations accountable through ‘effective, proportionate and dissuasive penalties’.
Chapter 6

CHINA

Xiong Yin, Jie Chai and Yanli Zhang

I  OVERVIEW

i  Government policy on mining in general and on international investment

China has continued to make great efforts in recent years to push forward its open-door policy and its reforms in mining law to streamline administration and improve services, such as the inclusion of mineral resources with proved reserves in the pilot work of the unified registration of rights with respect to natural resources, the promotion of reform of the systems of mineral rights transfer and mineral resources royalty, and the implementation of the publication system for information on the exploration and exploitation of mineral rights, so as to improve mineral resource management.\(^2\)

To implement the State Council’s reform requirements of ‘decentralisation, supervision and service optimisation’ and to further improve the mineral rights approval management system, the Ministry of Land and Resources (MOLAR) issued four normative documents in 2017:

\(a\) the Mineral Rights Transfer Rules;
\(b\) the Notice on Further Standardising Approval, Registration and Management of Mineral Resources Exploration;
\(c\) the Notice on Further Standardising Mineral Rights Application Materials; and
\(d\) the Notice on Improving Issues Related to Approval, Registration and Management of Mineral Resources Exploitation.

These normative documents should further standardise mineral rights transfer; standardise and improve the approval, registration and management of mineral exploration rights and mining rights; streamline and combine mineral rights application materials; and continuously improve the business environment in mineral exploration and development. In addition, the royalty system for mineral resources was established and improved, and the competitive transfer of mineral rights in six pilot provinces was comprehensively promoted.\(^3\)

In 2018, a new ministry, the Ministry of Natural Resources, was established to replace MOLAR, to consolidate the responsibilities of MOLAR and other departments in respect of the ownership of natural resource assets, and to take over responsibility for regulating national land use, and ecological protection and restoration.

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In particular, China has been striving to further open up the mining sector, for example, by replacing the approval regime with a record-filing system in oil and gas project cooperation with foreign companies. On 30 June 2019, the National Development and Reform Commission (NDRC) and the Ministry of Commerce (MOFCOM) issued the Catalogue of Industries for Guiding Foreign Investment (2019 Version) and the Special Management Measures for the Market Entry of Foreign Investment (Negative List) (2019 Version) (the 2019 Negative List), which, as of 30 July 2019, will remove foreign investment restrictions on the exploitation of rare kinds of coal, the exploitation of graphite, the smelting and separation of rare earth, and the smelting of tungsten. Thus, the types of mineral resources that are open to foreign investment have been greatly expanded.

ii Risk factors

China’s legislation on mineral resources is undergoing a relatively fast transformation with some old laws superseded by newly enacted laws. For example, according to the Notice on Further Enhancing the Supervision and Management of Exploration and Construction Activities in Natural Protection Areas, jointly promulgated by 10 ministries, exploration and construction activities or production or operation facilities in the core area or buffer area of a natural protection area are prohibited, and any exploration or exploitation activities that have been started shall be terminated on the condition that the legal benefits of the exploration licence holder and exploitation licence holder are safeguarded. The change of laws or regulations may create risks or uncertainty for investors in mineral projects.

iii Description of the industry

China is the world’s largest producer of coal, gold and most rare earth minerals, and the world’s leading consumer of most mining products, particularly for commodities such as thermal coal and iron ore. Historically, China’s mining industry has been fragmented, with many companies operating in the same mining areas. Consolidation has been encouraged in an effort to increase efficiency and to improve safety and environmental performance. The reduction of energy dependence on fossil fuels could be a key challenge for the mining sector. Important goals within the Five-Year Plan (2016–2020) include developing western regions, protecting the environment and improving energy efficiency.

iv Investment and development

Alongside the Belt and Road Initiative, bilateral and multilateral cooperation in the fields of geology and mineral resources has been comprehensively promoted. Through international exchange platforms such as China Mining and the China – ASEAN Mining Cooperation Forum, geological survey cooperation projects have been actively carried out, and mining

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4 See Notice on Further Enhancing the Supervision and Management of Exploration and Construction Activities in Natural Protection Areas, Article 4.
6 The Belt and Road Initiative is a global development initiative of the Chinese government to jointly build Silk Road Economic Belt and 21st-Century Maritime Silk Road, involving investment in infrastructure projects in Asia, Europe, Africa, the Middle East and the Americas. The term originally came from, or in reference to, the trade activities and friendship of ancient China with peoples and countries in Europe, Asia and Africa along the Silk Road and maritime journeys.
exchanges and cooperation with relevant countries have been further expanded. Four cooperation agreements and action plans were signed in 2008 with the Ministry of Mines of Chile, the Ministry of Natural Resources of Canada, the Ministry of Mines of Sudan, and Queen's University of Canada. Under the framework of bilateral intergovernmental cooperation, high-level coordination mechanisms with Canada, Australia, South Africa, Mongolia, Kazakhstan, Argentina, Chile, Mexico and other countries in the mining industry were continuously consolidated in 2018. Twenty-eight cooperation agreements were signed with foreign geological survey agencies, and five countries (Mali, Niger, Morocco, Montenegro and Bangladesh) became new cooperation partners in 2018. More efforts have been made to promote key bilateral cooperation projects between China and the United States, Germany, Canada, Italy and South Korea, respectively. At present, 229 memorandums of understanding and project cooperation agreements have been signed with geological survey agencies, institutes and universities in 63 countries.\(^7\)

II  LEGAL FRAMEWORK

i  Overview

The legislation provisions governing the minerals and mining industry are as follows: the Constitution; laws such as the General Principles of the Civil Law and Property Law; relevant regulations of the State Council and rules of ministries; relevant local regulations; and regulatory documents published by regulatory agencies.

ii  Regulatory agencies

The ministry in charge of geology and mineral resources under the State Council is the Ministry of Natural Resources (MNR),\(^8\) which is responsible for the supervision and administration of exploration and exploitation of mineral resources throughout the country, with the assistance of other agencies under the State Council. The departments in charge of geology and mineral resources under the people's governments at provincial level are responsible for the supervision and administration of exploration and exploitation of mineral resources within their respective administrative areas.

iii  Mineral reporting requirements

China has not set up any systems in connection with the disclosure of information relating to mineral projects.

III  MINING RIGHTS AND REQUIRED LICENCES AND PERMITS

i  Title

According to the Constitution, mineral resources belong to the state.\(^9\) Under China’s Mineral Resources Law, the right of state ownership in respect of mineral resources belongs to the state, and state ownership, either near the earth's surface or underground, will not be altered

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7  [Supra note 2](#)
8  Recently reorganised according to Decision of the 1st Session of the 13th National People's Congress on the State Council Institutional Reform Proposal.
9  [Constitution of the People's Republic of China (2018 Amendment), Article 9](#)
by ownership, or the right to the use, of the land to which the mineral resources are attached.\(^\text{10}\) The state may transfer the right to possess, use and benefit from the mineral resources to a qualified natural person, legal person or other economic organisation (holder). After obtaining the exploration right or exploitation right (mining right), holders may conduct exploration and exploitation of mineral resources and sell the mineral products.

### ii Surface and mining rights

**Method and process of obtaining mining rights**

Mining rights may be obtained through a bidding process. The registration agency determines the scope of the mining zone for bids, publishes the invitation for bids, sets forth bidding rules, organises the evaluation of the bids and determines the winning bidder based on merit. The winning bidder will pay the licence fee for the mining right and, in the case of a mining right resulting from a state-funded exploration, also pay the price determined through a valuation for that mining right, then complete the registration procedures and obtain the exploration or mining licence. The scope of the mining zone for bids from overseas will be determined by the MNR.\(^\text{11}\)

Mining rights may also be obtained through a transfer agreement. Since 2015, however, China has implemented a policy to strictly control and regulate the transfer of mining rights by agreement. Currently, mining rights may be directly transferred by agreement only under the following circumstances:\(^\text{12}\)

- **a** key mineral resources development projects approved by the State Council and the mineral producing areas providing supporting resources for the key construction projects approved by the State Council;
- **b** mineral resources development projects with large or medium-sized reserves approved by the people’s governments at provincial level;
- **c** prospecting projects looking for substitute resources for old mines (crisis mines) that have been listed as a national special project;
- **d** areas adjacent to the range of exploration and mining under a mining right that will need to expand through integration or use of the existing production system; or
- **e** scattered surrounding resources involved in the range of exploration under an exploration right that will need to expand through integration or as a result of comprehensive exploration.

To obtain mining rights, the applicant should first apply to the registration agency for demarcating the scope of the mining zone, complete the relevant procedures for setting up a mining entity based on the demarcated scope of the mining zone and obtain approval for the mining entity. The registration agency will make a decision to approve or reject the application and notify the applicant within 40 days of receipt of the application documents. Then an application is approved, the applicant must pay the licence fee for the mining right within 30 days of receipt of the notice. In the case of applying for a mining right resulting

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\(^{10}\) Mineral Resources Law of the People’s Republic of China (2009 Amendment), Article 3.


\(^{12}\) Notice of the Ministry of Land and Resources on Issues Regarding the Administration of Strict Control and Regulation of Transfer of Mineral Rights by Agreement, Article 1.
from a state-funded exploration through which the location of mineral reserves has been verified already, the applicant should pay, in addition to the licence fee, a price determined through a valuation of the mining right resulting from the state-funded exploration, then complete the registration procedures, and obtain the exploration or mining licence.\(^{13}\)

**Surface rights for holders**

Exploration licence holders are granted the following surface rights:\(^{14}\)

1. installing electricity power facilities, water supply pipes and communication lines in the exploration area and in neighbouring areas; however, they must not affect or damage the original electricity power, water supply facilities or communication lines;
2. passing through the exploration areas and neighbouring areas; and
3. using the land temporarily as may be required for construction work.
4. In the event, however, that an exploration licence holder during its temporary use of the land causes damage to the property of other people, it should make restitution according to the law.\(^ {15}\)

Mining licence holders are granted the following surface rights:\(^ {16}\)

1. constructing within the mining area such production and living facilities as may be needed for mining; and
2. obtaining the land-use right according to the law required for production.

After completion of the construction land procedures, the land for mining may by agreement be transferred, leased or leased with an option to transfer. If the land-use right is obtained by way of grant, the land user may, depending on the mining production phase, the term of the mining right and other factors, choose the land-use term within the maximum number of years allowed by law and may pay the land-use fee by instalments.\(^ {17}\)

**Conditions for maintaining mining rights**

Exploration licence holders should:\(^ {18}\)

1. start the exploration operation within the prescribed time limit and complete the exploration within the time limit stipulated by the exploration licence;
2. report the commencement of operations, and other related issues, to the exploration registration authorities at the beginning of exploration work;
3. conduct the exploration in accordance with the exploration construction designs; any unauthorised mining activities are not allowed;
4. conduct a comprehensive exploration and evaluation of any co-product minerals or by-product minerals while ascertaining the primary minerals;

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\(^ {13}\) Measures for Registration Administration of Exploration Blocks of Mineral Resources (2014 Amendment), Articles 8 and 13; Measures for Registration Administration of Mineral Resources Exploitation (2014 Amendment), Articles 6 and 10.


\(^ {15}\) id.

\(^ {16}\) ibid., Article 30.

\(^ {17}\) Implementing Opinions of Ministry of Land and Resources, Ministry of Finance, Ministry of Environmental Protection on Accelerating the Construction of Green Mines, Article 3.

compile a mineral resources exploration report and submit it to the relevant departments for examination and approval;

submit the mineral resources exploration achievement files in accordance with the relevant regulations of the State Council;

comply with the relevant laws and regulations regarding labour safety, land reclamation and environmental protection; and

upon completion of exploration work, immediately block the wells and fill in the holes left by the exploration, or adopt other measures to eliminate potential dangers.

Furthermore, to maintain the exploration right, the exploration licence holder should satisfy the minimum capital input requirement for exploration according to law. Currently, the requirements are as follows:19

- 2,000 yuan per square kilometre for the first exploration year;
- 5,000 yuan per square kilometre for the second exploration year; and
- 10,000 yuan per square kilometre for each exploration year from the third onwards.

If the licence holder’s capital input for exploration for a given year exceeds the minimum requirement, the surplus may be factored into the capital input for the following exploration year. In this respect, the mining licence holder should:

- conduct mine construction or mining within the approved term;
- conduct efficient protection, rational mining and comprehensive utilisation of mineral resources;
- pay the resources tax and the mineral resources compensation fees pursuant to the law;
- comply with the applicable laws and regulations regarding safety of workers, water and soil conservancy, land reclamation and environmental protection; and
- accept the supervision and administration of both the competent departments in charge of geology and mineral resources and other relevant competent authorities, and complete and present the mineral reserve forms and mineral resources development and utilisation statistics reports according to the relevant regulations.20

Terms of validity of mining rights

Exploration right

Currently, the valid term of an exploration licence is three years; however, the valid term of an exploration licence for petroleum or natural gas is seven years. To extend the exploration period, the licence holder should apply to the registration agency, no later than 30 days prior to expiry of the term of the exploration licence. Each extension should not exceed two years.21

Mining right

Under the current law, the valid term for a mining licence will be determined according to the construction scale of the mine: for a large-scale mine or above, the term of the mining

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19 Measures for Registration Administration of Exploration Blocks of Mineral Resources (2014 Amendment), Article 16.
licence is 30 years, for a medium-scale mine, 20 years, and for a small-scale mine, 10 years. If a project involves progressive exploration and development of petroleum or natural gas, the longest term is 15 years. To continue the mining operation after expiry of the licence term, the licence holder should apply to the registration agency for an extension, no later than 30 days prior to expiry of the term of the licence.22

Protection of mining rights

The exploration licence fee or exploration right price may be deducted or exempted upon application by the licence holder and approval by the competent authorities, if the exploration is encouraged by the state for certain minerals or in certain regions.23

The mining licence fee or mining right price may also be deducted or exempted upon application by the licence holder and approval by the competent registration authorities, if, among other circumstances, the mining of mineral resources is in a remote or poor area, or the mining is for minerals urgently needed by the state, or if a mining enterprise is suffering severe losses and has to suspend production owing to a natural disaster or other force majeure event.24

After issuing a mining licence, the registration agency should notify the relevant people’s government at the county level where the scope of the mining zone is located. The county government should, within 90 days of receiving the notice, publish the scope of the mining zone and may organise the erecting of boundary poles or land markers at the request of the mining licence holder.25

The Chinese government implemented a system for publicising exploration and mining information for mining right-holders in 2017, which is now the public platform for publishing mining right-related announcements, including (1) the release, transaction and transaction results, (2) a continuous reminder service flagging up those exploration or mining licences with fewer than 120 days remaining on their term of validity, and (3) a timely warning for any abnormal mining right-related transactions that violate PRC laws and regulations.26

During the process of development and integration of mineral resources, the Chinese government might require the closure of some mining enterprises and cancellation of their mining rights. For those holders whose mining right is cancelled, they should be refunded the proportion of licence fees and other costs corresponding to the remaining mineral reserve.27

Restrictions for foreign investors

Mineral resources in China are open to foreign investors for exploration or mining, subject to specific prohibitions. Previously, foreign investment in the exploration and development of oil and natural gas (except for coal-bed gas, oil shale, oil sand and shale gas) was allowed only by forming a joint venture or cooperation with a Chinese party. That restriction was, however, removed. Moreover, the prohibition of the exploration of molybdenum, tin, antimony and

22 ibid., Article 7.
23 ibid., Article 15.
24 ibid., Article 12.
25 ibid., Article 8.
26 See footnote 2.
27 Notice of Ministry of Finance and Ministry of Land and Resources on Further Closing of Mining Enterprises and Returning Paid License Fee, Section 1.
fluorite was cancelled. According to the 2019 Negative List, foreign investors are prohibited from exploring or developing only certain kinds of mineral resources, such as investment in the exploration, mining and ore dressing of rare earth, radioactive minerals and wolfram.\(^{28}\)

As the Negative List may be amended or updated from time to time, it is advisable that investors pay attention to any possible changes in the limitations on foreign investment in mineral resources.

### iii Additional permits and licences

In addition to an exploration or mining licence, other permits and licences may be required for certain mining-related activities, such as approval from the competent authority for the design documents for a mine construction project.\(^{29}\) Special permits or licences may be required for certain kinds of mineral resources, such as petroleum or natural gas, which will need the State Council’s approval for establishing a petroleum company or consent for the exploitation of petroleum or natural gas, and a qualification certificate relating to the mining enterprise as a legal person.\(^{30}\)

### iv Closure and remediation of mining projects

To close down a mining project, a mining enterprise must submit an application and a geological report to the departments that originally gave approval for starting up the mine, one year prior to completion of mining. After the geological report is approved by the competent departments, the mining enterprise should prepare and submit for approval a report on closing the mine to the competent departments and other relevant authorities.\(^{31}\) After approval of the report on closing the mine, the mining enterprise should complete the following work: (1) classifying and filing the geological, surveying and mining documents, and presenting the geological report on closing down the mine, the report on closing the mine and other relevant material; (2) finishing the work regarding safety of workers, water and soil conservancy, land reclamation and environmental protection, or paying the costs for land reclamation and environmental protection in accordance with the approved report on closing the mine. Based on the approved report on closing the mine and the document issued by the relevant authorities evidencing completion of the aforementioned work, the mining enterprise should apply to the authority that originally issued the mining licence for revocation of that licence, and complete the procedures for closing down the mine.\(^{32}\)

According to a notice issued by the State Council in 2017, a deposit for environmental control and restoration of the mine should be paid into an environmental control and restoration fund to be used by the mining enterprise for carrying out the necessary work.\(^{33}\)

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\(^{29}\) Law on Safety in Mines of the People’s Republic of China, Article 8.

\(^{30}\) Measures for Registration Administration of Mineral Resources Exploitation (2014 Amendment), Article 5.


\(^{32}\) ibid., Article 34.

\(^{33}\) Notice of the State Council on Issuing the Plan for the Reform of the Mineral Resource Royalty System.
IV  ENVIRONMENTAL AND SOCIAL CONSIDERATION

i  Environmental, health and safety regulations

Legislation for protecting the environment is enacted by the state and local governments. The state creates the laws and administrative regulations on environmental protection, and local governments may, to an extent not violating the state law, enact their own respective regulations and rules on environmental protection according to their own specific situations. The laws and administrative regulations on environmental protection in relation to mining activities include the Environmental Protection Law, the Regulations on Environmental Protection Management for Construction Projects and Measures for the Control of the Soil Environment of Land for Mining and Industry (For Trial Implementation), effective as of 1 August 2018.

In conducting mining activities, mining enterprises must comply with the Work Safety Law and the state regulations on production safety. 34 A mining enterprise should set up an organisation to manage production safety or assign full-time persons to safeguard production safety.35 A mine construction project should undergo safety assessment according to the relevant regulations of the state.36 Before the commencement of any operations at a constructed mine, the construction entities are responsible for making arrangements for an inspection of the safety facilities according to the law, and a mining project may start production operations only after the safety facilities pass that inspection and have been approved for production operations.37

In recent years, to address the frequent occurrence of coal mining accidents, the Chinese government has tightened the regulations on mining safety and has taken measures to control potential risks to safety, such as closing a colliery with annual production not exceeding 90,000 tons and without safe production conditions, encouraging advanced colliery enterprises to reorganise or merge small coal mines, strictly tightening safety standards for colliery work, and no longer approving new collieries with an annual production capacity of less than 300,000 tons or new coal-gas outburst mines with an annual production capacity of less than 900,000 tons.38

Mining operations must abide by laws and regulations regarding labour and health issues and protect workers’ life and health. China’s Labour Law prohibits any work assignment for female workers to engage in underground mining work and for underage workers (over 16 but younger than 18) to engage in underground mining work or poisonous or harmful work.39 There are also special requirements relating to certain types of mining that may cause serious damage to human health, such as coal mining, whereby coal mining enterprises are required to organise regular occupational health examinations and to strengthen pneumoconiosis prevention work for their workers.40

36  ibid., Article 29.
37  ibid., Article 31.
39  Labour Law of the People’s Republic of China, Articles 58, 59 and 64.
ii  **Environmental compliance**

An approved environmental impact report is mandatory before any mining project can commence construction. The report should be submitted to the competent environmental protection authority for approval, which will make its decision within 60 days of receipt of the report.41

In the event of any material changes to the nature, scale, location, production techniques, or measures of pollution prevention or ecological protection of a mining project after the environmental impact report has been approved, the mining construction entity should submit a new environmental impact report for approval.42 Upon completion of a mining construction project, the mining construction entity should follow requirements for inspection and acceptance of the environmental protection facilities of the construction project in accordance with the standards and procedures stipulated by the environmental protection authorities under the State Council.43 Except for those reports that need to be kept confidential as required by law, the mining construction entity should make the report on the inspection and acceptance requirements public, according to the law.44

iii  **Third-party rights**

China is a multi-ethnic country and implements regional minority autonomy systems in its five autonomous regions. If the mining of mineral resources is in a minority autonomous area, the state should take into consideration the local interests of the region and make arrangements favourable to the region’s economic development and to the production and well-being of the local minority people. The government authorities in the autonomous regions are required to regard it as a priority to develop and utilise in a rational manner the mineral resources that may be developed by the local authorities in accordance with the law and the national plan.45

V  **OPERATIONS, PROCESSING AND SALE OF MINERALS**

i  **Processing and operations**

The import of equipment and machinery for exploration and mining is permitted and should comply with relevant import and export regulations.

There are no special rules or regulations on the processing of extracted minerals.

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

An exploration licence holder is entitled to sell the mineral products recovered during the exploration operation in accordance with the approved project design, and a mining licence

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41 Regulations on Environmental Protection Management for Construction on Projects (2017 Amendment), Article 9.
42 ibid., Article 12.
43 ibid., Article 17(1).
44 ibid., Article 17(3).
holder is entitled to sell the mineral products, except for those minerals which should be sold only to the designated purchaser as stipulated by the State Council, according to the Mineral Resources Law and its implementation regulations.  

The import or export of mineral products is permitted except for those mineral products that are forbidden to be imported or exported under the Catalogue of Commodities Prohibited from Processing Trade and the relevant adjusted catalogue promulgated by the Ministry of Commerce and General Administration of Customs.

iii  Foreign investment

Foreign investors may remit overseas their lawful profits distributed by foreign-invested enterprises (FIEs) in accordance with the regulations on foreign exchange administration. There are no special restrictions regarding the movement of capital and currency exchange applicable to mining industry.

The Chinese government has been trying to open up the nation to foreign investment. The Notice of the State Council on Several Measures for Expanding the Opening-up and Active Use of Foreign Investment, promulgated in January 2017, requires an easing of the restrictions for foreign investment with respect to oil shale, oil sand, shale gas and other unconventional oil and gas and mineral resources in the mining industry. The 2019 Negative List has removed some of the restrictions on foreign investment in the mining sector and the 2018 Negative List and the Catalogue of Industries for Guiding Foreign Investment (2017 Revision) were both repealed.

To establish a foreign-invested mineral exploration enterprise, investors should follow the Measures for the Administration of Foreign-Invested Mineral Exploration Enterprises. Upon approval of a project for the exploration or mining of mineral resources with foreign investment, the MNR will issue an exploration licence or a mining licence; when Chinese and foreign parties cooperate in a mineral resources exploration or mining project, the Chinese party should file the signed contract with the original licence issuing authority.47

VI  CHARGES

i  Royalties

The mining of mineral resources is subject to resource tax in accordance with the relevant regulations. All entities and individuals engaged in the exploitation of mineral products or in the production of salts within the PRC territory and the sea areas under PRC jurisdiction are liable to pay resource tax. The taxable items and the rates payable are determined in accordance with the Table of Taxable Items and Tax Rates of Resource Tax and relevant rules of the Ministry of Finance.48

46  ibid., Article 34.
ii Taxes

Other taxes to which an FIE is liable are the same as those that Chinese domestic enterprises should pay, such as corporate income tax, value added tax (VAT) and stamp duties.

**Enterprise income tax**

Enterprises and other organisations that earn income within the PRC territory are subject to a corporate income tax. Currently, the rate is 25 per cent.49

**Value added tax**

All organisations and individuals engaged in the sale of goods, the provision of processing, repair or replacement services, or import of goods within the PRC territory should pay VAT. The rate is variable; for example, the VAT on the sale of goods, labour services, leasing services of tangible movables or importing goods is 17 per cent, and the rate for selling services or intangible assets is 6 per cent.50

**Stamp duty**

All entities and individuals who execute or receive, within the PRC territory, documents in the categories specified in the relevant regulations are subject to stamp duty. The rate is variable; for example, the stamp duty on survey and design contracts for engineering and construction projects is 0.05 per cent of the receipt.51

**Urban and town land-use tax**

Organisations, entities and individuals using land within the scope of a city, county, administrative town, industrial or mining area will need to pay urban and town land-use tax. Currently, the annual rates of land-use tax per square metre are as follows: 1.5 to 30 yuan in large cities, 1.2 to 24 yuan in medium-sized cities, 0.9 to 18 yuan in small cities and 0.6 to 12 yuan in county seats, administrative towns, industrial and mining areas.52

**Property tax**

A property owner should pay property tax. If the title is state-owned, the property tax should be paid by the entity operating and managing the property. In the event that the owner is not in the place where the property is located or the title has not been fixed or is under dispute, the property agent or the user should pay the tax. The property tax rate is 1.2 per cent if calculated according to the remaining value of the property, and 12 per cent if calculated according to the rent revenue of the property.53

50 Interim Regulations of the People's Republic of China on Value-Added Tax, Article 2.
51 Interim Regulations of the People's Republic of China on Stamp Duty, Article 3.
52 Interim Regulations of the People's Republic of China on Urban and Town Land-use Tax, Article 4.
Urban maintenance and construction tax
Organisations, entities and individuals that pay consumption tax, VAT and business tax are also liable for urban maintenance and construction tax. The current rates are as follows: if the location of the taxpayer is urban, 7 per cent; if the location of the taxpayer is in a county or town, 5 per cent; and if the location is neither urban nor in a county or town, 1 per cent.54

Education surcharge
Organisations, entities and individuals that pay consumption tax, VAT or business tax should also pay an education surcharge, except those organisations that pay surcharges for education in rural areas pursuant to the Notice of the State Council on Raising Funds for Running Schools in Rural Areas. The education surcharge is calculated according to the amounts paid for VAT, business tax and consumption tax, subject to a collection rate for the education surcharge of 3 per cent, and will be collected at the same time as VAT, business tax or consumption tax payments.55

iii Duties
Chinese Customs will collect import or export duties on all goods permitted by China to be imported into or exported out of the customs territory and all inward articles, unless otherwise provided for by laws or regulations. The tariff items, tariff headings and duty rates are defined by the Import and Export Tariff of the PRC and the Flat Duty Rates on Inward Articles of the PRC.

iv Other fees
An entity involved in the exploration and mining of mineral resources within the PRC territory and other sea areas under PRC jurisdiction must pay resource compensation fees. Mineral resources compensation fees are calculated based on a certain ratio of the sales income of mineral products and may be treated by the payer as a management expense. According to the Notice of the Ministry of Finance and the National Development and Reform Commission on Clearing Funds Relating to Rare Earth, Tungsten and Molybdenum, as of 1 May 2015, the resource compensation fee for rare earth, tungsten and molybdenum mining has been reduced to zero, and the collection of price adjustment funds for rare earth, tungsten and molybdenum has been suspended. According to the Notice of the Ministry of Finance and the State Administration of Taxation on Advancing Reforms on Resource Tax, when implementing the price-based collection of resources tax, the resource compensation fees for all types of mineral resources should be reduced to zero, collection of price adjustment funds should be suspended, and the various local collection funds established unlawfully for mineral resources should be cancelled.

China implements a system whereby charges are payable for exploration rights. The exploration right fee is calculated and paid annually. According to the Measures for Registration and Administration of Exploration Blocks of Mineral Resources and the Administrative Measures on Royalties and Prices for Exploration Rights and Mining Rights, currently the standard exploration right fees are: from the first exploration year to the third

55 Interim Provisions on Collection of the Education Surcharge, Article 3.
exploration year, 100 yuan per square kilometre per year; from the fourth exploration year, 100 yuan per square kilometre to be added each year, but the maximum should not exceed 500 yuan per square kilometre per year.\textsuperscript{56} As indicated above, when obtaining an exploration right resulting from a state-funded exploration through which the location of minerals is already verified, in addition to the exploration right fee, a charge determined by a valuation of the exploration right should also be paid.\textsuperscript{57} In addition, according to the Notice of the Ministry of Finance and the National Development and Reform Commission on Cancelling, Suspending the Levy of, and Waiving a Batch of Administrative and Institutional Fees, the collection of mineral resources exploration registration fees relating to exploration registration is suspended.

Charges are also payable for mining rights. If the application has been approved, the mining right applicant should pay a mining right fee. According to the Measures for Registration and Administration of Mineral Resources Mining and the Administrative Measures on Royalties and Prices for Exploration Rights and Mining Rights, the mining right fee should be paid annually according to the acreage of the scope of the mining zone at a rate of 1,000 yuan per square kilometre per year.\textsuperscript{58} Again, when obtaining a mining right resulting from a state-funded exploration through which the location of minerals is already verified, in addition to the mining right fee, a charge determined by a valuation of the mining right should also be paid.\textsuperscript{59} According to the Notice of the Ministry of Finance and the National Development and Reform Commission on Cancelling, Suspending the Levy of, and Waiving a Batch of Administrative and Institutional Fees, as also indicated in the paragraph above, the collection of mineral resources mining registration fees relating to mining registration is suspended.

\textbf{VII \hspace{1em} OUTLOOK AND TRENDS}

The prospective development of China's mineral resources laws is as follows:

\begin{itemize}
  \item[a] to continue the streamlining of the administrative approval processes;
  \item[b] to promulgate new laws to improve the regulation of mineral resources;
  \item[c] to continue the opening-up policy to encourage foreign investment and technology in exploration, mining and related mineral resources valuation; and
  \item[d] to place a stronger emphasis on human safety and environmental protection within the mining industry.
\end{itemize}

\textsuperscript{56} Measures for Registration Administration of Exploration Blocks of Mineral Resources (2014 Amendment), Article 12.
\textsuperscript{57} ibid., Article 13.
\textsuperscript{58} Measures for Registration Administration of Mineral Resources Exploitation (2014 Amendment), Article 9.
\textsuperscript{59} ibid., Article 10.
Chapter 7

COLOMBIA

José Vicente Zapata, Daniel Fajardo and Estefanny Pardo

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 ranges 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, which ranks the country as one of the most important producers of nickel and coal in South America and the second-largest producer of emeralds in the world. Nevertheless, the industry is going through a rough period, caused by different judicial and administrative decisions that have created an environment of legal instability and uncertainty for foreign investment.

In 2018, the Colombian Constitutional Court issued a historic decision, which determined that municipalities do not have the exclusive prerogative to decide on the use of the subsoil, and therefore cannot veto or prohibit mining or hydrocarbon activities through popular consultations. The decision of the Court provided that territorial entities have limited powers to decide on the use of land, as such prerogative corresponds to the executive branch. Furthermore, the Constitutional Court established that the determination of land use, must be the result of the coordination between the central government and regional authorities.

Mining in Colombia is developed on a number of levels, with different standards of production and environmental management. Small-scale mining, for example, has the largest number of production units and, although still deficient in relation to overall performance, it is still significant in terms of generating employment and, in some cases, 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., open-cast mining projects).

Although the mining industry is one of the fundamental pillars of the Colombian economy (in terms of foreign investment, exports and its contribution to gross domestic product (GDP)), in 2018 the sector again suffered a contraction, having fallen from a GDP
share of 6.03 in 2017 to 4.75 per cent in 2018. This situation derives from a combination of several factors, among others, legal instability and uncertainties, illegal mining and attempts by communities and environmental organisations to ban mining projects, through public consultations.

Despite the foregoing, other factors, such as the peace process with the Armed Revolutionary Forces of Colombia ending an armed conflict of more than 50 years, has made Colombia an even more attractive country to foreign investors. Furthermore, the election of Iván Duque as president of Colombia, generated great expectations regarding the strengthening of foreign investment in both the mining and energy sectors. However, relevant changes in the sector are yet to be implemented.

II LEGAL FRAMEWORK

The regulatory framework for mining in Colombia is made up of regulations relating to different categories, ranging from constitutional to mainly technical norms, which regulate day-to-day mining operations.

The Colombian Constitution of 1991 provides that the subsoil and 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 and allows individuals to develop these activities.

The main regulation in force is the Mining Code issued through Law 685 of 2001 (the 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 projects, and promoting and observing the obligations arising from mining concessions.

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


5 Articles 332 and 334, Colombian Political Constitution.
The Colombian Geological Service is in charge of scientific research for the potential resources of the Colombian subsoil in accordance with the policies set forth by the Ministry of Mines and Energy.

Finally, the Government Policy, with respect to the different sectors of the economy, including mining, is incorporated in the National Development Plan 2018-2022, issued via Law 1955 of 2019, which established the following new matters with respect to mining:

- created a temporary environmental licence for off-record miners (i.e., individuals that are small-scale traditional miners). This mechanism allows off-record miners to conduct mining operations on a temporary basis and until the mining authority issues a final decision with respect to the environmental licence;
- eliminated certain requirements for the assignment of the mining title and extended the 45 business day term for the authority to decide on the assignment to 60 business days. In addition, it eliminated the ‘affirmative administrative silence’, pursuant to which an assignment of a mining title was deemed approved whenever the authority failed to issue a decision within the specific term provided for in the law;
- ordered the implementation of a mining grid system to be applied for concession applications and even for mining titles granted, which will allow precise identification of the location of the mining titles;
- included the possibility for extending mining concession contracts issued under Decree 2655 of 1988 for a 30-year term;
- established that mining concession contracts must be settled and liquidated within the 12-month term following the termination of the mining contract; and
- included the possibility of extending regulation for oil and gas easements contained in Law 1274 of 2009, to mining activities. This will allow miners to negotiate and obtain easement rights without purchasing the properties.

III MINING RIGHTS AND REQUIRED LICENCES AND PERMITS

i Title

Mining regulations in Colombia follow the principle that, notwithstanding exempted 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 that mining titles grant rights only for the exploration and exploitation of minerals in the subsoil and, thus, any right or title to 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 to accept or object the assignment within 60 business days pursuant to Law 1955 of 2019. The Colombian state, and in particular the ANM, may declare the expiry or termination of a mining title at any time for any of the following causes:

a. dissolution of the entity holding the title, except in cases where the entity ceases to exist because of a merger deriving from a takeover;
b. lack of finances that seriously affects the performance of contractual obligations;  
c. a lack of performance in work within the terms established in the Mining Code or the non-authorised suspension of such work for more than six continuous months;
d. non-payment of the complete economic considerations on time;
e. omission of a previous notice to the authority about the assignment of the mining title contract;
f. non-payment of fines or the non-reinstatement of the bonds that endorse the title;
g. a 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. an infringement of provisions on excluded and restricted areas for mining;
i. a 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 from that of its extraction, causing the economic considerations related to the title to be destined for a different municipality from that of its origin.

ii. Surface and mining rights

As the regulations stand, mining titles are granted by the ANM to legal entities or individuals, whether nationals or not, on a first come, first served basis; in other words, 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 – in addition to the applicant’s economic and legal capacity, those requirements 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 work, and the economic estimates derived from those terms and guidelines.

Foreign companies and individuals have the same rights as nationals. The main difference is that foreign companies shall set up a branch in Colombia, except in cases where activities do not exceed the term of one year. According to the External Regulatory Circular Letter

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6 If the entity has an open proceeding for its financial and legal reorganisation or restructuring, referred provision would not apply, pursuant to regulations set forth in Law 1116 of 2006.
7 Decree 4134 of 2011, Article 4.
8 Articles 18, 19 and 20, Law 685 of 2001.
Mining Law: Colombia

DCIN-83 of the Central Bank, the branches of foreign companies are subject to the foreign exchange special regime that includes, among other things, the obligation to channel resources by filing the corresponding foreign investment forms.

In addition, pursuant to the Mining Code, mining is considered a public interest activity, which in practice enables the holder of a mining title to request expropriation and the imposition of easements over properties required for the development of the permitted mining activities. Moreover, pursuant to the National Development Plan 2018-2022, the imposition of mining easements shall be carried out as provided in Law 1274 of 2009, which regulates oil and gas easements.

### iii Additional permits and licences

In addition to the environmental permits and licences explained below, a mining title-holder is required to take out 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 relating to the period from January to December of the immediately preceding year. They must also submit the semi-annual mining basic form each July, with the corresponding information relating to the period from January to June of the current year. In these forms they must indicate, inter alia: the status of construction and exploration activities, production and sales, programme of work, employment and work conditions, and environmental issues.

### iv Closure and remediation of mining projects

Aside from the insurance policy described above, 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, pursuant to Decree 1076 of 2015, which regulates the characteristics that each closure and dismantling plan must contain.

### 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 protection of the environment as a fundamental principle and collective right. The Constitution sets out the key elements that guide the country’s environmental management, namely 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 natural resources.

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The MESD, 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 of 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 environmental licences for mining projects based on the projected production.

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

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 all ethnic communities located within the area of influence prior to commencement of any activity. 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 regarding measures or projects, activities or other work 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 be carried out between the representatives of the projects and the Ministry of Internal Affairs whenever the latter certifies the presence of ethnic communities 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 environmental studies;

\[c\] consultation hearing presided over by the pertinent environmental authority;

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\[10\] Articles 2.2.2.3.2.2 and 2.2.2.3.2.3, Decree 1076 of 2015.
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 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 utmost importance to note that the Constitutional Court, when deciding on constitutional actions regarding tutelage,11 has ruled that the failure to undertake a consultation process results in a violation of fundamental rights and, as a result, orders the temporary suspension of the project or activity.12

On the other hand, during 2016, the Constitutional Court ruled as unconstitutional Article 37 of the Mining Code, which stated a prohibition for regional entities to restrict mining activities in their territory. In other words, to date, regional entities (e.g., the municipalities) do not have the exclusive prerogative to decide on the use of the subsoil, and therefore cannot veto or prohibit mining or hydrocarbon activities through popular consultations.13

iv Additional considerations

Under Colombian law, given that the environment is subject to special protection by the Constitution, both the legislator and the government are legally authorised to broaden existing regulations 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 has ruled that there are no acquired rights regarding environmental matters,14 and has 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 establishes that it is not possible to carry out mining activities in areas declared by the Colombian government as areas for the protection and development of renewable natural resources or environmentally protected areas (exclusion areas), such as areas included in the national parks system, regional natural parks and forest reserves.15 Article 34 does not specifically mention páramo areas as exclusion areas. However, the Article was modified by Article 3 of Law 1382 of 2010, to express include páramo areas as one of the areas protected by that 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 2010 and established that protection and environmental authorisation could

11 The Acción de Tutela is a constitutional action with a special procedure that seeks the protection of fundamental rights.
12 See www.urosario.edu.co/getattachment/340e1f11-842c-49d4-8341-6a6a0349dd27/Corte-Constitucional-ordena-suspension-del-proyecto/.
13 ibidem 2.
14 Constitutional Court of Colombia, Decision C-035 of 2016.
continue, but with no possibility of extension,\textsuperscript{16} 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 expired rights that existed prior to February 2010. In 2014, the MESD issued Resolution 2090 containing the delimitation of the area known as Páramo de Santurban, within which two major mining projects at exploration stage are located. In 2017, the Constitutional Court issued Ruling T-361 of 2017, which annulled Resolution 2090 on the grounds of a lack of participation by the communities located within the Páramo de Santurban area, and ordered the MESD to issue a new delimitation to be developed under a participating, effective and deliberative procedure. At the time of writing, the Santurban delimitation is yet to be issued.

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 into three main stages, each of which starts following completion of the previous stage:

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 a work programme to the ANM, which must contain detailed information about the prospectivity of the area, a programme of work and the economic expenditure assigned to the next stage.

b Construction and assembly for a period of three years, which comprises the necessary work and infrastructure 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 a mining project must take place continuously and therefore production may begin at the second stage only exceptionally.

Finally, as regards mining operations, it should be noted that a ban on the use of mercury in mining in Colombia became effective as of 16 July 2018. This is a result of the issuance of Law 1658 of 2013, which established a five-year term for the total elimination of the use of mercury in mining activities. As of date the five-year term has already elapsed and thus, no mining mercury can be used in mining.

ii Sale, import and export of extracted or processed minerals

Colombian regulations do not set out any restrictions in connection with the sale, commercialisation or export of minerals that have been extracted under a duly issued mining title. However, the following entities must register with the Registry of Mining Traders:

\textsuperscript{16} Article 173, Law 1753 of 2015.
(1) traders who buy and sell minerals regularly to transform, benefit, distribute, intermediate, export or consume the minerals; (2) mining processing plants; and (3) trading houses that buy gold, silver, platinum, precious and semi-precious stones from licensed miners.17

iii Foreign investment

Foreign nationals are granted the same civil rights as any Colombian.18 Other than limitations under the Constitution or other laws, foreign nationals in Colombian territory are granted the same guarantees as Colombians.19

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 process of incorporating a subsidiary or a branch office usually takes two to three weeks.

To attract foreign investment, Colombia has implemented a policy of negotiation and ratification of international investment agreements, which includes bilateral investment treaties (BITs), free trade agreements with chapters on investment and double tax agreements. Moreover, 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 Belgium, Chile, China, India, Japan, Peru, Spain, Switzerland and the United Kingdom.

Through Presidential Directive No. 4 of 2018, the Colombian presidency has limited approvals of international arbitration clauses, as they require a prior and favourable decision by the Director of the State Legal Defence Agency. Additionally, approval of arbitration clauses in state contracts under ICSID rules is now prohibited.

VI CHARGES

i Royalties

Companies committed to any production of renewable natural resources shall be liable to a royalty in favour of the state. Declaration, liquidation and payment of royalties must be made by mining operators in either monthly or quarterly instalments, depending on the mineral exploited, for which a unique form has been designed by the ANM. The ‘Form for Declaration of Production and Liquidation of Royalties, Compensation and other Fees for the Exploitation of Minerals’ was developed in accordance with stipulations in Decrees 145 of 1995 and 600 of 1996.20

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

18 Article 100, Colombian Political Constitution.
19 ibidem.


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

### Taxes

The mining industry is taxed under the general Colombian 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 varies from one region to another.

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

- **a** Corporate income tax (33 per cent tariff);
- **b** The corporate income tax surtax (4 per cent tariff for 2018). The corporate income tax (CIT) rate for Colombian entities is 33 per cent (as of fiscal year 2018). In fiscal year 2018, the CIT rate will be 33 per cent plus 4 per cent (i.e., 37 per cent) and as of fiscal year 2019 and thereafter, it will be 33 per cent;
- **c** Industry and commerce tax (ICA). An event that is subject to ICA is one involving the exercise or performance, directly or indirectly, of commercial, industrial or service activities within the jurisdiction of a municipality. ICA tax rates vary from 0.2 per cent to 1.2 per cent, depending on the nature of the activity to be performed in the respective municipality. The full 100 per cent of ICA paid is deductible for income tax purposes;
- **d** Bank debit tax. Colombia currently has a bank debit tax in place. This tax is withheld by the financial authorities and has a taxable base of 4 per 1,000 applicable on any withdrawal or transfer made from savings or cheque accounts. The full 100 per cent of bank debit tax paid is deductible for income tax purposes;
- **e** Value added tax (VAT). All goods and services purchased locally are subject to the standard rate of 19 per cent. This rate applies to all supplies of goods or services, unless a specific provision allows an exclusion from VAT or application of a reduced rate; and
- **f** Royalties.

In addition, all goods and services purchased locally are subject to 19 per cent VAT.
### Tax Definition – scope

#### Income tax
The remuneration of the factors of production, all net income, that increase the equity*

<table>
<thead>
<tr>
<th>Level</th>
<th>Tariff</th>
</tr>
</thead>
<tbody>
<tr>
<td>National</td>
<td>33 per cent (2019)</td>
</tr>
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</table>

#### Industry and commerce tax
The remuneration generated from service, industrial and commercial activities carried out in the municipality

<table>
<thead>
<tr>
<th>Level</th>
<th>Tariff</th>
</tr>
</thead>
<tbody>
<tr>
<td>Regional</td>
<td>Between 0.2 and 1.2 per cent</td>
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</table>

#### Bank debit tax
Any withdrawal or transfer from savings or cheque accounts

<table>
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<tr>
<th>Level</th>
<th>Tariff</th>
</tr>
</thead>
<tbody>
<tr>
<td>National</td>
<td>4 per 1,000</td>
</tr>
</tbody>
</table>

#### Value added tax
All goods and services purchased locally

<table>
<thead>
<tr>
<th>Level</th>
<th>Tariff</th>
</tr>
</thead>
<tbody>
<tr>
<td>National</td>
<td>19 per cent</td>
</tr>
</tbody>
</table>

### iii Tax incentives

As an incentive to increase investments in mining exploration, the Colombian government has established a regulatory framework to allow the issuance of tax refund certificates (CERTs), which grant a monetary benefit to be used in the payment of taxes, contributions and fees. In the mining sector, the CERTs correspond to a percentage of the mining investment. For tax purposes, the value of the CERT does not constitute taxable income or capital gain for the entity or individual who receives or acquires it and it may be used for the payment of taxes.

Note that investments in the mining sector that may be entitled to a tax incentive are those that aim to maintain or increase the production of current projects, to accelerate the projects that are in transition (from construction and assembly to exploitation) and to increase exploration projects, fulfilling certain requirements.

### iv Duties

Depending on the stage of the project (exploration or construction and assembling), concessionaires shall pay a surface canon. This fee must be calculated annually and the fee will vary from 0.5 minimum daily legal wages to three minimum legal daily wages21 per hectare depending on the term of the mining title and the area of the mining title.

### iv Other fees

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

Finally, after settlement of the concession contract, the mining right-holder must pay all the costs incurred in adapting the land for those activities. The mining environmental policy will secure the relevant obligations during the term of the contract.

Under Law 685 of 2001 and Resolution 338 of 2014, the title-holder must take out 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 expenditure. 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 must cover 10 per cent of the result of multiplying the amount of estimated annual production by the mine pit price of the extracted mineral, as established by the Colombian government.

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21 Approximately US$9 per day as of 2019.
OUTLOOK AND TRENDS

As has been previously stated, legal instability and uncertainty has seriously affected the Colombian mining industry to the extent that, to date, investments amounting to approximately US$7 billion are yet to become a reality.22 According to the ANM, Colombia produced approximately 89.4 million tons of coal in 2017 (a 1 per cent decrease compared to 2016)23 and 41.06 tons of gold (a 34 per cent decrease in production compared to 2016). However, some mining sectors showed signs of growth, such as nickel, emeralds and construction materials, which, compared to 2016, grew by 9 per cent, 5 per cent and 5 per cent respectively.24

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, the outlook for mining in Colombia is still uncertain. In addition, with the announcement by several mining companies of their intention to enter into dispute resolution mechanisms with Colombia at various international arbitration courts, the prospect for foreign investment is also uncertain.

Finally, it is important to note that the election of Iván Duque as the president of Colombia has generated a favourable outlook for the mining sector, in particular with respect to legal stability and certainty. Among the proposals announced by Ivan Duque during his presidency campaign are (1) a limitation of constitutional actions regarding tutelage to prevent their use being abused,25 (2) unification of rulings issued by the highest courts, and (3) the regulation of public consultations for projects of national interest, such as hydrocarbons and mining. However, several months after President Iván Duque took oath of office the mining sector is yet to be reactivated.

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25 Constitutional legal action to demand protection of constitutional rights.
Chapter 8

DEMOCRATIC REPUBLIC OF THE CONGO

Aimery de Schoutheete, Thibaut Hollanders and Edwine Endundo

I OVERVIEW

Mining represents a critical sector for the development of the Democratic Republic of the Congo (DRC). 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 make this region the second richest copper region in the world, with 70 million metric tons, 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 efforts to establish or re-establish both industrial production and a legal framework for this key sector.

After several years of discussion, the 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 1 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.

The 2002 Mining Code was substantially amended by Law No. 18-001 of 9 March 2018 (the New Mining Code). The New Mining Code notably reinforces local content requirements, reduces the tax regime attractiveness and abrogates the 10-year stability clause provided for in the 2002 Mining Code.

Major mining companies have threatened to challenge the New Mining Code through international investment arbitration. However, the DRC government has maintained all the problematic amendments in the New Mining Code.

Some commentators have predicted that, as a consequence, the DRC’s mining sector could suffer a slowdown.

1 Aimery de Schoutheete is a senior partner, Thibaut Hollanders is a partner and Edwine Endundo is an associate at Liedekerke Wolters Waelbroeck Kirkpatrick SCRL.

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II LEGAL FRAMEWORK

The New Mining Code was adopted by the Congolese Parliament on 27 January 2018 and promulgated by the president of the DRC on 9 March 2018. The implementing measures of the New Mining Code are set forth in the Mining Regulations adopted in June 2018. The DRC is a member of several international organisations, including the World Trade Organization, the World Bank Group, the Multilateral Investment Agency, and the International Centre for Settlement of Investment Disputes. The DRC has also ratified the 1958 New York Convention on the recognition of foreign arbitral awards.

In addition, the DRC voluntarily adhered to the Extractive Industries Transparency Initiative criteria, and has entered into several bilateral investment treaties and 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 new EU Conflict Minerals Regulation 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 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

3 Decree No. 18/24 of 8 June 2018 on mining regulation.
4 Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores and gold originating from conflict-affected and high-risk areas is due to come into full force on 1 January 2021.
5 Le Guichet Unique – CEPICI.
6 Decree No. 068/2003 of 3 April 2003 relating to the creation, organisation and functioning of the mining cadastre (CAMI).
7 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 (CN-ITIE/RDC).
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

i 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 types of mining permits available in the DRC are research permits, exploitation permits (including small-scale mines) and tailing exploitation permits. Specific legislation regarding artisanal mining also exists.

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 10 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 permit entails no priority whatsoever in relation to potential future exploration or exploitation rights.

An exploration permit may be granted to any eligible private company for a period of five years, renewable once for the same duration, with respect to all mineral substances (Article 52). To be eligible for an exploration permit, a company must demonstrate a minimum financial capacity of at least five times the total amount of the annual surface rights payable for the area covered by the exploration permit (Article 58). The surface rights amount to US$5.89 per square metre (Article 397). In addition, the company will have to submit a rehabilitation and mitigation plan before starting any research activity. There are specific obligations for maintaining the permit, including the requirement to start exploration work within one year of delivery of the permit (Article 197).

Should the holder of a research permit demonstrate through a feasibility study the existence of an economically workable ore deposit (including tailings, for which specific permits exist) and sufficient financial capacity for the development, construction and exploitation of a mine, the Minister of Mines may grant an exploitation permit for a duration of 25 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 10 per cent of the operator’s share capital (Article 71). 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 contains specific provisions with respect to artisanal or small to very small-scale mining rights, and 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 20 working days to examine the request and to make a decision (Article 40). 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 reach a decision within the required time frame imposed by the Mining Code, the mining permit will be considered granted.

When a favourable decision is made, 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 valid 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.8

The holder of the mining rights is required to obtain a financial guarantee in an amount sufficient to carry out environmental rehabilitation.

IV ENVIRONMENTAL AND LABOUR CONSIDERATIONS

i Environmental, health and safety regulations

The New 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 New Mining Code.

8 Article 218 of 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 work 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.

c. 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.9

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 New Mining Code.

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

Additional provisions of the New Mining Code are intended to ensure the conservation of any archaeological findings that occur during 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 or schools.

V OPERATIONS, PROCESSING AND SALE OF MINERALS

i Processing and operations

The New Mining Code authorises a permit holder obtaining any further licences or permits to install and operate processing plants inside the perimeter of the relevant 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 New Mining Code. However, when applying for the granting of a mining right, mining operators must, pursuant to the New Mining Code, commit to process and manufacture minerals in the DRC. If for any reason if is impossible to do so, a derogation may be granted subject to the fulfilment of several criteria. However, current mining title owners will benefit from a three-year period to comply with this industrialisation requirement.

9 Article 21 of Law No. 11-009 dated 9 July 2011 pertaining to general principles related to environmental protection.
Expatriate labour may be hired but the New Mining Code (like its predecessor) 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

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

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, which have been in force since 24 September 2014. Their main characteristics are as follows:

a the export or import 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 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 the DRC. There is no exchange control restriction on 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.

VI CHARGES

The tax and customs regime applicable to DRC mining companies is exhaustively set forth in the New Mining Code.10

The main taxes levied on mining companies include 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 2012.11 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.

10 Articles 220 et seq. of the Mining Code.
11 Ordinance-Act No. 10/001 of 20 August 2010 relating to the introduction of VAT.
Royalties (i.e., specific mining tax) are due on the gross commercial value of all commercial products. Royalties become due at the exploitation phase and are payable at the leaving of the goods from the exploitation or processing site of the project. They amount to 1 per cent for iron or ferrous metals, 3.5 per cent for non-ferrous metals, 3.5 per cent for precious metals, 6 per cent for gemstones, 1 per cent for industrial minerals, zero per cent for common construction materials and 10 per cent for strategic minerals determined by the government (i.e. copper, cobalt and coltan and geranium).12 13

Although mining royalties are deductible expenses for the determination of corporate income tax, they are due regardless of the mining company’s profitability (Article 255).

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.

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

The tax rate on expatriate remunerations only amounts to half the common tax rate set at 25 per cent.

The withholding tax rate payable on dividends is set at 10 per cent of the gross amount.

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 a foreign currency is not subject to withholding tax provided that the interest rate and other loan conditions are at least as favourable as those the company could obtain from unaffiliated companies.

The New Mining Code has further implemented a super profit tax at a rate of 50 per cent. The super profit tax is due when the commodity prices rise by 25 per cent in comparison to those referred to in the feasibility study. The revenues subject to the super profit tax are then exempted from the profit tax (i.e., the corporate income tax at 30 per cent).

Lastly, the New Mining Code has introduced a capital gain tax, which will become due in the case of a share transfer; the amount that is taxable is calculated on the basis of the share transfer price and the accounting value of the share.

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:

- 2 per cent for all goods and products strictly for mining use, which are imported before exploitation of the mine has commenced;
- 5 per cent for all goods and products strictly for mining use, which are imported after exploitation of the mine has commenced; and

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12 Article 241 of the New Mining Code.
13 Article 1 of the Decree No 18/042 of 24 November 2018 relating to declaration of strategic minerals.
14 Articles 225 et seq. of the New Mining Code.
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 a research or exploitation permit is subject to a surface right at the rate of US$5.89 per quadrangle.

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 government’s decision to initiate such a major review of the Code. According to the New Mining Code’s explanatory statement, among other points, the aim of the Code is to:

a enhance the government’s control over the mining sector;
b increase the state revenues generated by mining activities;
c further regulate elements related to the social and environmental responsibility of mining corporations; and
d incorporate the latest changes in the Congolese administrative context, for instance the introduction of VAT in the Congolese tax regime.

In 2015, the government decided to suspend the review of the 2002 Mining Code, presumably because of 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.

On 27 January 2018, after unsuccessful discussions with mining operators, the New Mining Code was approved by Parliament, promulgated by the president of the Republic on 9 March and published in the Official Gazette on 28 March 2018. In June 2018, a new mining regulation came into force, closing the legislative procedure of the mining sector reform.

Mining companies seeking to invest in the DRC must note that, pursuant to the New Mining Code, subcontracting activities in the mining sector are subject to Act No. 17/001 of 8 February 2017 establishing the rules applicable to subcontracting in the private sector (the Subcontracting Act). The Subcontracting Act notably provides that:

a activities can only be subcontracted to Congolese-owned companies promoted by Congolese nationals (with strictly limited exceptions);
b 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
c 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 on subcontracting activities in the mining sector by a ministerial decree, the Subcontracting Act’s implementation measures impose rather unclear obligations on mining operators and subcontractors.

In line with a current African trend, the New Mining Code reinforces local content requirements. By way of example, 25 per cent of purchase desks share capital is reserved for Congolese citizens.

From a political point of view, the new president of the Republic has announced he would be willing to work with all stakeholders in the mining sector for win-win partnerships and would be willing to relax some issues raised after the revision of the 2002 Mining Code and its implementation measures.

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 9

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 three negotiation processes for the mining exploitation agreements for the three strategic projects in Ecuador (three out of five strategic projects), Mirador (Ecuacorriente-Chinese) in production to this date, Fruta del Norte (Lundin Gold Inc.-Canadian) will be in production in fourth quarter of 2019, and Loma Larga (INV Minerals-Canadian) suspended due to an anti-mining local consultation process.

The previous government strongly supported the mining industry in Ecuador, during which period the two contracts mentioned above were signed and the third contract (Loma Larga) was agreed and several of the legal and regulatory reforms that will be explained later in this chapter were made. The current government also supports the mining industry, especially as a new source of revenues for the country.

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. These projects are known as second generation projects and include: Cascabel-Solgold, Llurimagua-Codelco with ENAMI, Cangrejos-Lumina, La Plata, Curipamba among others.

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 other 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 Superintendencies, and 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 regulations and directives of the Mining Law, 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 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). Under a recent Ministerial Decree, the Mines Ministry allowed exploratory drilling within the initial exploration period (before only authorised within the advanced exploration period, which is positive. The aforementioned mining periods do not apply to small scale concessions, since such concessions could carry out exploration and exploitation activities simultaneously.

In addition, mining concessions are divided into large-scale concessions, medium-sized mining and small-scale mining, as per the following conditions:
Mining Law: Ecuador

<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</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 Energy and Non-Renewable Natural Resources, the Mining Regulation and Control Agency (ARCOM), the Ministry of Environment and the Water Secretariat (SENAGUA).

The Ministry of Energy and Non-Renewable Natural Resources 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.

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).

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 Energy and Non-Renewable Natural Resources. 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, 275 granted up to date) and an investment commitment for the following four years of US$1.157 billion. The president decided to stop the public tender and auction processes until they analyse and define what would be the best way to reopen the mining cadastre, since the previous processes revealed some errors regarding the process and the committed investments.
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.3

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 Energy and Non-Renewable Natural Resources 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 Energy and Non-Renewable Natural Resources 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 Energy and Non-Renewable Natural Resources 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.

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.

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3 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 (protected and intangible areas).
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 and 169 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 regard to the specific internal regulations that the mining companies are required to have duly approved we can mention the following.

a Internal work regulations and occupational health and safety regulations duly approved by the Ministry of Labour.

b Internal work and 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. It is important to mention that due to the large number of new mining concessions granted, the Ministry of Environment is not complying with such term.

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. 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 Energy and Non-Renewable Natural Resources.

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4 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.

5 Article 78 of the Mining Law.
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 Energy and Non-Renewable Natural Resources, 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 regard 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

The Production, Commerce and Investments Organic Code 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); 
  • 3 per cent for small-scale mining;
  • 4 per cent for medium-scale mining; and
  • 3–8 per cent for large-scale mining (for gold, silver and copper); and

b the main taxes applicable to the mining industry are the following:
  • income tax (25 per cent);
  • value added tax (VAT) (12 per cent);
  • capital outflow tax (5 per cent);
  • windfall tax (this tax was derogated);
  • 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 depend 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, April 2016 and August 2018. 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 a mining exploitation agreement with the state;

f payment of the 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;

i legal and tax stability for medium and large-scale metallic mining with the execution of the investment protection agreement; and

j derogation of the windfall tax.

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, formula of calculation to avoid any subjective parameters negotiation, legal and tax stability, derogation of certain taxes, 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, despite being one of the world’s top bauxite producers – making the mining industry a key sector of the Guinean economy – Guinea is ranked at only 132 of 195 nations in terms of gross domestic product (GDP) in 2017 and 177th of 188 nations listed on the human development index in the 2017 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 significant recent and current investments in the bauxite sector, in particular in the prefectures of Boffa and Boké. Thanks to newcomers and a significant logistic improvement, Guinea has already reached the objective of tripling by 2020 its production to 60,000 million tonnes of bauxite a year. In just last year, an increase of 31 per cent of the bauxite production has been recorded. In the same vein, state mining revenues increased from 293 million in 2015 to 355 million in 2018. In the recent past, 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 during a period when the iron ore price is low. As a result, the development of projects in the southern part of Guinea has been slow.

1 Stéphane Brabant and Bertrand Montembault are partners at Herbert Smith Freehills. The authors would also like to acknowledge the assistance of Paul Morton, Eva Maarek.
2 Source: https://globaledge.msu.edu/countries/guinea/economy.
The main reasons generally put forward to explain why Guinea’s mining potential has not been fulfilled in the past 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, the legal regime in Guinea that governs mining has been significantly amended during the past two decades, with successive moves to tackle these issues, attract foreign investors and promote transparency and good governance.

Nevertheless, since the 2016 economic upturn, which was mainly driven by the extractive sector, Guinea’s GDP growth almost reached 6 per cent in 2018 and is projected to average 6 per cent in 2019–2020. Deflecting the uniquely significant importance of the mining sector in Guinea, the African Union decided in July 2018 to settle the African Minerals Development Centre (an organisation in charge of the implementation of the African Mining Vision) in Conakry.

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 case by case without the benefit of a general legal framework for the sector. The Ministry of Mines was not set up until 1981.

Between 1984 and 2008, Guinea was ruled by General Lansana Conté, a period during which the country sought to open itself up 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 risks and uncertainties and to improve the deteriorating financial situation of certain developing countries under structural adjustment programmes.

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

Following the adoption of the 1986 Mining Code, Guinea adopted an investment code by Order No. 001/PRG/87 of 3 January 1987. It aimed to reopen the Guinean economy to the private sector by guaranteeing that there would be no discrimination between foreign and national investors, providing for freedom to transfer capital (including profit repatriation) and offering protection against nationalisation.

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6 http://mines.gov.gn/sommet-de-lua-la-guinee-retenue-pour-abriter-le-cadm/.
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 by the World Bank as the ‘Strategy for African Mining’ in its 1992 report of that title.

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 Mining Code (comprising 186 Articles) was enacted by Law No. L/95/036/CTRN of 30 June 1995 (the 1995 Mining Code) with a view to:

- promoting further transparency and limiting the discretionary powers of the state and providing greater clarity on state participation;
- 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 International Monetary Fund 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 the freedom to import goods and services);
- providing for more detailed tax provisions and making the fiscal regime more attractive to investors; 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 fits 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 while recognising 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 in the sector. However, it 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 order to represent and manage the State’s activities in the mining industry, SOGUIPAMI (Société Guinéenne du Patrimoine Minier) was created by Decree No. 218/PRG/ SCG dated 11 August 2001. SOGUIPAMI is a state-owned responsible for managing the shareholdings held by the State in mining companies and the development of mining permits. In addition, SOGUIPAMI is entitled to hold research permits either on its own or in partnership for promotion purposes. As a result of Decree no 2019-123 dated 19 April 2019, the oversight of the company has been transferred from the Ministry of Mines to the Presidency.

7 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.
8 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].’
9 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.’
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 local communities living around the areas of operations;10
- detailed environmental and rehabilitation obligations;
- 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 for, inter alia, 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;11
- 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.

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10 Despite increased recognition of the necessity to foster an inclusive model of the mining industry; local communities remain very frustrated with the situation. On 25 February 2019, 13 villages in the Boke mining region seized the mediator of the organisation branch of the World Bank which finances the Guinea Bauxite Company, a partly state owned company. They explained having been expropriated land they owned in violation of their information and compensation rights. See, https://www.inclusivedevelopment.net/campaign/guinea-alcoa-rio-tinto-bauxite-mine/.

11 Some mining conventions are available on the website of the Technical Committee at www.contratsminiersguinee.org.
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 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 in January 2014: Decree D/2014/012 on the management of the authorisations and mining rights; (Decree D/2014/013 on the implementation of the financial provisions of the Mining Code; (Decree D/2014/014 on environmental and social impact assessment for mining operations; and 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).

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.

Finally, Guinea adopted Law No. 0032/2017/AN as promulgated by Decree No. 0/2017/278/PRG/SGG dated 24 October 2017 on public-private partnership. Although mining rights are excluded from its scope, the Law will apply to integrated mining projects comprising both mining and infrastructure aspects. To the best of our knowledge, at the date hereof, the implementing decrees of Law No. 00325/2017/AN have not been adopted yet.

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.

<table>
<thead>
<tr>
<th>Key rights and obligations</th>
<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 explore, exploit and dispose of</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>
<td>25 years</td>
</tr>
<tr>
<td><strong>Maximum area</strong></td>
<td>500km² (bauxite and iron ore) 100km² (other)</td>
<td>Based on deposits identified in a feasibility study</td>
<td></td>
</tr>
<tr>
<td><strong>Maximum number</strong></td>
<td>Three (bauxite) Three (iron ore) Five (other)</td>
<td>N/A</td>
<td>N/A</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.* • Exploration work must begin within six months of the grant of the permit. • 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. • Development work must begin within one year of the grant of the permit or concession. • 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. † • The state may revoke the title if development work has not begun within 18 months of the grant of an exploitation permit or two years of the grant of a concession. • Commercial production must start within four years of the issuance of the permit if the ore is to be exported or five years if the ore is to be processed locally (five or six years respectively for a concession), otherwise a penalty for delay based on the gap between planned and actual expenditure may be applied. • Obligation to fund an environmental rehabilitation trust account to guarantee the rehabilitation and closure of the mining site. ‡</td>
<td></td>
<td></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 the grant of the title and up to a further 20 per cent interest on terms to be agreed with the title-holder</td>
<td></td>
</tr>
<tr>
<td><strong>Transferability</strong></td>
<td>No</td>
<td>Yes – subject to approval by the Minister of Mines, an environmental audit and a health and safety audit</td>
<td></td>
</tr>
</tbody>
</table>

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* 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.
### 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>N/A</td>
<td>Guinean-registered entities</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>N/A</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>
<td></td>
</tr>
</tbody>
</table>

If exploration work has been undertaken by the state, the state may seek reimbursement on the basis of an assessment by an independent auditor.

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 to cover the exploration costs that have been incurred.

### Process for grant

<table>
<thead>
<tr>
<th></th>
<th>Exploration permit</th>
<th>Exploitation permit</th>
<th>Concession</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>If no deposit has been identified, awarded on a first-come, first-served basis.</strong></td>
<td>If an exploration permit is in place, an application must be filed no later than three months before the end of its term.</td>
<td>If there is no exploration permit, or the holder of the relevant exploration permit does not apply, based on a competitive tendering process.</td>
<td>Granted by ministerial decree upon recommendation of the Minister of Mines following approval by the National Mining Commission.</td>
</tr>
<tr>
<td><strong>If a deposit has been discovered, based on a competitive tendering process.</strong></td>
<td></td>
<td></td>
<td>Granted by an order of the Minister of Mines upon recommendation of the CPDM following approval of the Technical Committee.</td>
</tr>
</tbody>
</table>

### Key documents for grant

<table>
<thead>
<tr>
<th></th>
<th>Exploration permit</th>
<th>Exploitation permit</th>
<th>Concession</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Work and expenditure commitments deemed acceptable.</td>
<td>A feasibility study including:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Environmental impact notice to be filed before the start of the work and no later than six months after the date of award.</td>
<td>• a detailed schedule of the work;</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>• an environmental and social impact study (including a hazard study, a risk management plan, a health and safety plan, a rehabilitation plan and a resettlement plan detailing, inter alia, compensation for persons displaced by the project);</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>• a plan for supporting Guinean companies; and</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>• a community development plan providing, inter alia, for the training of the local community, to be annexed to a local development agreement to be signed upon the grant of the permit or the concession.†</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

* 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><strong>Number of renewals</strong></td>
<td>Two</td>
<td>Unlimited</td>
<td>Unlimited</td>
</tr>
<tr>
<td><strong>Term of renewals</strong></td>
<td>Two years</td>
<td>Five years</td>
<td>10 years</td>
</tr>
<tr>
<td><strong>Time for applying for renewals</strong></td>
<td>Three months before end of term</td>
<td>Six months before end of term</td>
<td>Six months before end of term</td>
</tr>
<tr>
<td><strong>Extensions</strong></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>N/A</td>
</tr>
<tr>
<td><strong>Relinquishment</strong></td>
<td>50 per cent on each renewal</td>
<td>N/A</td>
<td>N/A</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. The model is provided by Decree D/2014/015/PRG/SGG.

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adopter a model mining agreement and dated 17 January 2014. 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 to secure and maintain the required permits and approvals from the relevant authorities.

iv Closure and remediation of mining projects

According to Article 131 of the Mining Code, 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:

a. eliminate health and safety risks;

b. rehabilitate the site to a condition acceptable to the local community; and

c. restore vegetation with similar characteristics in the surrounding area.

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

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 title-holders must apply whichever are the highest standards applicable in Guinea or those followed by title-holders 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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12 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 title-holders’ existing rights. 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’ land rights 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 title-holders must provide reasonable and adequate compensation to the legitimate occupants of the land;

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

d if the necessary 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 as a result of mining activities.

iv Additional considerations

Local content

Article 130 provides that a ‘contribution to local development’ must be paid by title-holders 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. To that end, a Local Economic Development Fund has been created by a Decree D/2017/275/PR0/SGG dated 31 October 2017.

Article 107 also provides that:

a title-holders 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></td>
<td>Year 1 to Year 5</td>
<td>Year 6 to Year 10</td>
</tr>
<tr>
<td>10 per cent</td>
<td>15 per cent</td>
<td>25 per cent</td>
</tr>
<tr>
<td>20 per cent</td>
<td>20 per cent</td>
<td>20 per cent</td>
</tr>
</tbody>
</table>

Title-holders 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 title-holders 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
title-holders:
- 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, as follows:

<table>
<thead>
<tr>
<th></th>
<th>Exploration</th>
<th>Development</th>
<th>Exploitation</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Year 1 to Year 5</td>
<td>Year 6 to Year 10</td>
<td>Year 11 to Year 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:
- as of the date of the first commercial production, the assistant managing director of the title-holder must be a Guinean national;
- after five years of the date of the first commercial production, the managing director of the title-holding entity must be a Guinean national; and
- title-holders must file an annual report on measures taken for employing Guineans.

V OPERATIONS, PROCESSING AND SALE OF MINERALS

i Processing and operations
While title-holders are free to export raw materials from Guinea before they are processed, Article 139 states that title-holders 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 five-year grace period from the date the title-holder has reached a ‘fair return on investment’.\(^\text{13}\)

ii Sale, import and export of extracted or processed minerals
Law No. L/2013/053/CNT of 8 April 2013 introduced a pre-emption right in favour of 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 exceeding three months.

The taxable income of the title-holder may also be readjusted in such a case.

iii Foreign investment
Article 184 requires title-holders 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’.

\(^{13}\) As indicated, it is likely that Law No. 0032/2017/AN promulgated by Decree No. 0/2017/278/PRG/SGG dated 24 October 2017 on public-private partnership will apply in this context.
As noted by a number of practitioners, the drafting and practical implications of Article 184 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 or supporting document obtained or prepared by title-holders.

VI 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 title-holders can opt to defer the amortisation of fixed assets purchased during the exploration and development phases from the beginning 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 title-holders who have signed a mining agreement for up to 15 years from the date the concession is granted.

Pursuant to article 165 implementation Decree A/2018/5212/MEF/MMG/MB/MATD/SGG 15 per cent of the mining tax revenues shall be allocated to local authorities’ budget. The total amount shall be poor into a fund to foster development of rural communities.

i Royalties

Title-holders must pay an annual surface royalty in accordance with the table below:

<table>
<thead>
<tr>
<th>Surface royalty (US$ per km)</th>
<th>Award</th>
<th>First renewal</th>
<th>Second renewal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exploration permit</td>
<td>10</td>
<td>15</td>
<td>20</td>
</tr>
<tr>
<td>Exploitation permit</td>
<td>75</td>
<td>100</td>
<td>200</td>
</tr>
<tr>
<td>Concession</td>
<td>150</td>
<td>200</td>
<td>300</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>Rate</th>
<th>Basis</th>
</tr>
</thead>
<tbody>
<tr>
<td>Iron ore</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-Tubarao/Qingdao</td>
</tr>
<tr>
<td>Bauxite</td>
<td>Three–month LME seller price</td>
</tr>
<tr>
<td>Gold</td>
<td>London PM fixing</td>
</tr>
</tbody>
</table>

Export tax

An export tax is payable when ore is exported without first being processed in Guinea. The rates are 2 per cent on iron ore and 0.075 per cent on 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 title-holders, including:

\( a \) an exemption from customs duties during the exploration and development phases; and

\( b \) 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.\(^{14}\)

iv  Other fees and taxes
The issuances, renewals, extensions and transfers of mining titles are subject to 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>Rate</th>
<th>Basis</th>
</tr>
</thead>
<tbody>
<tr>
<td>Transfer of exploitation permit or concession</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>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>
</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 not covered by mining agreements.

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 title-holders within 24 months of 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 upon the 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 for a period not exceeding eight years; and

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

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\(^{14}\) 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).
VIII OUTLOOK AND TRENDS

The success of the 2011 Mining Code, as further modified, 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 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 provides the perfect environment for the mining sector to grow in.

At the political level, the next presidential elections will take place in 2020 and President Ouattara has not yet officially confirmed whether he will run for a third mandate. The Ivorian civil society fears renewed tension around the upcoming presidential elections, still deeply affected by the electoral crisis in 2011.²

The Ivory Coast continues to be one of the most dynamic economies in Africa. Since 2012, the country has enjoyed strong growth in its gross domestic product (GDP) and has a projected real GDP of 7.5 per cent in 2019.³

Before undertaking an analysis of the mining legislation and its effects on the sector, an overview of the current status and context of the mining sector in the Ivory Coast is essential to evaluate its future prospects. The economic boost that the country has enjoyed since 2012 is supported by President Ouattara’s government’s strategic plan to promote the mining sector as the country’s main source of economic and social development, which in turn depends on the Ivory Coast’s capacity to attract international mining companies. The legal framework enacted following the adoption of the new Mining Code aims to establish a balance between the interests of investors and the state, while complying with international local content requirements and factoring in social and environmental parameters.

The mining sector was still quite dynamic in 2018. The annual turnover was 582.3 billion CFA francs in 2018, compared to 539 billion CFA francs in 2017. In addition, the number of individuals directly employed also increased, by 26.63 per cent. Tax revenues generated by mining companies totalled 65.84 billion CFA francs in 2018, up 16.65 per cent as compared to 2017.⁴

The Ivory Coast has large untapped resources, with an estimated two-thirds of the territory covered with mineral resources. The country is currently exploiting nickel, bauxite,
manganese, diamonds and gold but also has considerable reserves in steel, iron ore and coltan. As at 31 December 2018, 178 mining exploration permits (compared to 164 in 2017) and 16 exploitation permits (against 14 in 2017) were in place.\(^5\)

Gold mining remains at the forefront of the sector despite a decline in gold production by 3.57 percent in 2018 to 24.5 tonnes compared to a forecast of 26.5 tonnes.\(^6\) An exploitation permit has been granted to Perseus Mining for the Yaouré project.\(^7\) Endeavour Mining has also increased its interest in the Ity project and announced that it will start production shortly.\(^8\)

The mining administration initiated diversification of exploitation in 2016 and in 2017. Three copper and nickel exploration permits were granted in June 2019, two to SODEMI (the state-owned company) and the third to TONKPI Mining Company.\(^9\)

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, the different sections of the Supreme Court (composed of the Court of Cassation and the State Council), the Courts of Appeal and tribunals are responsible for performing judicial functions.

The main laws applicable to mining activities are the Code, the decree dated 25 June 2014 implementing the Code, 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. A draft of a collective labour agreement for the mining sector is being discussed amongst stakeholders.\(^10\)

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 governs any mining operation relating to the prospection, exploration, exploitation, detention, traffic, transport, treatment, trade and transformation of minerals within the territories of the WAEMU Member States. The amendment of the WAEMU Mining Code is being discussed amongst the WAEMU member States. The Ministers of Mines of the Member States have already agreed on some guidelines, such as the non-stabilisation of issues relating to human rights, health, safety, employment, environmental and social aspects, improvement of the rules relating to sub-contracting and introducing mechanisms for allowing the national private companies to acquire participating interests in mining companies.\(^11\)

\(^{5}\) Fédération Atlantique des Agences de Presse Africaines, ‘Côte d’Ivoire/ Le chiffre d’affaire des sociétés d’exploitation minière en hausse de 8% (Ministre)’, 5 July 2019.
\(^{6}\) Ministerial Council dated 10 April 2019.
\(^{8}\) Agence Ecofin, ‘Côte d’Ivoire : Endeavour Mining augmente à 85% ses intérêts dans la mine Ity’, 14 January 2019.
\(^{10}\) Africa Mining Intelligence ‘La convention collective spéciale mines est presque prêté’, 8 January 2019.
\(^{11}\) Extract of the communication from the WAEMU Mining Ministers dated 29 June 2019.
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. A Supplementary Act to the ECOWAS Mining Code has recently been approved on 29 June 2019, which aims at ensuring that the local communities benefit from the revenues arising of the mining operations.\(^{12}\)

At the international level, the Ivory Coast has made good progress in terms of transparency. It joined the Kimberley Process Certification Scheme in 2013, with the aim of 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. In May 2013, it was declared compliant with the 2011 EITI Rules and in May 2018 it was declared to have made ‘meaningful progress’ towards implementing the 2016 EITI Standard.\(^{13}\)

According to the Code, the main regulatory bodies in the Ivory Coast are the President of the Republic and the Ministry of Mines and Geology (the Ministry), the department in charge of implementing mining policy. The current Minister of Mines and Geology is Mr Jean Claude Kouassi.

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 natural underground resources located within its territory, including territorial waters and the continental shelf up to the 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

\(^{12}\) Final release of the 55th session of the meeting between CEDEAO heads of state and government held on 29 June 2019.

\(^{13}\) Website of EITI.
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, and to dispose of the products extracted during these operations. However, disposal is 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 movable 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 minimum share capital of 20 million West African CFA francs 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 seeking 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 work. 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 metre 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 work within six months of that date.

**Duration and renewal**

The duration of 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 renewal at least three months before the expiry date and renewal is granted automatically if the applicant has fulfilled all its obligations. Exceptionally, an additional renewal for a maximum of two years may be granted if the reason for the request is a delay in finalising a 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 payment of an option right and provision of proof that work 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. The 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 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 exploration work 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, and 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.

Unlike exploration permits, exploitation permits are indivisible, immovable rights that may be mortgaged subject to approval by 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 development work has been reduced from two years, as stipulated in the former Code, to one year.

The Administration of Mines may put out to tender any perimeters not attributed and on which work has 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 a convention does not mirror the duration applicable to an exploitation permit 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) may be negotiated at market conditions.

However, this percentage does not pertain to participation by state-owned companies. Therefore, any participation by SODEMI in the share capital may indirectly increase the control of these entities 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 a postponement or suspension of the mine exploitation work, 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. The 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 obligations relating to the environment and the rehabilitation of sites (see Section IV).
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 work 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. This plan shall be approved by the administrations for mines and for the environment. The content of such a plan is further detailed in Section IV.

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. The aim of this account is to cover any costs relating 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 relating to health and safety. During the operations, it must guarantee the safety of persons and goods in connection with 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 appropriate measures must be taken to avoid future accidents of the same kind.

ii Environmental compliance

A permit holder must conduct mining operations in a way that ensures protection of the environment, rehabilitation of exploited sites and 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, dismantling and removal of mining installations, the post-rehabilitation surveillance of the site, and suggestions of how the site could be reconverted. These matters must be addressed during the exploitation period and not just 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 for 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 to protect the rights of local populations. The Code guarantees the right to a fair indemnity for the land’s occupants and legal owners in the event of occupation of the land. This 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 work completed on the 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 draw up 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 a public servant of any kind, who has been involved in the mining administration, from obtaining financial benefits directly or indirectly from mining companies; this stipulation 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 those 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 more than 152 billion West African CFA francs 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 511.6 billion West African CFA francs, mainly as a result of the increase in oil and gas prices and the inclusion of customs duties and employee contributions from 2012.
V OPERATIONS, PROCESSING AND SALE OF MINERALS

i Processing and operations
The Code does not contain detailed provisions regarding the processing and transformation of extracted ore. It merely provides that the holder of an exploitation permit has the right to transport the extracted 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 this 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, price and quantity. As regards 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.14

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 or 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, and 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.

14 However, preferences for Ivorian companies and employees may be considered as violating the WAEMU Treaty and the WAEMU Mining Code, which expressly provide 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) and range 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 (1 million West African CFA francs) and their renewal (2 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 are 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

Article 169(e) of the Code formerly provided for a total exemption from corporate income tax and from the minimum flat tax for the holder of an exploitation permit for the first five years after the beginning of commercial production. Ordinance No. 2018-144 has abolished
this exemption. However, the Ordinance provides that (1) the mining convention in force and the exploitation permit granted prior to the entry into force of the Ordinance shall not be affected by the ending of the exemption, and (2) an exploitation permit granted in 2018 shall benefit from discounted rates on corporate tax for the two first years after the beginning of commercial production (a discounted rate of 75 per cent for the first year and of 50 per cent for the second year).

The Code also provides for other exemptions to the benefit of exploitation permit holders relating to customs duties, including value added tax, on various imported materials.

VII OUTLOOK AND TRENDS

The reform of the WAEMU Mining Code should be closely monitored as it will have an impact on the Ivorian legal framework. It will probably create additional obligations for mining companies operating in Ivory Coast. The WAEMU requirements in terms of exchange control are also key and should be clearly considered prior to any investment decision. The relevant authorities (including the central bank, BCEAO) are becoming stricter on compliance by international companies operating in the WAEMU area with such requirements.

Trends in the Ivory Coast mining industry point to positive outcomes. The government confirmed that the mining sector’s place in the Ivorian economy should grow.

With major gold players such as Randgold Resources and Endeavour Mining planning to increase the life expectancy of their mines, gold mining should remain the principal driver of the mining sector in the next few years despite its slight decline in 2018. The government intends to double the gold production in the country by 2025.

However, the success of the gold industry has a significant disadvantage: illegal gold panning is becoming more and more of an issue in slowing the industry down. Solutions have been proposed to overcome this problem, including the establishment of the Brigade de Répression des Infractions du Code Minier towards the end of 2018, which has already fined a number of individuals responsible for illegal mining activities. In addition, the recent removal of the corporate tax exemption has sent a negative signal to the mining sector.

Despite that, the future of the mining sector should remain dynamic, although the political stability will be key and should be carefully monitored in the context of the upcoming presidential election.

Finally, the Ivorian authorities’ objective is to raise the country’s economy to the level of an emerging economy by 2020. This aim is currently being furthered by significant investments in infrastructure and power projects, which are likely to have a positive effect 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, joining cocoa and coffee production.

16 Agence Ecofin, La Côte d’Ivoire veut doubler sa production d’or d’ici 2025, 10 December 2018.
Chapter 12

MEXICO

Alberto M Vázquez and Rubén Federico García

I OVERVIEW

Mexico was the largest producer of silver in the world during 2017. 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 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 any 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 a 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 allowable minerals or other substances located within an allotted area to either:

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a the first applicant with respect to a specific plot of land; or
b in a public bidding procedure, the best offeror with respect to land covered by cancelled allotments or by mineral reserves that have been disincorporated.

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:

a 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

b private property shall not be expropriated except for reasons of public interest and subject to payment of an 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 states:

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 land³ (not including exploration or exploitation of hydrocarbons and distribution of electric energy), the state may validly establish any mining activity on private property, in consideration that various benefits for the community are created 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 from 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

⁴ Amendments to the Mining Law published in the Official Journal 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 [. . .] [T]he 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-compliance 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,5 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 from 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 Journal of the Federation
   on 2 February 1999);

b. the Federal Law of Waters (published in the Official Journal of the Federation on
   1 December 1992);

c. the Federal Labour Law (published in the Official Journal of the Federation on
   1 April 1970);

d. the Federal Law of Fire Arms and Explosives (published in the Official Journal of the
   Federation on 11 January 1972);

e. the General Law on Ecological Balance and Environmental Protection (published in
   the Official Journal of the Federation on 28 January 1988) and relevant Regulations;

f. the Federal Law on Metrology and Standards (published in the Official Journal of the
   Federation on 1 July 1992); and

g. the Federal Law of Environmental Responsibilities (published in the Official Journal 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 to the 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 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 any of the above-mentioned activities exist, then the Ministry of Energy must carry out a technical study to determine the possibility of the coexistence of 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 work 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

year regarding the assessment work 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 work reports is not filed on time.

The most common circumstances under which concessions may be cancelled are:

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, resulting from 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-adjoining mining properties for the purposes of proving assessment works, when said concessions do not either constitute a mining or mining-metallurgic unit from the technical and management standpoint; and
g for the holder of a mining concession to lose its legal capacity to be a holder.

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 work.

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 for reasons of public interest and by means of a fair indemnification.8

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The expropriation procedure may be initiated exceptionally by an individual or private legal entity (in this case, the holder of a mining concession), when legally permitted by virtue of the Mining Law, which expressly authorises the concessionaire to do so.

According to the Mining Law, expropriation enables the Federal Executive, at the 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 carrying out exploration, exploitation or beneficiation work, and 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), at the 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 work, and 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 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 for the benefit of another property with 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.

For the purposes of the Mining Law, an easement may be requested on land where the mining concession is located, or on adjacent land 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 work 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

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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, so that a mining expert can prepare survey work 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 who prevents or hinders the survey work 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 the land is private, ejido or communal property.

_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. parcelling land; and

c. land for 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 filing is complete and the legal requirements are met, the file must be transferred to the Ministry of 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 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 requisition _ejido_ or communal properties, but only in circumstances where the public interest is deemed to be of greater importance than 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 that 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 the public interest in the exploitation of minerals located in the subsoil.

The Ministry of Agrarian Reform is the authority competent to notify an expropriation to the Ejido Commission, which shall be made:
a through an official communication;
b through publication in the Official Journal of the Federation; and
c through 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 (government) 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.

**Free negotiation**

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 the concessionaire may:

a obtain free access to the surface covering the mining concession for the performance of mining work;
b occupy, use and possess (totally or partially) the surface land necessary to carry out said work, or to establish the facilities considered important for its operation; 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 and most frequently used in mining, namely:

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 a practical standpoint, it is always advisable that the negotiation and execution of a contract or agreement be made with the owner of the surface land in the first stages of either the exploration work or the mining project itself given that, in our experience, some mining companies working in Mexico have faced serious problems and delays with non-existent agreements, or when trying to obtain the necessary authorisation and consent in the advanced stages of a project.

Furthermore, a lack of negotiation prior to the execution of a contract or agreement with the owner of the surface land may not only cause serious problems and delays in the schedule of work, but may also incur additional costs and excessively long periods of time in trying to find a solution to a 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 himself or herself as harmed by virtue of a resolution may file a revision remedy according to the terms of Article 83 (and other related and applicable articles) of the
Federal Law of Administrative Procedure\textsuperscript{10} or, if applicable, contest via an \textit{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 means of dispute resolution.

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 a case, the expropriation, temporary occupation or creation of easement shall be final, binding and enforceable.

\section*{iii Additional permits and licences}

\subsection*{Explosives permits}

The Federal Law of Fire Arms and Explosives (LFAE) administers the purchase, storage and use of explosives in the mining industry; it 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.

\subsection*{Water concessions}

Mining companies usually buy water from concessionaires of the area where the early stages of exploration work are being carried out.

As the construction or exploitation stage approaches, mining companies must obtain concessions from the National Water Commission or purchase concessions previously granted by that authority.

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.

\section*{iv Closure and remediation of mining projects}

Environmental impact authorisations (EIAs), which are granted case by case, contain a section devoted to the closure and rehabilitation plan for the mine; this plan is approved by the environmental authority before exploitation activities begin. There is no need to provide

\textsuperscript{10} Published in the Official Journal of the Federation on 4 August 1994, amended on 19 May 2000.
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). PROFEPA monitors company compliance with environmental legislation and enforces Mexican environmental laws, regulations and NOMs.

If warranted, PROFEPA may initiate administrative proceedings against companies that violate environmental laws; in the most extreme cases, 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 be as much as 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 impact 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. In such cases, a preventive report 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 this NOM in the exploration phases will have to present a preventive report rather than an environmental impact statement.

Any individual who owns or holds real estate in Mexico that has suffered any kind of pollution must remediate the pollution; this provision is applicable at any stage of any mining project in Mexico.

The environmental regulations have become increasingly stringent during 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 Journal 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 damage to the environment for the purposes of restoration or compensation (besides those actions already existing from the civil,
administrative and criminal points of view); penalties under this action may be as much as 600,000 days of minimum wage in force in Mexico City on the date on which the sanction is imposed.

ii Environmental compliance

Pursuant to the Federal Criminal Code, some crimes against the environment are sanctioned with prison sentences. In some cases, those 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 a 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 an area populated by an indigenous community (and which is different from an ejido or agrarian community), the 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 the 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 Journal of the Federation. These amendments mainly consist of 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 an 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 bank 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; 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 working 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 salaries are also considered in the FLL.

Employees have the right to an annual 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 the 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 import and export 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 these activities is subject to this Law, including importers and exporters, their custom representatives, customs brokers, transporters and possessors of authorised tax warehouses.

The Foreign Trade Law provides the proceedings to be carried out before commodities are imported, especially regarding 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 Journal 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 notable 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 the past, import permits (licences) for most products had to be obtained from the Ministry of Economy. Currently, 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:

- presenting any commodity before the customs authorities with a customs declaration;
- activating the mechanism of automatic selection;
- the customs inspection; and
- the disposition of the goods.

Importers and exporters of commodities must file a customs declaration before the customs authorities. The declaration 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 of reducing or being exempted from tariffs according to the particular tariff preferential treatment schedule of each agreement. Despite this, such agreements do not represent an opportunity to avoid paying other taxes derived from the import and export itself.

The Customs Law provides a list of goods that are exempted from payment of duties on foreign trade. The list includes goods exempted because of international treaties, or because they are being imported for national defence or public safety purposes. Regarding other kinds of taxes derived from imports, the possibility of obtaining an exemption for each kind of good should be revised separately.

General import or export taxes are calculated in consideration of the customs value of the commodity. For most imports, the customs value is based on the price that was paid or that should be paid for the commodity, according to the commercial invoice (the settlement value). If other expenses incurred during the import increase that value, it would be subject to 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 that apply export restrictions or duties.
### Foreign investment

Most deals 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, those companies may be wholly owned by foreign investors; there are no restrictions in respect of foreign investment in Mexican mining companies. Mexican-incorporated mining companies must also be registered 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 annually.

### VI CHARGES

Mexican tax laws are based on the fact that all Mexican residents and foreign residents carrying out activities within Mexican territory are obliged to pay taxes according to the approved rules.

Mining activities are considered to be entrepreneurial, including the extraction, preservation or transformation of raw materials. The net income obtained from these 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 carried out by companies and a 35 per cent rate could apply in the case of individuals carrying out 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, and those developing work 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 quota for each hectare, according to the period of validity of the concession or assignment;
- **b** additionally, another royalty is imposed on owners of concessions or assignments who stop 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. The taxable profit will be determined by 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 carrying out mining activities are required to pay federal taxes in the same way as other business entities. The taxes on business activities are described below.
Income tax

A 30 per cent tax rate is applied to income obtained from entrepreneurial activities. Costs and expenses that are indispensable for the activity can be deducted, provided certain requirements are complied with, including:

- obtaining electronic invoices; and
- making 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 based on a rate of 12 per cent applied to machinery and equipment involved in mining activities. Nevertheless, certain assets must be deducted based on the authorised rate according to the type of asset such as buildings, railroad, railways, office furniture and equipment, ships, planes, automobiles, computers, molds, etc.

The deductible amount is revised in line with inflation.

Interest is deductible on an accrued basis if obtained loans are invested in 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 also be deducted on accrued basis.

Salaries and fringe benefits for employees are considered a deductible expense. Nevertheless, certain restrictions are imposed on payments that are exempt of tax for employees.

Losses can be deducted within the 10 years following the year in which the loss occurs. The deductible amount is revised in line with inflation.

In the case of individuals, the same rules apply but the tax rate can reach 35 per cent.

Value added tax

Individuals and corporations are obliged to pay VAT at 16 per cent rate on the sale of goods, leasing and the rendering of services within Mexican territory.

A zero per cent tax rate is applied on certain activities, such as exports of goods and services (with certain restrictions), and transactions such as the sale of foods and patented medicine. A zero per cent tax rate also applies to the sale of gold and jewellery that contains 80 per cent of gold in sales to business entities (note that the same rule does not apply to sales of same to the general public).

Certain goods are exempt from VAT, such as land, apartment blocks and houses, books, magazines and newspapers, gold bullion that contains 99 per cent of gold in sales to the general public.

VAT payments should be made monthly on cash flow basis; the amount payable is the VAT charged to customers less the VAT paid to suppliers. Tax returns are definitive and independent of tax returns for other months.

In the case of a favourable balance, it is permitted to claim a reimbursement from the tax authority.

Payroll taxes

Employers are obliged to withhold the income tax relating to employees’ salaries. This could amount up to 35 per cent and it is calculated with a progressive tariff.
Additionally it is required to withhold social security quotas and pay them to the Social Security Institute with the employer’s social security quotas, which can amount up to 25 per cent of the salaries.

Employers are also obliged to pay 5 per cent into a housing fund and 2 per cent into a retirement fund for their employees.

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 kinds 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 may apply depending on whether or not a double taxation agreement exists.

**Dividends**

For domestic purposes, a 10 per cent tax rate applies to payments made to individuals. Dividends paid to other corporations are exempt from withholdings.

On the other hand, in case of shareholders who are foreign residents, a 10 per cent 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 or before 2013.

If dividends cannot be identified with profits on which income tax has been paid by the company that distributed the dividends, the company will be obliged to pay tax at 35 per cent, subject to certain rules.

Other taxes apply for certain operations, such as the purchase of land and construction, but these are generally imposed by states and municipalities.

**iii 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:

- registration with the Public Registry of Mining – 1,325 pesos;
- cancellation of a registration – 663 pesos;
- registration with a mining society – 2,650 pesos;
- registration of changes to the by-laws of a mining society – 1,325 pesos;
- notarial notices – 663 pesos;
- other notices – 663 pesos; and
- review of documents – 663 pesos.
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 22.1 million hectares.\(^{11}\) 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 account 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 outcome from 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 mining industry to be of the utmost importance for the development of mining projects; while the mining industry in Mexico continues to develop its activities, non-governmental organisations claim they are defending human (indigenous) rights. Mexico is still evolving on matters related to human rights and mining projects must now also see this as an important consideration in the development of any project.

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\(^{11}\) Sources: 5th Annual Report of the President of the United Mexican States, and ‘Abandonan concesiones mineras’, Reforma, 9 September 2014.
I OVERVIEW

For the past few years, foreign investment has been steadily driving Mozambique’s economy through the turmoil of the economic crisis. In 2016, the hidden debt crisis meant that the country’s economy faced currency depreciation and budget deficit; however, mineral resources and infrastructure projects put Mozambique back on the map of economic development.

The mining industry assures Mozambique’s place as one of Africa’s leading players in mineral resources projects. The coal industry is well established and thriving in the Province of Tete and it is expected that coal production will reach a figure of 100 million tons by 2020, which will establish the country as one of the world’s largest coal producers.

Infrastructure development is still the main challenge faced by private investors, particularly in the mining sector. Nevertheless, the government has been promoting several projects at national level to boost GDP growth and create jobs (at a time when the unemployment rate approaches 25 per cent). Projects such as the Nacala Corridor Railway or the exploration of liquefied natural gas from the Rovuma basin are two of the government investment priorities.

The mining legal framework has also been updated in recent years, mirroring the trends of the industry and putting the economy in a good position to respond to infrastructure development deficit. Current economic upsurge and further government regulation on promising sectors are already producing encouraging results.

II LEGAL FRAMEWORK

Mozambique’s mining industry is primarily regulated at the national level by nationwide laws (enacted by Parliament) and by implementing regulations (approved by the government). The mining industry is regulated by the following main statutes:

a The Mining Law (Law 20/2014, of 18 August 2014) sets out the legal framework for exploration of mineral resources, the necessary administrative procedures for the concession of licences and respective duration, and the investors’ regimes applicable for each mining title.

b The Mining Regulations (Decree 31/2015, of 31 December 2015) set out the specific provisions for each licence, such as the necessary administrative steps licence holders need to follow, the validity and renewal periods, assignment and cancellation.

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Law on the Taxation and Fiscal Benefits of Mining Operations (Law 28/2014, of 23 September 2014, amended by Law 15/2017, of 28 December 2017) sets out the tax regime, including tax rates and exemptions, applicable to the mining sector.

Mining Tax Regulations (Decree 28/2015, of 28 December 2015) sets out the rules for the assessment of mining production tax and surface tax.

Regulations on Health and Safety on Mining Activities (Decree 61/2006, of 26 December 2006) set out the rules and procedures for the safety of employees during mining operations.

Environmental Regulations for Mining Activities (Decree 26/2004, of 20 August 2004) set out the rules for preventing and diminishing the environmental impact of mining activities.

Rules on Environmental Management of Mining Activities (Ministerial Order 189/2006, of 14 December 2006) set out the rules for environmental licensing of Level I activities.

Regulations on Marketing of Mineral Products (Decree 20/2011, of 1 June 2011) set out the regulations on marketing and the licensing procedures for the trading of mining products (amended by Decree 25/2015, of 20 November 2015).


Rules and Procedures on the Registration of Report Technicians on Prospecting and Exploration Activities of a Mining Project (Ministerial Order 92/2007, of 11 July 2007) set out the procedures for obtaining the necessary clearance card issued by the National Directorate of Mines to sign off the necessary reports under the Mining Regulations.

Regulations on the Hiring of Expatriates for the Petroleum and Mining Sectors (Decree 63/2011, of 7 December 2014) contains the applicable rules for hiring expatriate personnel in these sectors.

Regulations regarding Labour on Mining Activities (Decree 13/2015, of 3 July 2015) set out the rules applicable to employment relationships in mining and petroleum activities.

VAT Refund Regulations (Decree 78/2017, of 28 December 2017) provides for a special value added tax regime for mining companies in the production stage.

Regulations on the National Rescue System for the Extractive Industry of Mineral Resources (Decree 32/2019, of 24 April 2019) set forth the principles and rules governing the setting up of rescue bodies in companies and the exercise of rescue operations in the mining industry.

The main regulatory bodies are the Ministry of Mineral Resources and Energy (MIREM), which is responsible for the award of mining rights, the National Institute of Mines, which oversees mining activities, the National Directorate of Geology and Mines, which is responsible for the administrative procedures within the industry, and the Inspectorate-General of Mineral Resources and Energy, which monitors mining activities and carries out inspections.

At an international level, Mozambique has entered into bilateral cooperation treaties with Angola (2009) and with Portugal (2014). Mozambique is also a party to the Kimberley Process Certification Scheme and a member of the Extractive Industries Transparency Initiative.
III MINING RIGHTS AND REQUIRED LICENCES AND PERMITS

i Title

According to the Constitution of the Republic of Mozambique, all mineral resources in the soil, subsoil and water are the sole property of the state. Mineral activities are subject to administrative authorisation by the government. This fundamental principle is replicated in the Mining Law.

ii Surface and mining rights

Mining rights are awarded by MIREM on a first come, first served basis. However, MIREM may subject the award of mineral rights to a public tender (1) if the area is believed to have mineral potential following a geological study, (2) when the area has already been subject to prior mining operations, and (3) when the area is reserved for mineral activities. Whenever justified by public interest, the award of handling and processing licenses may also be subject to public tender.

There are seven main types of mineral titles:

a prospecting and exploration licences;

b mining concessions;

c mining certificates, for small-scale mining operations;

d mining passes, for artisanal mining operations;

e mineral beneficiation licences;

f mineral processing licences; and

g marketing licences.

The most important and commonly awarded rights for medium and large-scale operations are prospecting and exploration licences (for the exploration phase) and mining concessions (for the mining and production phase).

A prospecting and exploration licence grants the holder access to licensed areas and authorises all prospecting and exploration activities, including selling samples and specimens. This type of licence is valid for two years if it relates to construction minerals (renewable for an additional two-year period) and for five years for all other minerals (renewable for an additional three-year period). Following the renewal period, the holder of the licence must apply for a new licence or request a conversion to another type of licence (typically a mining concession).

A prospecting and exploration licence can cover an area up to 198 hectares for construction minerals and 19,998 hectares for other mineral resources. Holders of a prospecting and exploration licence must submit annual reports on (1) the previous year’s activities and expenditure, and (2) a programme of work and budget details for the following year.

A mining concession allows the holder to extract minerals from the licensed area and authorises all extracting activities, including selling the minerals. A concession is valid for 25 years (renewable for a further 25 years). The licence covers the operations area and can be extended upon request to MIREM. An application for a mining concession must include an economic feasibility study and a mining production plan, as well as details of the applicant’s expertise and the financial resources to operate the extraction. The mining production plan must include details of the ore deposit, mine site design, operations schedule, expected commencement dates of development and commercial production, and environmental, health and safety plans.
In large-scale mining projects, the licence holder usually enters into a mining contract with the government, which sets out tax exemptions and modifications to the applicable administrative and labour regimes.

All prospecting and operation licences and mining concessions are awarded on an exclusivity basis.

A mineral processing licence entitles the holder to carry out mining operations to obtain mining ore and is granted for a period of 25 years, which may be extended once for a further 25 years.

A mineral beneficiation licence entitles the holder to carry out mining operations to recover useful ore components in order to transform them into useful or profitable minerals using physical processes, and is granted for a period of 25 years, which may be extended once for a further 25 years.

Finally, a marketing licence is required when the entity that sells or exports minerals is not the same as that which produced the minerals.

Any individual or company is eligible to hold a mining title. However, foreign applicants must keep in mind that (1) mining certificates and mining passes may only be awarded to Mozambican individuals, (2) mining concessions may only be awarded to Mozambican companies (but these companies can be 100% held by foreign entities, subject to the mandatory participation of Mozambican nationals), and (3) marketing licences that are not under a mining concession may only be granted to Mozambican nationals. Also, for mining contracts, the Law on Public Private Partnerships, Large-Scale Projects and Enterprise Concessions (Law 15/2011, of 10 August 2011) sets out that a percentage of participating interest (between 5% and 20% per cent) must be reserved to the state or to Mozambican nationals or entities.

As regards the protection of mineral rights, it must be stressed that Mozambique has an independent judicial system and observes the principles of the rule of law and due process. Mineral right protection and enforcement can be made through the local courts, although specific knowledge of technical mining issues is not always present. Litigation in Mozambican courts tends to be an expensive and time-consuming exercise.

One possible alternative to local judicial courts is international arbitration. Mozambique is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention), having deposited its instrument of accession with the Secretary-General of the United Nations on 10 June 1998. As permitted by the New York Convention, when it acceded thereto Mozambique declared that it would apply the Convention to the recognition and enforcement of awards made only in the territory of another contracting state on the basis of reciprocity. Therefore, only arbitral awards made in contracting states benefit from the more favourable recognition and enforcement regime provided for in the New York Convention. Awards made in non-contracting states will have to undergo a (more burdensome) judicial process of review and confirmation before they can be enforced.

iii Additional permits and licences

For the mining phase, holders of mining concessions must also obtain an environmental licence and a licence to use and exploit the land (DUAT). Both licences must be obtained within three years of the date of the mining concession being granted and before commencing extraction operations. Development must start within two years and production within three years of obtaining the environmental licence or the DUAT (whichever occurs later).
The award of a DUAT is required before any activity requiring the use of land, since in Mozambique all land belongs to the state and is granted (1) by the provincial government, if the mining concession does not exceed 1,000 hectares, (2) by the Minister of Agriculture, if the mining concession exceeds 1,000 hectares but does not exceed 10,000 hectares, and (3) by the Council of Ministers, if the mining concession exceeds 10,000 hectares. It is worth keep in mind that obtaining a DUAT may be a quite challenging and time-consuming process.

iv Closure and remediation of mining projects
The Mining Regulations and the Environmental Regulations for Mineral Activities set out that holders of mining titles are responsible for restoring the site where mining operations were carried out.

Holders of mineral titles may be further required to provide an annual financial bond in the form of an insurance policy, bank guarantee or bank deposit, to meet decommissioning costs of the operations.

IV ENVIRONMENTAL AND SOCIAL CONSIDERATIONS
i Environmental, health and safety regulations
Holders of mining titles are required to prepare and submit – ahead of commencement of mineral operations – security, health and safety plans to MIREM and to the Ministry of Labour on matters relating to risk assessment, potential sources of fire or explosion, the use and maintenance of equipment, working conditions, and measures to prevent risks, accidents and occupational diseases.

For the purposes of environmental compliance, mineral obligations are classified in three levels, which are defined based on the scope, scale and sophistication of the equipment to be used in the operations.

a Level I: the Basic Rules on Environmental Management for Mining Activities directed to moderate environmental damage and socio-economic impact arising from mineral activities shall apply. In this case, the holder of the mineral rights shall ensure that the activities are carried out using simple methods to prevent air, soil and water pollution, flora and fauna damage and risks to human health.

b Level II (e.g., operations in quarries or extraction for construction, or exploration and mining activities involving mechanised equipment): the holder of the mineral rights must submit an environmental management plan and an emergency and risk situation control programme. The environmental management plan must include a report on the conditions of the area, a monitoring programme, a rehabilitation programme (usually including backfilling and levelling measures) and a mine decommissioning and closure programme. The environmental management plan is also a statement of liability by the holder.

c Level III (e.g., mining concessions): the holder of a mining title is required to first obtain an environmental licence, issued by the Ministry of Coordination of Environmental Affairs (MICOA). To obtain an environmental licence, it is necessary to produce an environmental impact assessment (EIA). The EIA must also contain an environmental management programme and an emergency and risk situation control programme. The environmental management programme must cover a five-year period and contain a monitoring programme and mine decommissioning and closure programme (usually including backfilling and levelling measures).
The environmental licencing procedure involves a public consultation process involving the local communities, which must participate in the decision-making process. The EIA must be approved by MICOA and MIREM. An environmental licence is valid for the period of the corresponding concession, but is subject to review every five years and may be issued subject to certain conditions. In addition, the Environmental Regulations for Mining Activities encourage stakeholders to enter into a memorandum of understanding for a five-year period on the methods and procedures for the management of environmental, social, economic, biophysical and cultural matters during operation and decommissioning. Finally, an environmental management report, containing the results of environmental monitoring, must be submitted to MICOA each year.

Pursuant to the Mining Law, mining operations are classified in three levels for environmental assessment purposes: Levels A, B and C. Activities falling under Level A are subject to an EIA. Activities under Level B are subject to a simplified EIA and, activities under Level C are subject to an environmental management plan. These procedures must, necessarily, be read with the remaining provisions one may find under the Environmental Regulations for Mining Activity and with the Basic Rules on Environmental Management for Mining Activity.

ii  Third-party rights
The title-holder must prepare a resettlement plan, under the Resettlement Regulations (Decree 31/2012, of 8 August 2012), applicable to local communities affected by the mining activities. These communities are entitled to compensation or to be resettled in a new area, so resettlement must restore the cultural, social and economic conditions of the affected communities. Procedures regarding the hearing of local communities are set out in the Regulations on Consultation of Local Communities (Ministerial Order 158/2011, of 15 June 2011).

V  OPERATIONS, PROCESSING AND SALE OF MINERALS
i  Processing and operations

*Customs regime*

Holders of mining rights are usually granted customs exemptions on imports of machinery, equipment and other goods to be used in mining operations. If imported goods are not destined for use in mineral operations, the general customs regime applies. To calculate the customs duties and other charges due at the time of importing equipment, machinery and other goods, values stated in foreign currency must be converted into the local currency (metical). Customs duties are based on the Customs Classification of Goods under the Customs Tariff Schedule, according to which classification is made in line with the General Rules on Interpretation of the Harmonised System of Designation and Codification of Goods. The customs value on imports of goods is set out in the General Agreement on Tariffs and Trade. In 2002, Mozambique adopted the World Trade Organization’s Customs Valuation Agreement. Regardless of which method of evaluation is being used to assess the customs value, the following elements are taken into account: the cost of transportation of goods as far as the customs station, manoeuvring costs and insurance of goods (cost, insurance and freight value).
**Expatriate personnel**

Employment of foreign personnel is subject to special (labour and migration) rules. Foreign employees are only entitled to work in Mozambique under an employment contract of Mozambican law, entered into with a Mozambican employer (a national company or the national branch of a foreign company). The labour regime is mostly set out in the Regulations on the Hiring of Expatriates for the Petroleum and Mining Sectors (Decree 63/2011, of 7 December 2011).

An employment contract is subject to either authorisation by the Ministry of Labour or a quota regime (based on a notification procedure). Under the quota regime, the hiring of foreigners is subject merely to a notification to the authorities: a company with more than 100 employees may have 5 per cent foreigners, and a company with more than 10 but fewer than 100 employees may have 8 per cent foreigners. Companies with fewer than 10 employees may only hire one foreigner. Hiring more foreigners than the number allowed by the quota regime is subject to authorisation by the Ministry of Labour. The employer must submit an application identifying the employee or employees, explaining the job function in question and stating the grounds on which the authorisation is requested.

Mining contracts entered into between the government and the holder of mining rights may authorise the hiring of more foreigners than established by the quotas in the general regime. These hirings are subject to a notification to the labour authorities with the prior approval of the National Directorate of Mines.

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

The Customs Clearance Regulations (Decree 9/2017, of 6 April 2017) state that mineral products are subject to a special export customs regime. Holders of prospecting and exploration licences are only allowed to export mineral samples for the purposes of analysis and testing. Holders of mining concessions, mining certificates or mining permits may market and process the minerals they produce in the area of the respective mining title.

According to the Regulations on Marketing of Mineral Products and the Regulations on Marketing of Diamonds, Precious Metals and Gems, the sale, import and export of minerals by entities that do not hold a mining title is subject to prior licensing by MIREM and may only be awarded to Mozambican nationals.

**iii Foreign investment**

Foreign investors benefit from several guarantees provided for in the Mining Law, namely the safety and legal protection of the goods and rights within authorised mining activities. Limitation of public expropriation and mandatory compensation in cases of expropriation or confiscation are also provided for.

Holders of mining rights are required to register mining titles with the Mozambican Central Bank and provide evidence of the amount of foreign direct investment for the purposes of securing guarantees and other incentives.

The following operations qualify as foreign direct investment: (1) freely convertible currency or cash in the case of direct national investment, (2) equipment and relevant accessories, materials and other imported goods, and (3) value paid (in freely convertible currency) for the acquisition of shares in a company holding mining rights and established in Mozambique, or the acquisition of a mining title in the case of partial or total assignment.
VI CHARGES

Value added tax and customs duties apply throughout the life span of mining projects. However, royalties and other taxes may vary according to the phase of the operation.

i Royalties

Mining concession holders are required to pay royalties (production tax) on the value of the minerals extracted. The rate varies depending on the type of mineral: diamonds (8 per cent), precious metals, precious stones, semi-precious stones and heavy sand (6 per cent), base metals, coal, ornamental rocks and other minerals (3 per cent), sand and stone (1.5 per cent). The royalty value is calculated based on the market value of the mineral (if a previous consignment of the mineral was sold, then the value will be calculated based on that price).

ii Taxes

Prospecting and exploration licence holders and mining concession holders are required to pay surface tax and corporate income tax. Surface tax is a fixed amount per square kilometre of land and levied annually, payable on the month prior to the date of award of the licence.

Corporate income tax is due at 32 per cent on any profits generated (assessed under the ring-fencing principle, i.e., on a mineral right or licence basis). Although profits are unlikely to be generated during prospecting and exploration activities, those licence holders are subject to the rules applicable to the carrying forward of accumulated losses set out in the Corporate Income Tax Law (Law 34/2007, of 31 December 2007) and Corporate Income Tax Regulations (Decree 9/2008, of 16 April 2008). The definition of the tax treatment of deductible costs for income tax purposes, including a list of deductible and non-deductible costs, is expressly set out in the Law on the Taxation and Fiscal Benefits of Mining Operations (Law 28/2014, of 23 September 2014).

Mining ventures with a net return before taxes of at least 18 per cent may also be subject to the assessment of windfall profits tax.

Also worth noting is that capital gains arising from transfers between non-resident entities of equity interests, or any other rights or participating interests involving mining assets or rights located in Mozambique, may be taxable in Mozambique regardless of where the transaction takes place.

VII OUTLOOK AND TRENDS

2018 was marked by a worldwide increase in demand for minerals used in batteries, particularly in electric vehicles. This trend was felt in Mozambique as mining companies – mostly Australian – announced interest in intensifying efforts in exploiting Mozambique’s large graphite deposits, which count for somewhere between 20 per cent and 40 per cent of the world’s reserves of high-quality graphite, most of which are concentrated in the Cabo Delgado province. Commercial production of graphite was declared at some mines (Balama).

The boost in graphite mining is expected to continue in 2019 keeping up with the global demand for the commodity and is likely to help the economy regain the confidence of international investors and donors, which has been profoundly shaken by the country’s hidden debt case.

In addition, the approval of new mining regulations and tax regulations relating to the mining sector in recent years means that the legislator is paying attention to the mining
industry to maximise its development. It also means that the country is keeping an eye on the sector’s taxation, keeping state gains at high levels while allowing foreign private investment to thrive.

Recently approved amendments, to name a few, to the Commercial Code (Decree Law 1/2018, of 4 May 2018), Foreign Exchange Regulations (Notice 20/GMB/2017, of 27 December 2017), Transfer Pricing Regulations (Decree 70/2017, of 6 December 2017) and VAT Code also mean that doing business in Mozambique is now faster, with far fewer bureaucratic procedures blocking investment activities and up-to-date regulation supporting investment contracts between the state and private investors.

The government recently announced an investment of approximately US$100 million until 2023 in strategic projects and infrastructure. The mining sector continues to sustain its pole position in the country’s economic development, unscathed by global economic upturns and downturns and putting the country’s vast mineral reserves to good use. The government’s efforts to attract foreign investment and economic development go hand in hand with Mozambique’s mining potential, promoting new development areas and attracting new players to the industry.
Chapter 14

PERU

Daniel Palomino

I OVERVIEW

Peru is a country rich in minerals. It has the largest reserves of silver and it is on the third place worldwide of reserves of copper, zinc and molybdenum. Moreover, it is the second producer of copper, silver and zinc worldwide and it is on the first place in production of gold, tin, lead and zinc in Latin America. Therefore, mining activity constitutes one of the main sources of revenue in the country. In 2018, mining represented approximately 10 per cent of the national GDP and approximately 61 per cent of the total value of Peruvian exports.

These results have been possible thanks to the effectiveness of a regulatory framework, which for approximately 27 years has been mainly oriented to the promotion of investments in the mining sector to make new mining exploration projects viable and ensure the development and execution of new mining units on a large scale throughout Peruvian territory.

This regulatory framework personified by the General Mining Law, which Consolidated Text was approved by Supreme Decree No. 014-92-EM, was reinforced by new regulations, principles and values established in the Peruvian Political Constitution of 1993, which sets forth a free market economic model, ensures equal treatment of national or foreign investments and unrestricted respect to private property.

However, despite the fact that the legal and political stability that Peru has been enjoying in recent decades has made the country an attractive destination for investment in mining – as reported in the last report of the Fraser Institute 2018, where Peru is positioned in 14th out of 83 jurisdictions worldwide – social and environmental conflicts related to extraction activities or the need to recognise the ‘social licence’ on a regulatory level are still part of a pending agenda.

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4 Fraser Survey 2018, Fraser Institute.
II LEGAL FRAMEWORK

The regulatory framework applicable to mining activity is comprised mainly of the following regulations:

a. Political Constitution of 1993, Article 66;
b. Organic Law for Sustainable Development of Natural Resources, Law No. 26821 (26 June 1997);
c. Consolidated Text of the General Mining Law, approved by Supreme Decree No. 014-92-EM (3 June 1992) (General Mining Law) and its regulations;
d. General Environmental Law, Law No. 28611 (15 October 2005);
e. Law for National Environmental Impact Evaluation System, Law No. 27446 (23 April 2001);
f. Law regulating Mine Closure, Law No. 28090 (14 October 2013); and
g. Law of the right to prior consultation of indigenous or native peoples, recognised in Convention 169 of the International Labour Organization (ILO), Law No. 29785 (7 September 2011).

The main authorities related to the mining industry are as follows:

a. The Geological, Mining and Metallurgical Institute, which is in charge of granting titles of mining concessions to conduct mining activities of exploration and exploitation.
b. The Ministry of Energy and Mines, an entity in charge of formulating and evaluating national policies on sustainable development of mining activities. This Ministry, through its General Mining Bureau, is in charge of granting mining concessions to develop mining activities of benefit, transportation and general work.
c. The National Service for Environmental Certification for Sustainable Investments (SENACE), an institution in charge of evaluating and approving larger environmental impact assessments of mining projects.
d. The Agency for Assessment and Environmental Control (OEFA), a board in charge of promoting compliance with environmental regulations of the mining industry.
e. The Supervisory Board for Investment in Energy and Mines (OSINERGMIN), an institution in charge of supervising that mining companies comply with safety regulations of mining infrastructure and operations.

The activities that qualify as mining activities are defined in the General Mining Law and are the following:

a. Search: its purpose is to search for signs of mineralisation. To that effect, basic mining works are conducted.
b. Prospection: this investigation will identify areas of potential mineralisation, using chemical and physical indications, measurements with instruments and accurate techniques.
c. Exploration: search for and evaluation of mineral resources in order to find a new source of minerals or deposits that can be developed. Furthermore, its purpose is to demonstrate the dimensions, positions, mineral characteristics, reserves and values of mineral deposits.
d. Exploitation: extracting minerals in a mineral deposit.
e. General work: any mining activity that provides supplementary services, such as ventilation, dewatering, hoisting or extraction to two or more concessions of different concession owners.
Beneficiation: group of physical, chemical or physical-chemical processes that are conducted to extract or concentrate the valuable parts of an aggregate of minerals or to purify, melt or refine metals.

This activity comprises the following phases: mechanical preparation, metallurgical preparation and refining.

Mining transportation: this comprises systems used by massive and continuous transportation of mining products using non-conventional methods such as conveyor belts or concentrate pipelines.

Commercialisation: the commercialisation of mineral products is free. However, it is necessary to verify the lawful origin of the mineral.

Search, prospection and commercialisation activities are free and their execution does not require the granting of a mining concession. On the contrary, it is necessary to obtain a mining concession to execute activities such as exploration, exploitation, beneficiation, mining transportation and general work.

III MINING RIGHTS AND REQUIRED LICENCES AND PERMITS

Title

Renewable and non-renewable natural resources are patrimony of the Nation and the Peruvian state has sovereignty over their development. In the case of mineral resources, these are granted to third parties through the system of mining concessions.

The mining concession grants its titleholder the right to explore and exploit metallic and non-metallic mineral resources that are found in a solid area of undefined depth, limited by vertical planes corresponding to the sides of a square, rectangle or closed polygon, whose vertices are referred to Universal Transversal Mercator coordinates under the Official World Geodetic System (WGS84).

A mining concession is granted to extensions of 100 to 1,000 hectares, in grids or set of grids bordering at least on one side, except for the maritime domain, where grids of 100 to 10,000 hectares can be granted.

Regarding obligations derived from granting a mining concession, the holders of mining activities are classified in three levels, which are described in general terms as follows:

- General regime: mining holders that possess more than 2,000 hectares of mining concessions or who have a production or benefit installed capacity exceeding 350 metric tons per day (MT/day); or who have a legal entity among their shareholders.
- Regime of the small mining producer: mining holders who have up to 2,000 hectares of mining concessions or who have a production or benefit installed capacity not exceeding 350 MT/day.
- Regime of the artisanal mining producer: mining holders who have up to 1,000 hectares or who have a production or benefit installed capacity not exceeding 25 MT/day.

The mining concession requires the titleholder to comply with two key obligations: annual payment for the good standing fee and compliance with minimum annual required production or minimum investment.
The annual payment for the good standing fee must be made up to June 30 of each year. The amount to be paid is calculated based on the number of hectares of the mining rights and the qualification of the level to which the concession owner belongs in accordance with the following table:

<table>
<thead>
<tr>
<th>Regime</th>
<th>Good standing fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>General</td>
<td>US$3 per year and per hectare</td>
</tr>
<tr>
<td>Small mining producer</td>
<td>US$1 per year and per hectare</td>
</tr>
<tr>
<td>Artisanal mining producer</td>
<td>US$0.50 per year and per hectare</td>
</tr>
</tbody>
</table>

The obligation of minimum annual production consists of the investment for the production of mineral substances. For metallic substances, production may not be lower than the amount equal of a Tax Unit (UIT)\(^5\) per year and per hectare granted. For non-metallic substances, the minimum production amount is equal to 10 per cent of the UIT per year and per hectare granted.

For small mining producers, production may not be lower than the amount equal to 10 per cent of the UIT per year and per hectare granted in case of metallic substances; and to 5 per cent of the UIT per year and per hectare in the case of non-metallic mining substances.

For artisanal mining producers, production may not be lower than 5 per cent of the UIT per year and per hectare granted, whatever the substance of the mining concession.

Minimum annual production must be obtained no later than the expiry of year 10, counted from the year after the title of mining concession was granted. If the minimum annual production is not fulfilled under the above-mentioned rules, the mining concession will be subject to the payment of a penalty fee in accordance with the percentages and timelines established in Article 40 of the General Mining Law.

The titleholder of a mining concession will not be obliged to pay a penalty fee to the extent that the titleholder had invested no less than 10 times the amount of the penalty per year and per hectare, which corresponds to pay for the concession or administrative economic unit.

Mining concessions expire when the payment of the Good Standing Fee is not made in good time for two consecutive years, or after the thirtieth year expires, which is counted from the next year in which the title was granted, the mining holder has not been able to prove minimum annual production.

The areas corresponding to expired concessions or claims may not be requested, in whole or in part, by the preceding titleholder or its relatives up to the second degree of blood relationship or kinship, up to two years after being published as indictable.

Finally, it is necessary to mention that, as established by the Peruvian Political Constitution, foreigners may not acquire or possess mines within 50 kilometres of the borders, directly or indirectly, individually or as a corporation. Notwithstanding the foregoing, cases of public necessity are excluded from this restriction, which are declared by a supreme decree approved by the Cabinet.

\(^5\) The value of a Tax Unit in 2019 amounts to S/4,200.
ii Surface and mining rights
The mining concession is different real estate, separate from the plot of land where it is located. As a result of this difference, two rights *in rem* can coincide in the same area, whose ownership can belong to different people – on one side, the right *in rem* to extract metallic or non-metallic mineral resources from the subsoil and, on the other side, the right *in rem* on the surface.

In accordance with the General Mining Law and its regulations for mining procedures, for the execution of mining activities of exploration, exploitation, beneficiation, transportation or general work, it is necessary to have an authorisation of use of the surface plot from the owner of the plot of land.

The surface plot can belong to a private entity, a peasant community or to the Peruvian state itself. In the first case, it will be sufficient to execute a civil contract with the plot’s owner, regulating the use of said property for mining purposes. In the second case, the titleholder of the mining concession must observe the provisions of the General Law of Peasant Communities, Law No. 24656. Finally, in the event that the surface plot belongs to the Peruvian state, the mining holder must initiate pertinent administrative proceedings, whether to acquire or use it, or, if it is the case, request the constitution of an easement for the development of investment projects in accordance with the provisions of Law No. 30327.

iii Additional permits and licenses
The title of a mining concession does not constitute authorisation to conduct mining activities of exploration or exploitation. It is necessary to obtain a prior series of qualifying titles and administrative acts, including but not limited to, those mentioned below:

a approval of the environmental management instrument;
b certificate of non-existence of archaeological remains;
c authorisation of use of the surface plot from the owner of the plot of land; and
d other licences, permits and authorisations that are required in the effective legislation in accordance with the nature and location of the activities to be conducted.

Once the title of the mining concession of exploration and exploitation is issued and the remaining qualifying titles are obtained, the titleholder of a mining concession may ask the General Mining Bureau of the Ministry of Energy and Mines for the following authorisations to start operations, which are evidence of it being a holder of legal mining activity.

<table>
<thead>
<tr>
<th>Mining activity</th>
<th>Authorisation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exploration</td>
<td>Authorisation for start or restart of activities of mining exploration</td>
</tr>
<tr>
<td>Exploitation</td>
<td>Authorisation for start or restart of activities of mining exploitation</td>
</tr>
<tr>
<td>Beneficiation</td>
<td>Title of mining concession of benefit and authorisation of operation</td>
</tr>
<tr>
<td>Transportation</td>
<td>Title of mining concession of mining transportation and authorisation of operation</td>
</tr>
<tr>
<td>General work</td>
<td>Title of mining concession of general work and authorisation of operation</td>
</tr>
</tbody>
</table>

iv Closure and remediation of mining projects
The last phase of a mining project is mine closure. During this period, the holder of the mining activity must execute the mine closure plan, an environmental management instrument previously approved by the competent environmental authority, which includes the technical specifications of how the progressive recovery of the project site will be conducted, direct and
indirect costs to be incurred, a post-closure monitoring plan and measures to ensure that the area affected by the mining project may recover similar conditions to those found before the mining activity.

Once the closure phase is completed, the post-closure phase must be executed, which includes adopting measures for environmental treatment or monitoring to ensure that closure activities prolong over time. This phase cannot be developed in a period shorter than five years after the closure plan is concluded.

The cost of the execution of closure and post-closure activities will be paid by the holder of the mining activity. To ensure that it will comply with its obligations, a financial guarantee must be created to pay for the costs of the remediation measures of the closure and post-closure periods.

### IV ENVIRONMENTAL AND SOCIAL CONSIDERATIONS

**i Environmental, health and safety regulations**

Environmental management during the phase of mining exploration is regulated by the Environmental Regulations for Activities of Mining Exploration, approved by Supreme Decree No. 042-2017-EM. Environmental management for activities of exploitation, beneficiation, general work, transportation and mining storage is regulated by similar regulations approved by Supreme Decree No. 040-2014-EM. The purpose of both regulations is that the mining activities are conducted protecting the constitutional right to enjoy a balanced and appropriate environment for the development of life, considering free private initiative and sustainable development of natural resources.

Regarding occupational safety and health, the Occupational Safety and Health Law, Law No. 29783, is the general legal provision, whose purpose is to promote a culture of prevention of occupational risks in the country. At a sector level, the occupational safety and health for mining activities are regulated by the Regulations for Occupational Safety and Health in Mining, approved by Supreme Decree No. 024-2016-EM, a legal provision whose purpose is to prevent incidents, dangerous incidents, occupational diseases and occupational accidents in mining activities.

Compliance with the obligations contained in the above-mentioned regulations is controlled by the Ministry of Labour and Employment Promotion, the Ministry of Energy and Mines, the National Superintendency of Labour Control and OSINERGMIN.

**ii Environmental compliance**

The execution of public or private investment projects that comprise extraction activities that are prone to causing significant negative environmental impacts and will conducted inside national territory, including areas of maritime domain, must have an environmental certification, which is granted once the evaluation procedure of the environmental management instrument is completed by the competent environmental authority.

Environmental management instruments or environmental studies are classified in the following categories:

- Category I: Environmental Impact Statement (DIA), an environmental management instrument applicable to mining projects that could generate mild negative environmental impacts;
Category II: Semi-Detailed Environmental Impact Assessment (EIA-sd), a study applicable to mining projects that could generate moderate negative environmental impacts; and

Category III: Detailed Environmental Impact Assessment (EIA-d), a study applicable to mining projects that could generate highly negative environmental impacts.

For the evaluation and approval of environmental management instruments of categories I and II, the competent environmental authority is the Ministry of Energy and Mines. The competent authority for the evaluation and approval of environmental impact assessments of category III is the SENACE.

In the case of small-scale miners and artisanal miners, the environmental management instruments applicable to their mining projects are evaluated and approved by regional governments in whose jurisdictions the projects are located.

Once the environmental certification is granted, the mining holder is obliged to comply with obligations and technical specifications established therein. To that effect, OEFA is the competent entity to issue regulations for the environmental control and verification of compliance with controllable environmental obligations of the holders of the mining industry that belong to the general regime.

Based on their jurisdiction, the competent regional governments are in charge of the environmental control of mining activities conducted by small-scale miners and artisanal miners.

iii Third-party rights

In September 2011, the Law of the right to prior consultation of indigenous or native peoples was published, which is recognised in Convention 169 of the ILO, Law No. 29785. Said legal provision recognises the right of indigenous or native peoples to be consulted previously about legislative or administrative measures that affect directly their collective rights, physical existence, cultural identity, life quality or development.

Prior consultation is implemented by the state and its purpose is to reach an agreement between the state and indigenous or native peoples about a legislative or administrative measure that could affect the exercise of their collective rights directly.

In mining, administrative measures that are subject to prior consultation are authorisations for the commencement of activities of exploration, exploitation, granting or amendment of concessions of beneficiation and granting of concessions of mining transportation or general work.

iv Additional considerations

Although the mining regulations do not regulate a procedure to obtain a social licence, this term is currently used widely in the mining industry, which refers to the acceptance of the development of a mining investment project by a local community or stakeholders.

The social licence is not equal to the prior consultation process, the citizenship participation process or the environmental certification; it is not an authorisation, permit or licence established within the Peruvian legal system either.
V OPERATIONS, PROCESSING AND SALE OF MINERALS

i Processing and operation

The regulations on safety of mining infrastructure and the development of basic safety conditions in the operations are contained in the above-mentioned Regulations for Occupational Safety and Health in Mining, approved by Supreme Decree No. 024-2016-EM.

Currently, holders of the mining activity have the right to contract specialist companies for the execution of works of exploration, development, exploitation and mining beneficiation. These companies must be registered in the Register of Specialised Companies of Mining Contractors, which is administered by the General Mining Bureau of the Ministry of Energy and Mines.

ii Sale, import and export of extracted or processed minerals

The commercialisation of mining products is free, internal and external, not being necessary to grant a mining concession or an additional qualifying title. However, the acquirer of mining products is obliged to verify their lawful origin.

iii Foreign investment

The main source of direct foreign investment in the country comes from the mining industry. To promote foreign investment, effective mining laws establish three regimes of tax stability for the holders of mining activities according to the following conditions:

The holders of mining activities that initiate or are carrying out operations higher than 350 MT/day and up to 5,000 MT/day or those that make an investment equal to US$20 million will enjoy tax stability that will be guaranteed to them through a contract executed with the state for a term of 10 years, counted as from the fiscal year, in which the execution of the investment is proven.

The holders of mining activities with an initial capacity of no less than 5,000 MT/day or of expansions destined to reach a capacity of no less than 5,000 MT/day, which present investment programmes of no less than US$1 billion for the commencement of any of the mining activities; or, when dealing with investments in existing mining companies, a minimum investment programme of US$250,000 will be required; and exceptionally, those that invest at least US$250 million in state-owned companies subject to a privatisation programme will enjoy tax stability, which will be guaranteed to them through a contract executed with the state for a term of 12 years, counted from the fiscal year in which the execution of the investment or the expansion is proven.

Holders of mining activities with an initial capacity of no less than 15,000 MT/day or of expansions conducted to reach a capacity of no less than 20,000 MT/day, and those that initiate or carry out mining activities that present investment programmes of no less than US$500 million will enjoy guaranteed tax stability through a contract executed with the state for a term of 15 years counted from the fiscal year in which the execution of the investment is proven. Exceptionally, people who invest no less than the equivalent in domestic currency of US$500 million will also have the right to this contract.
VI CHARGES

Mining activity is subject to the same taxes applicable to any other economic activity in Peru and other additional charges inherent to the industry.

i Royalties

The mining royalty is what titleholders of mining concessions and assignees pay to the state for the exploitation of metallic and non-metallic mineral resources in favour of regional governments, local governments and national universities of the jurisdiction where the extraction activity is conducted.

The royalty to be paid is determined quarterly. A rate established by the Law is applied on the quarterly operating profit of the subjects of mining activity, based on the operating margin of the trimester.

For the holders of mining activities that belong to the general regime, the amount to be paid as mining royalty will be the greater amount that results from comparing the result of applying the effective rate on the quarterly operating profit and 1 per cent of the revenue generated for the sales made in the calendar trimester.

ii Taxes

Income tax

The companies that engage in mining activities are charged with the income tax of third category. In this way, for domiciled subjects, the income tax will be determined applying a rate of 29.5 per cent on the net income.

Special mining tax

The titleholders of mining concessions and assignees that engage in mining activities of exploitation of metallic mineral resources are obliged to pay a special tax that levies the operating profit from the sales of metallic mineral resources as they are, as well as profit from self-consumption and unjustified removal of the property.

This tax is determined quarterly. A rate established by the law is applied on the quarterly operating profit of the subjects of mining activity, based on the operating margin of the trimester.

Special mining contribution

It is an originating public resource from the exploitation of non-renewable natural resources that is applicable to subjects of the mining activity based on the execution of agreements with the state in respect of projects, for which the effectiveness of contracts of guarantees and measures to promote investment is kept.

The tax obligation is the result of applying a rate effective in accordance with the provisions of Exhibit II of Law No. 29790 on the quarterly operating profit of the subjects of mining activity, which is established based on the operating margin. It takes place every three months at the closing of each trimester.
iii  Duties
Legislative Decree No. 892 sets forth that employees subject to the employment regime of private activity have the right to participate in the profits of the companies that engage in activities that generate third-category income.

Therefore, mining companies are obliged to distribute 8 per cent of the taxable annual income, before taxes, in favour of their employees, with a maximum limit per employee equal to 18 monthly salaries.

vi  Other fees

*Contribution for Regulation*

OSINERGMIN and OEFA's duties of supervision and control are funded with the contribution for regulation established in Law No. 27332.

The regulation contribution for 2019 relating to the OSINERGMIN, charged to holders of activities under the general regime, amounts to 0.13 per cent of their monthly invoicing, after deducting VAT and the Tax of Municipal Promotion.

The contribution for regulation that corresponds to the OEFA, charged to the holders of activities of the general regime, for 2019, amounts to 0.11 per cent of their monthly invoicing, after deducting VAT and the Tax of Municipal Promotion.

VII  OUTLOOK AND TRENDS

In 2012, the Peruvian government started an interdiction process into mining activities executed without qualifying titles and administrative acts or conducted in forbidden areas on Peruvian territory. Simultaneously, it started a macro process of mining formalisation aimed at small-scale miners and artisanal miners, so that within two years they will comply with the required legal requirements for commencement of mining exploitation activities or the title of concession of benefit and authorisation of operation, respectively.

The two-year term expired in April 2014. From that date, the formalisation process has been constantly postponed until a new milestone was established for August 2020.

To complete the mining formalisation, the miners in process of formalisation must fulfill the following requirements:

a  obtain the approval of the environmental management instrument for the Formalisation of Small-Scale Mining and Artisanal Mining Activities or of the Corrective Environmental Management Instrument;

b  prove ownership or obtain the authorisation of use of the surface plot;

c  prove ownership, obtain an assignment contract or a contract of exploitation in respect of the mining concession, where the informal mining activity is being executed; and

d  submit a sworn statement indicating that there are no archaeological remains in the area where the informal mining activity is being developed.

To date, there are more than 10 bills oriented to restructuring this formalisation process due to the reduced percentage of miners that have been able to formalise their businesses successfully. The main obstacles to formalisation are still the execution of contracts of mining concession or contracts of exploitation with the titleholders of mining concessions and obtaining the authorisation of use of the surface plot from the property owner.
New legislative amendments

At the time of writing, the Peruvian government had announced that it is working towards a new General Mining Law that guarantees that mining activities are executed in harmony with the environment and under the principles of sustainable development. Additionally, there is a need to develop a specific regulatory framework that allows the exploitation of radioactive minerals and lithium and make amendments to the Regulations for Mining Procedures, the regime of contracts of tax stability and investment contracts in mining exploration.
Chapter 15

PORTUGAL

Joana Silva Aroso and Olinda Magalhães

I OVERVIEW

Although the country’s territorial dimension is small, Portugal is historically known for being a ‘mining country’ with a very diverse and complex geology.

Given the overwhelming technological progresses and the growth of consumption of different types of goods that use minerals as raw material, as well as the fact that these are limited resources, it is imperious that the government provides a clear and transparent set of rules that allow national and foreign investors to decide, plan and implement profitable mining projects in Portugal.

The Portuguese legal system belongs to the family of the continental or civil law countries, which provides any interested party the possibility to have previous and direct knowledge of most of the applicable rules and statutes, sustained in written law.

The Portuguese Constitution (the primary and fundamental law, approved in 1976 and still into force\(^2\)) determines that mineral deposits, mineral-medicinal water springs and natural underground caves are public property.\(^3\) This mention clearly demonstrates the importance of geological resources.

Portuguese legislation has been adjusted throughout the times to provide an adequate framework for the exploration and exploitation of the country’s geological resources.

Following the National Strategy for Geological Resources – Mineral Resources, approved by the Council of Ministers Resolution No. 78/2012, of 11 September, the current legal framework for the discovery and use of geological resources located in Portugal was enacted – Law No. 54/2015, of 22 June, and the previous mining legislation (from the 1990s)\(^4\) was revoked.

Since November 2018,\(^5\) the mining industry has been administered by the Ministry of the Environment and Energetic Transition (MATE), who directly supervises the General Directorate for Energy and Geology (DGEG), the public body responsible for the conception, promotion and evaluation of energy and geological resources policies. This has been a clear sign of a new governmental approach, in which the goal to develop and satisfy the national extractive industry is to be balanced with strong environmental and sustainability concerns.

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1 Joana Silva Aroso is a partner and Olinda Magalhães is an associate lawyer at JPAB – José Pedro Aguiar-Branco Advogados.
3 Article 84.º of the Portuguese Constitution.
4 Decree-Law No. 90/90, of 16 March.
5 Decree-Law No. 90/2018, of 9 November.
at both a national and a regional perspective. As such, the Portuguese Environmental Agency (APA), the Nature and Forest Conservation Institute (ICNF) and the Municipalities are relevant players in the mining sector in Portugal.

Bearing in mind that Portugal offers a steady and clear legal framework, political stability, and that foreign direct investment is not restricted under general Portuguese law, the most relevant mining companies in the world have invested in Portugal, considering it to be a ‘low-risk’ country, apart from the risk inherent to the mining activity itself. The mines of Neves-Corvo and Aljustrel (copper and zinc), Panasqueira (tungsten) and Barroso (feldspar and quartz, as well as lithium prospection) can be highlighted as significant examples.

In 2018, the total amount of mineral substances exported from Portugal to the rest of the world reached a €1 billion, half of which correspond to metallic minerals (such as zinc and copper concentrates).

In response to the number of applications for the exploration and exploitation of lithium mineral deposits in Portugal since 2016 – as a result of the increase in the worldwide demand for electric vehicles – the Portuguese government created a Lithium Working Group, which prepared a well-structured and complete report, submitted to public consultation in 2017.

In fact, Portugal is already Europe’s largest producer of lithium, which accounts for less than 15 per cent of Europe’s total consumption, being all of it used for ceramics and glassware. By increasing extraction and making refinement and production processes more economically viable, Portugal might assume a leading role within this new market.

II LEGAL FRAMEWORK

The revelation and use of Portuguese geological resources can relate to different types of natural assets and is subject to both European and national legislation.

Law No. 54/2015, of 22 June, establishes the basis of the legal regime for the disclosure and enhancement of the existing geological resources in national territory, including those located in the national maritime space, and consists in a general regime for all types of geological resources. Decree-Law No. 88/90, of 16 March, specifically regulates the use of natural mineral deposits.7

Nevertheless, mining activity must comply with adjacent national and European legislation, as it affects different areas, such as industrial licensing, environmental impact, safety, security, workforce, among others. Therefore, it is important to take into consideration the following:

a Decree-Law No. 162/90, of 22 May, which approves the Regulation of Safety and Hygiene for Work in Mines and Quarries.

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6 There are currently 64 declared actively productive mines in Portugal, according to DGEG’s information referring to 2018. In 2017, when quarries and thermal establishments were also considered there were 812 active establishments.

7 The revelation and use of other geological resources are regulated by Decree-Laws No. 84/90 (spring water), 85/90 (industrial mineral waters), 86/90 (mineral water), 87/90 (geothermal resources), all of 16 March; 270/2001, of 6 October, amended by Decree-Law 340/2007, of 12 October, concerning mineral masses (quarries) and, finally, 109/94, of 26 April, amended by Law No. 82/2017, of 18 August, concerning the exploration, exploitation and production of oil.
Ministerial Order No. 897/95, of 17 July, which establishes the fees applicable to the licensing procedures.

Council of Ministers’ Resolution No. 11/2018, of 31 January, which approves the strategic guidelines for enhancing the potential of lithium minerals in Portugal.

Order No. 2847/2017, of 5 April, from the Secretary of State for Energy, which establishes the mandatory audition of the local government in the procedures for acquisition of mining rights.

Council of Ministers’ Resolution No. 11/2018, of 31 January, which approves the strategic guidelines for enhancing the potential of lithium minerals in Portugal.

Order No. 2847/2017, of 5 April, from the Secretary of State for Energy, which establishes the mandatory audition of the local government in the procedures for acquisition of mining rights.

Decree-Law No. 151-B/2013, of 31 October, amended by Decree-Law No. 152-B/2007, of 11 December, which transposes to the Portuguese internal legal order the European Directive 2014/52 and establishes the regulation for the environmental impact assessment (EIA) of public and private projects that may have significant effects on the environment.

Decree-Law No. 75/2015, of 11 May, amended by Decree-Law No. 39/2018, of 11 June, which approves the single environmental licensing regime.

Ministerial Orders No. 368/2015, of 19 October, and No. 395/2015, of 4 November, which establish the fees to be charged and the technical requirements and standards applicable under the EIA process.


Decree-Law No. 147/2008, of 29 July, as amended by Decree-Law No. 13/2016, of 9 March, which establishes the legal regime of liability for environmental damages, applicable to the waste management of mineral deposits and mineral masses waste.

Decree-Laws No. 376/84, of 30 November, 303/90, of 27 September (amended by Decree-Law No. 93/2018, of 13 November) and 139/2002, of 17 May, which contain the regulations on the commercialisation, manufacturing, and use of explosives.

Decree-Law No. 195/95, of 28 July, as amended by Law No. 71/2018, of 31 December, which establishes the specific legal regime for social security of mine workers.

Decree-Law No. 198-A/2001, of 6 July, which establishes the legal framework concerning the environmental recovery of degraded mining areas.

Presently, the MATE is the entity responsible for the main political and administrative decisions concerning the mining activity, such as those made within the acquisition of mining rights and EIA procedures. These powers – licensing and granting of mining rights – can be delegated, by the Minister, in the Secretary of State of Energy (SEE), and the administrative procedure itself shall be held by the DGEG. However, there are other entities that have jurisdiction over the attribution of mining rights, such as Madeira’s and Azores’ autonomous regional governments, or that must be consulted in the process, such as the Municipalities, but also the entities with jurisdiction over environmental protection, land management, cultural heritage, nature conservation, forests and hydro-agricultural uses.

### III MINING RIGHTS AND REQUIRED LICENCES AND PERMITS

In Portugal, geological resources can be privately or publicly owned according to their nature. Therefore, mineral deposits, natural mineral waters, mining and industrial waters and geothermal resources, due to their rarity, natural and economic value, and the importance
of their application in industrial processes are considered of public domain. The same classification is given to other geological resources that are of geological and mining relevance to the country, and to all the geological resources found in the bed and underground of the Portuguese national maritime space.

Differently, the mineral masses and spring waters, as well as other geological formations, structures or natural assets that do not have the above-mentioned necessary characteristics, can be privately owned.

When in the public domain, the property of these natural resources cannot be transferred to private parties. However, the state can – instead of directly exploring – grant private parties (applicants), through administrative contracts, the right to exclusively use them. The revelation and use of geological resources non-integrated in the public domain also need an administrative authorisation, through the attribution of a licence to the landowner or to a third party that has executed an exploitation contract.

### Surface and mining rights

According with Mining Law, geological resources integrated in the public domain may be subject to four different types of private use, that correspond to different stages of knowledge of the existent geological and mineral asset: (1) preliminary assessment rights, which aim to authorise the applicant to undertake the necessary studies and analysis to better understand the existing resources in the intended area; (2) prospection and exploration rights, for the development of activities, studies and analysis directed at the disclosure of the resources and the determination of their characteristics and evaluation of their economic value; (3) experimental exploitation rights, when the conditions for exploitation have not been met; and (4) exploitation rights for the purpose of conducting operations for the economic use of the resources, when the previously developed studies already allow for such confirmation.

The specific type of rights granted to the applicable entity, and requested by it if that is the case, should and will, therefore, be adjusted to the pre-existent knowledge regarding the resource and according with the private party’s technical and financial capacity to develop and invest. All rights under an administrative contract for pre-assessment, exploration, experimental exploitation or concession of exploitation, are granted to the applicable entity on an exclusive basis, therefore no incompatible rights (considering the object, nature and area granted) can be given to third parties during the term of the contract.

Each type of right can be acquired through a different administrative procedure, subject to different conditions and duration.

Pre-assessments rights are not transferable and can be granted for a maximum area of 15 square kilometres and for the limited period of one year, without extension. Upon expiration of these rights, the applicant must inform DGEG of its ability to proceed to the next phase and request the granting of exploration rights, or if it is its intention to release the granted area.

The attribution of these types of rights depends on a previous administrative procedure which starts with the submission of an application before the DGEG, where – among other details – the applicant must disclose its technical, economic and financial capability, the work plan, the technical and financial means and the budget they will apply to reach the proposed goals. Once approved, these will be the conditions for the maintenance of the granted pre-assessment rights.

According to Law No. 54/2015 and Decree-Law No. 88/90, granting exploration rights may depend either on a direct application (proposal) or a public tender. The decision
on the procedure to adopt belongs to the central government (i.e., MATE). However, when the procedure is triggered based on the applicant’s initiative, the filing of another application with the same object by a third party, within the period legally established for that purpose, determines the opening of a public tender by the DGEG, with the first applicant having pre-emptive rights on equal terms.

On the individual proposal, the applicant has to indicate the mineral substances they are applying for, the intended area – which cannot exceed 500 square kilometres or 5,000 square kilometres if the granted area is located on the Portuguese maritime space – the general work plan, the volume of investment envisaged and how it is financed for such purpose, as well as present evidence of their technical and financial suitability.

If the application is accepted after a preliminary analysis, the DGEG will notify the applicant to provide a provisional guarantee and, once that is secured, to proceed with the publication of a Notice in the Official Law Journal, as well as in the newspaper of the head office of the municipality where the intended area is located, and in two newspapers of great circulation, one in Lisbon and the other in Oporto, with an invitation for the submission of complaints within 30 working days.

After this public consultation, the DGEG can ask for complementary information regarding the application, after which it will prepare the final process information to be shared with the mayors of all of the municipalities covered by the request or application, for them to issue their formal opinion on the matter.

DGEG’s final information and the municipalities’ opinion will then be sent to the MATE for a final decision – or to the SEE if the powers are delegated – and if such decision is favourable, the procedure will proceed to the signature of the contract. This contract will establish the conditions for the exploration and can also determine some of the conditions for the exploitation phase.

Exploration rights can be granted for a maximum period of five years, with an initial three-year period that may be extended for two more years. The extension is subject to the compliance with the conditions set in the signed contract, such as the mandatory work and investment plans, the deadlines for each phase of the work plan, the financial charges of the exploration activity and the periodic submission of activity reports to the DGEG. The applicant is requested to provide a bank guarantee to ensure the performance of the contract and must initiate the work until the term of a six-month period (usually this period is reduced to 60 days in the contract).

Exploration rights may only be granted for available areas, unless there is no incompatibility with the activities corresponding to operating concessions already allocated or in the allocation procedure. Available areas are the areas of the national territory over which exclusive rights do not apply to geological resources integrated in the public domain of the state.

Upon expiration of the term of the exploration contract, the applicant has the right to apply to the corresponding experimental exploitation rights or to ask for the concession of exploitation rights.

The application for the concession of exploitation rights may be carried out for an area covered by a contract for prospecting and exploration, for experimental exploitation, or directly for an available area, or for an area that, if it is covered by prospecting and research rights, does not involve the same substance of the mineral deposit and there is no incompatibility. It may also be granted as a result of a public tender.
The procedure to obtain experimental exploitation rights or exploration rights follows the same steps established for the application for exploration rights and is subordinated to the same mandatory hearings (e.g., public consultation, municipalities, administrative and environmental hearings). However, if the project is covered by the EIA regime, the licensing will only take place upon the issuance of a favourable environmental impact statement.

The experimental exploitation rights can only be granted for a maximum of five years and its sole purpose is to obtain additional information of the existing resource.

Differently, the exploitation rights entitle the applicant to exploit resources in accordance with the law and the respective contract and to market all products resulting from the exploitation and can last up to 90 years (nevertheless, the Portuguese state normally establishes a duration of 50 years).

The application for these types of mining rights must include, among other information, the intended area, the characterisation of the mineral deposit, the Mining Plan (exploitation plan), the Environmental and Landscape Recovery Plan (PARP), the Waste Management Plan, the Safety and Health Plan, and the Pre-Viability of Exploitation Study. These plans, in their final versions, approved and accepted by DGEG and the state, alongside with a financial guarantee that must be provided by the applicant, will be part of the conditions that must be complied with during the development of the exploitation activity.

Regardless the specific type of mining rights granted, the applicant is legally required to keep confidential all technical and financial data obtained during the pre-assessment, exploration, or exploitation activities.

Exploration and exploitation rights may be transferable to a third party. However, that transference is never automatic, depending on authorisation of the MATE. In the case of dissolution of the legal entity to which the rights were granted, only the asset value is transferred.

A mortgage can only be lodged over the exploitation rights or over the exploration annexes or infrastructures as a guarantee for credits intended for exploration work, but the security shall be notified in advance to the DGEG.

The mining rights are granted through administrative contracts concluded with Portuguese state, according with the mining laws and the Portuguese Public Procurement Code. Therefore, in case of a contractual breach by the state, the private party has the same rights as those recognised under other types of administrative or public contracts, being able to – through judicial means – force the execution and compliance of the contract or claiming a compensation in case of breach.

### Additional permits and licences

Under Law No. 54/2015, attribution of mining rights may depend on additional permits and licences, issued by other entities, such as administrative entities or environmental entities with jurisdiction over the territory, namely due to environmental protection, landscape recovery, spatial planning, hygiene, and health and safety. This is also applicable if the activities of disclosure and exploitation of geological resources were to take place in the national maritime space, in which case the respective title of private use is demanded.

The concession of exploitation rights normally depends on an EIA.

These entities can be the municipalities whose territory is affected by the granted area, APA, ICNF, Coordination and Regional Development Commission, among others.
On the other hand, once the mining rights are granted, the applicant will have the right to temporarily use the soils and lands that are necessary for the mining activities (pre-assessment, exploration, exploitation). For such purpose, the applicant will have to obtain all the necessary permits before the landowners and pay them the due compensations.

If no agreement is reached with the landowners, Law No. 54/2015 recognises the applicant entitled with exploration and experimental exploitation rights, the right to ask the government for the constitution of an administrative easement on the buildings covered in the granted areas. The concessionaire of exploitation rights has the right to request the expropriation of the necessary land. They can also prefer in the purchase of any rustic or urban land within the defined concession area.

Within the Portuguese territory and social context, the legal framework regulating vacant and community managed lands assumes relevance.  

iii  Closure and remediation of mining projects

According to the terms of the contract and the law, the concessionaire of mining rights will have the obligation to undertake remediation and recovery works once the activity ends. The concrete terms of this recovery must be proposed by the applicant in their application, as they are required to submit a PARP before DGEG. In addition, these requirements for closure and remediation of the mining project will be assessed and approved within the EIA process.

The concessionaire will also be obliged to post one or more financial guarantees to ensure compliance with the contract, namely with the established terms for the landscape recovery of the covered area.

IV  ENVIRONMENTAL AND SOCIAL CONSIDERATIONS

i  Environmental, health and safety regulations

As mentioned above, the attribution of any rights over geological resources (except for the right of previous evaluation) is preceded by a mandatory consultation of, namely, the municipalities whose territory is affected and other relevant entities concerning environmental protection.

The main environmental regulations to be considered within the mining activity refer to the Portuguese environmental impact assessment legislation and to the European ecological network – Natura 2000 – legislation. These legal acts have the intention of protecting biodiversity, through the conservation or restoration of natural habitats, wild flora and fauna and species control.

There is a specific legal regulation concerning waste management of mineral deposits and mineral masses that must be considered, as well as the related legal regime of civil liability for environmental damages applicable to this waste management. The facilities connected to this type of waste are subject to a licensing procedure, to be pursued before the DGEG, within the approval of the ‘mining plan’. The holder of mining rights must prepare a sustainable waste management plan and review it every five years.

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8 Law No. 75/2017, of 17 August.
9 Respectively sustained in Decree-Law No. 151-B/2013, of 31 October and Decree-Law No. 140/99, of 24 April, in their last versions.
Concerning Health and Safety regulations in the mining sector, one must have in mind, in addition to the legal regime for the promotion of health and safety at work, the provisions of the General Regulation of Safety and Health at work in Mines and Quarries. This legal instrument imposes certain obligations – on both the employer and the employees – to prevent professional hazards and to promote health and hygiene within mines and quarries. Ordinance No. 198/96, of 4 June, also regulates the minimum safety and health requirements in open and underground sites of the extractive industries (e.g., emergency exists, dangers zones).

Highlight must also be given to Decree-Law No. 50/2005, of 25 February, which refers to the minimum safety and health requirements regarding the use of work equipment, and to Decree-Law No. 24/2012, of 6 February, which consolidates minimum requirements for the protection of workers exposed to chemicals at work.

ii Environmental compliance

According to the Portuguese legal framework of the EIA, this assessment must be carried out in all public and private projects that may have significant effects on the environment.

Regarding mining projects, the law states that an EIA is mandatory when the area of the opencast mine exceeds 25 hectares or when there are peat extraction projects in an area that exceeds 150 ha.

An EIA may also be required when the mining projects are partially, or totally located in a sensible area and can potentially cause a significant environmental impact due to their location, dimension or nature. It may also be required if the competent public authority considers that the mining projects are likely to cause a significant impact on the environment even though they do not exceed the above-mentioned limits and are not located in sensible areas. A thorough environmental impact study will be required to determine all the direct and indirect effects of the project on the environment and to recommend the adequate measures to minimise or annul those effects.

The most relevant administrative authorities involved in the EIA procedure are the licensing entity (DGEG) and the EIA authority – which can be either APA or CCDR.

It is relevant to clarify that the decisions concerning the EIA are prior to the licensing or authorisation of the projects. But it also very important to set clear that the attribution of exploration rights is not dependant on an EIA, as it is only demanded when we are in the context of exploitation rights.

An environmental licence – according to Decree-Law No. 127/2013, of 30 August – may also be required, to prevent or reduce air, water and soil pollution, as well as waste production.

Both the EIA and the aforementioned environmental licence are processed within the ‘single licensing environmental regime’, which aims at articulating all the legal regimes involved and therefore simplifying the procedures of environmental licensing, concluding in the emission of a single environmental title (a document containing all the relevant information about the environmental licences of the project or activity).

11 Decree-Law No. 102/2009, of 10 September, modified and republished by Law No. 37/014, of 28 January, with recent adjustments by the Law No. 28/2016, of 23 August.
12 Approved by Decree-Law No. 162/90, of 22 May.
13 Approved by Decree-Law No. 75/2015, of 11 May.
The timeline to conclude the above-mentioned procedures is variable, but a minimum time frame of six to 12 months is the norm.

iii Third-party rights
In Portugal there is no mandatory process for addressing third-party rights.

However, the bearer of mining rights will have inherent rights over the lands in which the mining projects are to be developed, namely the one to temporarily use the land required for the work and the implementation of the respective facilities. Therefore, it will have to pay compensation to third parties for any damage caused by the exploration and exploitation activities and provide all security, environmental protection and landscape recovery measures when the works are terminated.

iv Additional considerations
The authorisations, conditions or restrictions to mining activities will depend on the location, area and type or works to be promoted.

In some areas, such as protection zones of natural mineral and spring water, protected areas of natural parks or demarcated regions (e.g., vineyards, rivers), there are specific regulations that might restrict or forbid certain types of works and activities.

The municipalities, ICNF and CCDR have a fundamental role in issuing their opinions on these restrictions.

the social licence to operate, regarding the approach of local communities, clarification of the exploration and exploitation purposes, methods and contribution to local economic, social and environmental welfare, is a very important issue to be addressed.

V OPERATIONS, PROCESSING AND SALE OF MINERALS

i Processing and operations
The importation of equipment and machinery for use in mining activities is not subject to special restrictions, other than those related to the security of people and assets.

During the activity, the concessionaire has to make use of the resources in accordance with the appropriate technical standards and in harmony with the public interest of the best use of these assets, and cannot proceed with the mining activity in a way that compromises the best economic use of resources.

The use of foreign labour in mining activities in Portugal is subject to the same restrictions as in any other activity. As such, it must comply with the conditions and procedures for the entry, stay, departure and removal of foreign citizens from Portuguese territory, established by Law No. 23/2007, of 4 July, as amended by Law No. 28/2019, of 29 March.

To legally work in Portugal, non-EU citizen must have a residence permit with the purpose of work. This type of permit can have three different purposes:

a to live and work in Portugal as an employee with an employment contract, which demands that the job vacancy exists and that it has not been filled by a Portuguese or European Union national, by citizens of countries with special agreements with Portugal and by foreigners who live in Portugal with valid residence permits;

b to live and work in Portugal as an employee with an employment contract in a highly qualified activity; and

c to live and work in Portugal as a self-employed or as an entrepreneurial immigrant.
ii Sale, import and export of extracted or processed minerals

The commercialisation or valorisation of the exploitation products, originating from authorised mining activities, is subject to inspection. Differently, export, sale or any form of transmission of products, even free of charge, that are not from authorised exploitations or legally imported holdings is prohibited. In any case, the exportation of ores must also follow all the applicable European legislation and treaties.

On the other hand, the exportation of ores or lands obtained during the exploration activities may be allowed by a member of the MATE, if for industrial analysis or testing.

European legislation establishes some restrictions to the importation of some minerals. For example, EU Regulation (EU) 2017/821, of the European Parliament and of the Council, of 17 May 2017, lays down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas. This EU Conflict Minerals Regulation, of which most of the legal provisions will come into force on 1 January 2021, applies to conflict minerals, so it will ‘only apply directly to EU-based importers of tin, tantalum, tungsten and gold – whether these are in the form of mineral ores, concentrates or processed metals’ – but also intends to ‘promote the responsible sourcing of smelters and refiners of tin, tantalum, tungsten and gold, whether they are based inside the EU or not’. European companies will have to ensure, through a due diligence process, that they import these minerals and metals from responsible sources only.

iii Foreign investment

There are no restrictions to foreign investment in mining companies or mining projects in Portugal, neither is that type of investment subject to prior governmental review or approval. Foreign companies are subject to the same administrative procedures as Portuguese companies and must comply with the same criteria and are recognised the same rights and obligations during mining activities.

VI CHARGES

i Royalties

In the context of mining projects, Law No. 54/2015 states that the geological resources exploitation is subject to payment of ‘exploitation charges’.

This payment is negotiated and defined in the concession contracts signed with the Portuguese state, using liquid exploitation annual results or the value of the resources ‘at the mine gate’ as a reference. Current practice is that the state has the discretion to choose between these two alternative calculations, usually following the higher value criteria: a percentage of the net smelter return on sales (usually up to 10 per cent) or of the mine head value of the mining products (3.5 per cent to 5 per cent).

It is usually paid in an annual basis and it is destined to support the geological resources management, namely through its better knowledge, and it might also be used to support social responsibility projects.

These charges might also include prizes to be paid by the concessionaire and fixed values determined according to the geological potential of the granted areas.
ii Taxes

Corporate income tax (IRC) is a tax levied on profits derived by both resident and non-resident entities. Resident entities (with head office or effective place of management in Portuguese territory) are generally subject to taxation on worldwide profits. Non-resident entities with a permanent establishment in Portugal are subject to corporate tax on the profits of their permanent establishments in Portuguese territory. Non-resident entities are only taxed on Portuguese-sourced income.

IRC is levied at a 21 per cent rate, to which may be added a municipal surtax of up to 1.5 per cent levied on taxable profits (depending on the municipality), as well as a state surtax of 3 per cent on taxable profits exceeding €1.5 million and up to €7.5 million, 5 per cent on taxable profits exceeding €7.5 million and up to €35 million, and 9 per cent on taxable profits exceeding €35 million. This means that the nominal tax rate may reach 31.5 per cent.

A special reduced IRC rate (of 17 per cent on taxable profits up to €15,000) is available for small and medium companies (with a turnover below €50 million among other criteria).

iii Duties

Since the implementation of the EU internal market, goods can circulate freely between Member States. For non-EU goods, all Member States apply the common customs tariff (CCT) and the revised European Union Customs Code. As such, Portugal uses the harmonised nomenclature and classification system (HS) present in the CCT, where Section V is devoted to mineral products and its Chapter 26 specifically refers to minerals, determining the exemption of duties.

iv Other fees

Aside from the above-mentioned exploration charges and indemnification payments, namely for environmental and landscape restoration, Ordinance No. 897/95 establishes the fees due for contracts and activities related to geological resources exploration and exploitation to be charged to the holder of the mining rights. Fixed annual fees per area (km²) might also be contractually established.

VII OUTLOOK AND TRENDS

The growing number of applications for the exploration of lithium, in Portugal, in the past two years, has not been ignored by the government.

Following the aforementioned Lithium Group report, in 2018, the Council of Ministers approved Resolution No. 11/2018, of 31 January.

This legal instrument defines the strategical guidelines for lithium exploitation in Portugal, focusing primarily in the geological knowledge of our territory and determining that exploration and exploitation rights will be granted through public tender considering predefined areas. The government announced in early June 2019 that this international public tender will cover lithium exploration within nine areas, confirming the intention to launch this proceeding until the end of the year.
I OVERVIEW

i New mining code

The Parliament of Senegal passed a new Mining Code, Act No. 27/2016 on the Mining Code, on 30 October 2016.

The new Mining Code (the 2016 Code) applies to new applications only; the provisions of the 2003 Mining Code (the 2003 Code) will continue 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 (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); the maximum term for an initial permit under the 2003 Code is 25 years. Mining permits are 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 valued added tax (VAT) and the port charge levied by the Senegalese Shippers’ Council (COSEC) during the period commencing on the date of entry into force of the mining permit (or small-mine permit) and ending on the first day of commercial production.

1 Mouhamed Kebe is the managing partner of Geni & Kebe.
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(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).

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.

Local development funds

The 2016 Code introduces an obligation for mining title-holders to contribute annually to a local development fund.

a) Entry fees for the grant of small-mine permits and mining permits, and fees for research permits, semi-mechanised authorisations and quarry permits, will increase under the 2016 Code.

b) The 2016 Code introduces an annual surface royalty payable by all title-holders, including holders of research permits and quarry permits. This will be 50,000 West African CFA francs per hectare for a small-mine permit and 250,000 West African CFA francs per square kilometre for a mining permit.

c) Most taxes relating to the mining sector were 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 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 at 1.5 per cent.

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 (unspecified). The purpose of the local development funds is to promote the economic and social development of local communities 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
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. It 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 the 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:

- diversification of mineral production and the beneficiation of mineral products before export is encouraged;
- the lawful rights and interests of investors are guaranteed;
- foreign investments are governed by the non-discriminatory principle, meaning that foreign investors will be treated no less favourably than comparable domestic investors;
- the protection of the environment and the sustainability of mining will be a key objective; and
- 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:

- Act No. 27/2016 on the Mining Code dated 30 October 2016, enacting the 2016 Code;
- Act No. 2003-36, dated 24 November 2003, enacting the 2003 Code; and

Apart from the Mining Codes, the mining sector is also regulated by:

- 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;
- the Tax Code, No. 2012-31 of 31 December 2012;
- the revised Uniform Act of OHADA³ relating to general commercial law, dated 15 December 2010;

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.

e Statute No. 98/03, dated 8 January 1998, enacting the Forest Code and its implementing decree, dated 20 February 1998; and

f the exchange regulations in force in the member countries of WAEMU.

The competent authorities in the mining sector are:

a the Ministry of Energy and Mines;
b the Directorate of Mines and Geology; and
c 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 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.

No one can undertake or conduct an activity within Senegal governed by the 2003 Code without holding a mining title according to the terms of the mining legislation.

Prospecting

Three original copies of the application for a prospecting authorisation must be forwarded to the Minister, who must acknowledge receipt. The application must provide:

a the information and documents showing the identity of the person responsible for the work as set out under Article 5 of the 2003 Code;

b the aims of the planned prospecting, its scientific or economic character, its geographical location and its likely duration; and

c a brief description of the programme of work, the 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 confer any pre-emptive rights on 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 copies to the Minister. The application must provide:

- the information and documents showing the identity of the person responsible for the work as set out under Article 5 of the 2003 Code;
- a description of the mineral substances for which the application for the permit is being made;
- the coordinates of the exploration area;
- an estimate of the surface area of the exploration permit area being 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 being sought is indicated;
- a presentation of the planned exploration work and the 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 copies of the application addressed to the Minister four months before expiry of the exploration permit;
- documents providing identification of persons and corporates, the reference of the exploration permit coordinates and surface area of the permit area being sought;
- a feasibility study indicating the characteristics and performance of mining production units, an economic and financial assessment of the project and its socio-economic impact;
- a report detailing the results of the exploration phase indicating, in particular, the reserves, grades, types of mineral deposits and metallurgical tests;
- a plan for the development and start of mining operations;
- an investment plan and a timing chart for the undertaking of the mining project;
- an environmental impact study concerning the mining operation (approved by the Ministry of Environment, which issues a confirmatory certificate); and
- 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.
An 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 issued 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 movable 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 work;
- an exploitation permit or a mining concession; and
- 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 within the perimeter of the valid exploration permit.

A mining exploitation title confers on its holder:

- 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;
- the right to renew the title;
- the right to extend the 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 an extension of its title to these substances within six months);
 Mining Law: Senegal

the right to occupy 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 within the perimeter of the exploitation permit or within 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 work 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 payment of fixed taxes.

Additional permits and licences

Only the permits and licences mentioned above are required to conduct mining activities.

Closure and remediation of mining projects

Any holder of a mining title is under an obligation to rehabilitate sites when each mining title expires, 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

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 use 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.

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 this purpose.
iii  Third-party rights
The occupation of lands by the holder of a mining title, within 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:

- import, without financial settlement, any equipment belonging to it;
- import to Senegal any possessions and services necessary for such activities; and
- export the mineral-extracted substances, their concentrates, primary derivatives and all other derivatives after performing legal and regulation formalities for exporting these substances.

Holders of mining titles are guaranteed a free choice of suppliers, subcontractors and service providers as well as partners.
However, 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 subject 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 the 2003 Code are submitted to the exchange regulation in force in Senegal. As such, they are allowed to:

- collect in Senegal all funds acquired or borrowed from abroad, including receipts from the sale of their share production;
- 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
- import all funds acquired or borrowed abroad as are necessary for carrying 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 West African 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, in an attempt 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 a large investment, the duration of the exemption is at least equal to the period of the loan repayment, but 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 the mining exploitation title or small mine exploitation authorisation being granted, 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 duties applicable on entry, including value added tax and COSEC fees relating to:

- equipment, materials, supplies, machines and spare parts not produced or manufactured in Senegal, and specific materials required for mining operations;
- fuel, oil products, materials and spare parts, and complements required for mining operations; and
- 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 once the Minister has been notified 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 for research and exploitation are subject to the payment of fixed fees, as follows:

- research permits: 500,000 West Africa CFA francs;
- mining concessions: 7.5 million West Africa CFA francs; and
- other mineral mining rights: 1.5 million West Africa CFA francs.

These amounts are reviewed every five years by decree.

As previously noted, the concession holder is under an 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 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 implementation of the restoration programme.
Chapter 17

SOUTH AFRICA

Estelle (Bester) Hayes and Jeandri Cloete

I OVERVIEW

For more than a century, South Africa’s mining industry has been one of the main driving forces and still forms a crucial cornerstone of its economy, which is generally considered to be one of Africa’s wealthiest economies. 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, a shortage of electricity, an increase in a recalcitrant workforce and tensions with local communities, and reduced spending on infrastructure maintenance and development. However, recent strides have been made in addressing regulatory uncertainty by way of improved engagements and interaction between government and industry stakeholders.

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, while it aims to find common ground between contending interests of the stakeholders involved. 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 of the Protection of Investment Act, 2015 (PIA), which came into effect on 13 July 2018. 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 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 an international investment dispute brought in the International Centre for Settlement of Investment Disputes under South Africa’s bilateral investment treaties with Belgium and Luxembourg. 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.

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1 Estelle (Bester) Hayes is a director and Jeandri Cloete is an associate at Falcon & Hume Inc. The authors would like to thank I Nupen and P Smit for their contributions in preparing this article.

2 Piero Foresti, Laura de Carli & Others v. The Republic of South Africa, ICSID Case No. ARB(AF)/07/01.
Nevertheless, South Africa continues to be seen as an investment destination, with Anglo American, AngloGold Ashanti and BHP Group contributing to most of this year’s 28 per cent growth in the mining sector, despite a recent trend in operational migration. A number of smaller mining companies, especially from Canada and Australia, are also developing new projects in South Africa.

II LEGAL FRAMEWORK

In seeking to attain transformation and empowerment objectives, 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 and Energy, issues different types of licences and rights to applicants on a ‘first come, first served’ basis and upon satisfactory demonstration of the applicant’s 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, the Diamonds Act 1986, the National Environmental Management Act, 1998 and the National Water Act 1998.

The most noteworthy licences, rights and permits relating to mining and prospecting include:

a prospecting rights (which authorise invasive prospecting and exploration work, on an exclusive basis for the prospecting area and mineral concerned, but does not entitle the holder thereof to mine for that mineral);

b mining rights (which authorise mining and exploration on a large scale and for an extended period, on an exclusive basis for the mining area and mineral concerned); 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 right holders 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 a radical and 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. 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 PIA 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 and Energy (previously the Department of Mineral Resources) (DMRE). The DMRE 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 rights 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 DMRE 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 and rights, consideration of internal appeals and decisions to suspend or revoke licences and rights owing to non-compliance, are taken at national level by officials in the DMRE 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 and Energy (or his or her delegate), based on a ‘first come, first served’ application system and upon satisfactory demonstration of the applicant’s ability to comply with the financial, technical, environmental, health and safety, empowerment 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 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 and Energy 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, the most noteworthy licences relating to mining are prospecting rights, mining rights and mining permits.

An emphasised recognition of the tension between the rights of mineral right holders in terms of the MPRDA and informal land right holders (customary title holders) in terms of the Interim Protection to Informal Land Rights Act 1996 (IPILRA) have brought about an increase in recent litigation.

Mineral rights are conferred on applicants upon the satisfactory compliance of certain requirements. The MPRDA is peremptory insofar as, should all these requirements have been met, the Minister ‘must’ issue a mineral right. Following the High Court’s recent ruling, this authority can now only be exercised upon the additional compliance with the provisions set out in the IPILRA, where applicable, that protect Historically Disadvantaged South Africans’ (HDSAs) or traditional communities who hold informal land rights as a result of the previous dispensation’s failure to recognise customary title of land. Due the invasive nature of mineral rights on surface rights, the High Court held that the granting of a mining right in terms of MPRDA amounts to ‘deprivation’ for purposes of the IPILRA as it goes beyond the normal restrictions on property use and enjoyment, and as such, triggers the requirement of ‘consent’ in terms of IPILRA. In other words, where land is held on a communal basis by a community that is subject to IPILRA, a mining right can only be granted if that community provides its full and informed consent thereto, through a majority decision at a meeting convened for the purpose of considering such disposal and of which they have been given sufficient notice, and in which they have had a reasonable opportunity to participate.

Despite the benevolent intentions to reconcile these contending rights, given the sociopolitical climate at play, this additional requirement could ultimately prove repellent for holders and investors lacking in an appetite to tolerate delays and expensive and prolonged court proceedings, if faced with ineffective or time consuming community engagements, where uncertainty reigns in relation to recognised community representatives and their decision making powers on behalf of its community.

In terms of Section 5 of the MPRDA, prospecting rights and mining rights are limited real rights in respect of the land to which they relate. In simple terms, this means that prospecting and mining rights constitute limitations on the rights of ownership of the landowner. Moreover, Section 5 of the MPRDA expressly authorises the holder of a prospecting

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4 Subject to the Minister’s consent, mining permits may only be encumbered or mortgaged only for the purpose of financing the mining project in question and may not be transferred in any way whatsoever.

5 Baleni and Others v. Minister of Mineral Resources and Others 2019 (2) SA 453 (GP).
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.

To ensure 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 can, and which has become
common practice, 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. However, 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.\textsuperscript{6}

The Constitutional Court’s recent decision resulted in a power shift in favour of the
landowner or lawful occupier, insofar that it held that, should the landowner or lawful
occupier prevent the mineral right holder from commencing with its prospecting or mining
activities, the latter must first exhaust its internal remedies in terms of Section 54 of the
MPRDA before it can commence with its mining activities on the land,\textsuperscript{7} which in effect
means that the regional DMRE office is to be relied on to resolve such disputes. Once again,
in practice, this presents the right holder with significant obstacles to overcome in the form of
delays and possible prohibitions imposed by the Regional Manager, and ultimately expensive
and time-consuming court proceedings in respect of the enforcement of their rights.

Prospecting rights and mining rights are obtained by means of an application submitted
in a prescribed form to the Regional Manager of the DMRE 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
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:

\begin{itemize}
  \item \textit{a} prospecting or mining works 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;
  \item \textit{b} documents demonstrating how the applicant will comply with black economic
      empowerment requirements;
\end{itemize}

\textsuperscript{6} \textit{Joubert and Others v. Maranda Mining Co (Pty) Ltd} 2010 (1) SA 198 (SCA).

\textsuperscript{7} \textit{Maledu and Others v. Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another} 2019 (2) SA 1 (CC).
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

an application for an environmental authorisation.

Once an application is accepted by the DMRE, an applicant must submit the relevant environmental reports as required in terms of the National Environmental Management Act 1998 (NEMA) and consult in the prescribed manner with the landowner, lawful occupier and any interested and affected party and include the result thereof in the relevant environmental reports. Where an environmental impact assessment has been identified as the environmental instrument to be utilised in informing an application for an environmental authorisation, the environmental impact assessment is not submitted together with the other documents when the application is first submitted to the DMRE, but is conducted and developed over the course of the time when the mining right application is being processed.

In terms of time limits, a prospecting right may be granted 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 granted 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. 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 life of mine of 20 years, that applicant cannot, generally, obtain a mining right for a period of 30 years.

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 authorisation. 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 or both. The DMRE 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 new mining rights are subject to the requirement that HDSAs must have at least 30 per cent in the economic benefit and voting rights of the holder of a mining right.\(^8\)

### 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 further environmental authorisation authorising in detail the listed activities that will form part of the mining and mineral processing activities, should these listed activities incidental to the operations not be covered by the environmental authorisation forming part of a mining right;
- a waste management licence in respect of inter alia management of tailings;
- 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
- air quality licences, if required.

Other licences depend on the nature of the 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:

- licences for the possession, processing and beneficiation of precious metals;
- licences for the possession, processing and beneficiation of uncut diamonds;
- licences for the possession, beneficiation, transportation and exporting of nuclear materials and radioactive materials;
- licences for the destruction or relocation of archaeological sites or graves; and
- 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 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 into the DMRE’s bank account, 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 DMRE 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,

\(^8\) The Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry 2018.
the likely consequences of not rehabilitating (or partially rehabilitating) the disturbances concerned, the commitments and mitigation measures set out in the environmental authorisation 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. Very seldomly is a closure certificate issued in practice, 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, environmental activities associated with 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.

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 hold 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 an identified risk is sufficiently addressed.

ii Environmental compliance

As mentioned above, environmental activities associated with 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.

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:

a) an application submitted to the DMRE (which administers the provisions of NEMA insofar as it relates to mining activities);

b) 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;

c) 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;

d) 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

e) the final environmental impact assessment report and environmental management programme is then submitted to the DMRE 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 environmental impact assessment 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.

iii 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.

iv Additional considerations

An important development concerns the promulgation of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry, 2018 (Mining Charter 2018) on 27 September 2018, followed by the Implementation Guidelines to the Mining Charter 2018 in December 2018, outlining the processes and execution procedures in facilitate compliance with the requirements of the Mining Charter 2018. Following the most recent draft of the Mining Charter 2018, public comment, and extensive engagement and collaboration between stakeholders across the mining industry, the Mining Charter 2018 came into effect on 1 March 2019. Compliance is required from 27 September 2018 and 1 March 2019, for new and existing right holders, respectively. While some unrealistic requirements still remain, especially within the context of the employment equity and local procurement requirements, given South Africa’s current capacity to produce goods, services and skills locally, the Mining Charter, 2018 have responded to the stakeholder engagements to some extent, with lower compliance targets for right holders (i.e., the notable removal of the mandatory 1 per cent ‘trickle’ dividend to black shareholders under certain circumstances).

The Mining Charter 2018 introduces a number of new, but expected, empowerment requirements and measures for mines aimed at driving transformation and socioeconomic development, while providing economic growth and regulatory security.

A newly introduced concept relates to the ‘ring-fenced’ elements of Ownership and Mine Community Development, which require full (100 per cent) compliance at all times for mining right holders. The Mining Charter 2018 specifies different percentages of HDSA ownership in mining rights. For existing mining right holders, a minimum empowerment shareholding of 26 per cent is required to be recognised as compliant for the duration of the right, however, must be increased to 30 per cent upon renewal or transfer of such right. For pending applications, a minimum empowerment shareholding of 26 per cent is also required to be seen as fully compliant, subject to a five-year ‘top-up plan’ to increase its empowerment shareholding up to 30 per cent. In respect of new mining rights, holders must achieve a minimum empowerment shareholding requirement of 30 per cent, from the date of publication of the Mining Charter 2018 on 27 September 2018. This requirement of 30 per cent shareholding must be allocated in a specific ratio among qualifying employees (5 per cent non-transferable carried interest), mine communities (5 per cent non-transferable carried interest or minimum 5 per cent equity equivalent benefit) and black entrepreneurs (20 per cent effective ownership) with preference to black women (5 per cent). These compliance targets for existing mining rights are subject to a ‘once empowered, always empowered’ principle, meaning that rightholders are able to retain empowerment status even if their empowerment partners have exited their equity investment, on the condition that the empowered shareholder exited prior to 27 September 2018 and were lawfully authorised to do so in terms of the underlying agreements. The extent to which the Mining Charter 2018 applies to rights granted to junior miners, is dependent on turnover and employee threshold. Another key change and ring-fenced element to the Mining Charter 2018 refers to Mine Community Development, which requires full compliance with Social and Labour Plan commitments. Further overarching changes includes, more stringent requirements for
procurement of mining goods and services from local and HDSA suppliers, permission to invest in enterprise and supplier development by offsetting some procurement obligations, and increased requirements for employment of HDSAs in junior, middle and senior management of mining companies.

V OPERATIONS, PROCESSING AND SALE OF MINERALS

i Processing and operations

There is no general limitation on the import and export of equipment. However, as indicated, the Mining Charter 2018 puts a specific focus on local procurement, insofar that mining rightholders will be expected to source a certain percentage of their capital goods and consumables (mining goods) from local producers, including HDSAs. The Mining Charter 2018 expressly states that a mining rightholder is required to promote economic growth through the development of small, medium and micro enterprises and suppliers of mining goods and services. This plays a part 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 precious metals, diamonds and nuclear materials, there are no general restrictions on processing extracted minerals.

As far as use of foreign labour and services is concerned, we note that under the Mining Charter, 2018 mining rightholders are expected to source certain minimum percentages of their services from local producers, including from HDSA service providers.

Mining rightholders are required to invest in enterprise and supplier development (ESD) to strengthen local procurement, however, mining rightholders are permitted to offset a percentage of their mining goods and services procurement obligations against investments into ESD.

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.

ii Sale, import and export of extracted or processed minerals

Other than the special permits required for processing, possessing, transporting or exporting 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.

Pursuant to the lapsed MPRDA Amendment Bill,9 the government proposed imposing certain restrictions on the export of unprocessed minerals, being those minerals declared as ‘strategic minerals’, in an effort to promote local beneficiation of minerals. However, towards the end 2018, the government announced the withdrawal of the MPRDA Amendment Bill.10

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9 Bill has lapsed in terms of National Assembly Rule 333(2).

10 Bill not withdrawn, but lapsed, which has the same effect.
iii Foreign investment

South Africa implements a system of exchange control, in terms of which approval is required from the South African Reserve Bank 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 South African company. Generally speaking, the Reserve Bank finalises applications for exchange control approvals relatively quickly (i.e., 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 a bilateral investment treaty with the investor’s country; where no bilateral investment treaty exists, the PIA which commenced on 13 July 2018, will apply. 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, which is in the process of being reviewed, is constantly being interpreted by the courts, and there is case law to the effect that South African law does not recognise any forms of constructive or indirect expropriation. Moreover, the Protection of Investment Act stipulates that investment disputes will be decided by the domestic courts, unless the government consents to international arbitration.

VI CHARGES

i Royalties

Under the terms of the Mineral and Petroleum Resources Royalty Act, 2008 (the Royalty Act), a person who wins or recovers a mineral resource in South Africa (an extractor) must pay a royalty for the benefit of the National Revenue Fund in respect of the transfer of that mineral resource to another party. Under the terms of Section 4 of the Royalty Act, a formula is prescribed for calculating the extent of the royalty, based on the earnings before interest and taxes from the gross sales of refined or unrefined mineral resources. Following amendments to the Royalty Act, with effect from 1 January 2019, gross sales, in respect of refined mineral resources, excludes any insurance and handling expenditure actually incurred after being refined to a specified condition, or any amount received to effect the disposal thereof, while in respect of unrefined mineral resources, it excludes all transport, insurance and handling (TIH) expenditure actually incurred after being brought to a specified condition or any TIH expenditure to effect the disposal thereof – irrespective of whether such expenditure is specifically considered in the determination of gross sales and irrespective of whether it is of a capital nature.11 The maximum 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.

If gross sales, in respect of mineral resources won or recovered by the extractor for purposes of testing, identification, analysis and sampling pursuant to a prospecting or exploration right, do not exceed 100,000 rand during a year of assessment, an extractor is exempt from the imposed royalty.

11 United Manganese of Kalahari (Pty) Ltd v. Commissioner, South African Revenue Services 2018 (2) SA 275 (GP).
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), transfer duties in respect of transfers of land or prospecting and mining rights and as from 1 June 2019, carbon tax (if the taxpayer conducts a prescribed listed activity and such activity exceeds the prescribed greenhouse gas emissions threshold). 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 whereby income tax rates increase as the company’s profits increase, while allowing shareholders to receive dividends even when no income tax is payable because of low profits. A detailed discussion of the tax regime applicable to mining companies in South Africa is beyond the scope of this chapter.

Duties

Duties payable by mining companies include transfer duties and custom duties for the importing of goods.

Other fees

In addition to the above-mentioned taxes, duties and royalties, 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

Following the High Court’s recent ruling, in terms of which informal land right holders, falling within the scope of IPILRA, are required to provide full and informed consent before a mining right is granted, the Minister has announced his intention in February 2019 to appeal this judgment as it jeopardises the licensing authority held by the state as required by mining legislation.

The announcement of the withdrawal of the MPRDA Amendment Bill, which introduced controversial concepts such as restrictions on the export of strategic minerals (as mentioned above) and substitution of the first come first serve right application process with a process of periodic invitation by the Minister, is viewed as a welcome development towards creating regulatory certainty on the part of the government within the mining sector. The proposed withdrawal presents a step towards the anticipated split of the MPRDA into separate legislative frameworks for minerals and petroleum resources respectively, following a stagnation in legislation development in the oil and gas sector and particularly in the wake of the recent gas condensate discovery in the Outeniqua Basin off the southern coast of South Africa by petroleum giant Total.

Despite the Mining Charter 2018 receiving some praise for providing regulatory certainty and accounting for stakeholders’ concerns, the Minerals Council South Africa (previously known as the Chamber of Mines) filed an application for the judicial review of the Mining Charter 2018 during March 2019, aimed at setting aside certain provisions of the Mining Charter 2018. The Minerals Council South Africa alleges that, in its current form, the Mining Charter 2018 fails to extend protection or fully recognise previous empowerment transactions upon the renewal and transfer of mining rights, having the effect that right
holders will have to top up their empowerment shareholding should it have fallen below the required target. This is despite the High Court ruling in favour of the Minerals Council (currently being appealed by the Minister) that mining rightholders cannot be compelled to restore their empowerment shareholding when black shareholders have disposed of their shareholding.

A further element of the Mining Charter 2018 recently published for public comment in March 2019 involves the Draft Reviewed Housing and Living Conditions Standard for the Minerals Industry 2019 (Draft Reviewed Housing Standard), purposed to ensure that a mining rightholder provides adequate and decent living circumstances and support services to its mine employees. The Draft Reviewed Housing Standard introduces new requirements for new and existing mining rightholders, the most notable thereof includes the submission of a housing and living conditions plan within certain prescribed periods, which is expected to attract comments of untenability and necessitate further stakeholder engagements. It is unlikely that the Draft Reviewed Housing Standard will be finalised and published in light of the pending judicial review of the Mining Charter 2018.

A further development aimed at regulatory certainty concerns the publication of further proposed amendments to the 2015 Financial Provisioning Regulations published in terms of NEMA for the rehabilitation and remediation of environmental damage caused by mining activities, in May 2019 for public comment. This follows on from stakeholder input received in respect of the proposed amendments to the Financial Provisioning Regulations published for public comment in 2017. Some notable amendments include:

a. the introduction of a specific obligation of the rightholder to remediate and rehabilitate environmental damage purposed to bring operations to an approved sustainable end state at closure, the exclusion of cover associated with an incident from application of the Regulations;

b. the removal of restrictive conditions for the use of trust funds as a financial provisioning vehicle, simplified methodologies for financial provisioning calculation; and

c. certain instances where the Minister can access a holder’s financial provisioning and the cessation of financial provision for residual and latent impacts to the Minister, upon the issuing of a closure certificate.

The outcome from the public comments will see the 2015 Financial Provisioning Regulations being replaced and implemented with effect from early 2020.
Chapter 18

TANZANIA

Thomas Mihayo Sipemba

I OVERVIEW

The Mineral Policy of Tanzania was promulgated in 2009\(^2\) by the Ministry of Energy and Minerals,\(^3\) which is charged with the responsibility of formulating a mineral policy, overseeing its administration and coordinating the development of the mineral sector of Tanzania. The Policy is driven by its vision, which is to have an effective mineral sector contributing significantly to the acceleration of socioeconomic development through the sustainable development and utilisation of mineral resources in Tanzania by 2025.\(^4\) Its objectives include, but are not limited to, improvement of the economic environment for the purposes of attracting and sustaining local and international private investment in the mineral sector.\(^5\) According to the Mineral Policy, the government of Tanzania is to remain as regulator and facilitator of the sector while promoting private sector involvement. However, the Policy document makes it clear that the government intends to participate strategically in mining projects and to establish an enabling environment that enables Tanzanians to participate in ownership of medium and large-scale mines.\(^6\)

Another aim of the Mineral Policy is to ensure that the government strengthens cooperation with regional and international bodies for the purposes of taking advantage of facilities, resources and information provided by such organisations. In this context, the government aims to collaborate with regional bodies of which Tanzania is a member in order to harmonise its own mineral policy with others and to work with regional and international organisations in respect of research, transfer of technology, training and exchange of information.\(^7\)

The other relevant feature of the Mineral Policy is that it underscores the need for a legal and regulatory framework that ensures transparency, predictability, minimum discretion and security of tenure.

Under Mining Act No. 14 of 2010, as amended,\(^8\) and Natural Wealth and Resources (Permanent Sovereignty) Act No. 5 of 2017, the entire property and control of all minerals

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\(^1\) Thomas Mihayo Sipemba is a partner at East African Law Chambers.
\(^2\) Published in September 2009.
\(^3\) The energy sector was hived off and there is now a separate Ministry of Energy.
\(^4\) Page 6 of the policy document.
\(^5\) Page 7 of the policy document.
\(^6\) Page 8 of the policy document.
\(^7\) Page 27 of the policy document.
\(^8\) Amendments to the Mining Act effected by the Written Laws (Miscellaneous) Amendments Act No. 7 of 2017.
on the surface or below the surface, including bodies of water, are public property vested in the President in trust for the citizens of Tanzania. Further, the law currently proclaims sovereignty over natural resources and wealth to the people of Tanzania and the government. The government exercises ownership and control of natural resources on behalf of the people of Tanzania and, for that purpose, all activities related to exploration of natural wealth and resources are to be conducted by the government on behalf of the people. Note that the proclaimed sovereignty cannot be questioned by any foreign court or tribunal. The government thus issues various types of mineral rights that allow interested persons to conduct exploration and exploitation of minerals subject to terms and conditions specified in law or specified in the mineral rights themselves. The types of mineral rights and other relevant matters are discussed below.

II LEGAL FRAMEWORK

The main legislation governing mining activities in Tanzania is the Mining Act of 2010, as amended from time to time, which makes provisions for regulation of mining activities, including prospecting, mining, processing and dealing in minerals. The Act also makes provisions on grant, tenure, terms and conditions, renewal and termination of mineral rights, payment of various taxes, fees, duties, royalties and other applicable charges.

Other legislation that regulates mining activities includes Natural Wealth and Resources (Permanent Sovereign) Act No. 5 of 2017 and Natural Wealth and Resources Contracts (Review and Renegotiation of Unconscionable Terms) Act No. 6 of 2017. As stated above, the Natural Wealth and Resources Act No. 5 makes provisions on the permanent sovereignty of natural resources. The Natural Wealth and Resources Contracts Act No. 6 provides for the powers of the National Assembly to review agreements concluded by the government and for the right of the government to renegotiate the terms that it considers unacceptable in agreements that it has already signed.

There are further legislation and subsidiary legislation that are applicable in regulating the mining sector, some of which are discussed below.

The main body regulating mining activities in Tanzania is the Mining Commission (the Commission), which is established as a body corporate and is vested with functions that include supervising and regulating the sector, issuing, cancelling and renewing mineral rights, and resolving disputes arising out of mining operations or activities. The Minister for Minerals is responsible for formulating policies, strategies and a legislative framework for mineral exploration and exploitation; the Commissioner for Minerals acts as an adviser to the Minister.

It is also important to mention resident mines officers. These are appointees of the Commission and have various roles, the most important being to monitor the day-to-day production process in mining projects, to verify records kept by miners, authorise entry into storage facilities, and have an overview of the transportation of minerals to government mineral warehouses.

There are various reporting requirements under the Mining Act and the Tanzania Extractive Industries Act No. 23 of 2015 (TEIA). Licence holders are required to keep certain

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9 Sections 21 and 22 of the Mining Act.
10 Sections 19 and 20 of the Mining Act.
11 Section 27 of the Mining Act.
records and provide quarterly reports to the Commission. Thus, licence holders conducting exploration activities are required to provide reports on boreholes drilled, aerial photographs, detailed logs of strata penetrated, minerals discovered, results of seismic surveys, geochemical or geophysical analysis and geological interpretations of the records kept, the number of employees and costs expended. Licence holders conducting mining activities are required to provide technical records of operations, geological reports and their interpretations, aerial photographs, ore logs, analysis and tests, as well as accurate and systematic financial records.

The TEIA establishes the Tanzania Extractive Industries (Transparency and Accountability) Committee (the Committee), which is responsible for promoting and enhancing transparency and accountability in the extractive industry. Some of its functions include (1) developing a framework for transparency and accountability in reporting and disclosure by all extractive industry companies on revenue due to or paid to the government; (2) requiring from any extractive industry company an accurate account of money paid by and received from the company as revenue accruing to the government from that company; (3) requiring disclosure of accurate records of the cost of production, capital expenditure at every stage of investment, volume of production and export data, and (4) conducting investigations on discrepancies in revenue payments and receipts in extractive companies. The Committee is mandated to set a threshold in every financial year for the purposes of identifying companies that qualify to submit reports. The TEIA also imposes a reporting obligation on local content and corporate social responsibility, whereby companies must submit an annual report containing information about these matters.

III MINING RIGHTS AND REQUIRED LICENCES AND PERMITS

i Title

As already stated, minerals in Tanzania are public property held by the president in trust for all citizens of Tanzania. To engage in any form of activity in the mining sector, whether it be prospecting or mining, one is required to obtain the appropriate mineral right from the several that can be issued by the Commission.

Title to minerals cannot be issued or held or be transferred to private persons except through the grant of a mineral right to prospect or mine.

ii Surface and mining rights

The various mining rights that may be granted in Tanzania include prospecting licences, special mining licences, mining licences and primary mining licences.

A prospecting licence once granted allows a person to enter the prospecting area, prospect for minerals to which the licence applies and carry out operations and such work as necessary for that purpose, including the removal and excavation of soil and earth. It may be applied for and issued for minerals falling under groups as specified under Mining Act (metallic minerals, energy minerals, gemstones excluding kimberlitic diamond, kimberlitic diamond, industrial minerals or building materials) and the licence will state the group and type of mineral to which it applies. A prospecting licence is granted for an initial period of four years and may be extended for a further three years, after which no further extension is possible. At the end of the two aforementioned periods, the area covered by the licence reverts to the government and a prospecting licence is issued to a local mining company, which shall be designated by the Minister subject to approval by the Cabinet. Any person intending to
conduct exploration work in such an area must do so through arrangements made with a local mining company, subject to prior approval from the Cabinet. The conditions that may apply to a prospecting licence include the following:

- a restriction to hold not more than 20 licences, provided that the cumulative prospecting areas do not exceed 2,000 square kilometres;
- prospecting operations must commence within three months of the prospecting licence being granted or within such period as the licensing authority may allow;
- the holder must give notice to the licensing authority of the discovery of any mineral deposit with a potential commercial value;
- the holder must adhere to the prospecting programme attached to the prospecting licence; and
- expenditure on prospecting operations must not be less than US$500 per square kilometre during the initial period and not less than US$ 2,000 per square kilometre after the first renewal. Where further prospecting is allowed, the minimum expenditure is US$6,000 per square kilometre. Note that minimum expenditure under a prospecting licence is US$100 for industrial minerals and building materials and US$250 for prospecting for gemstones.

A special mining licence will be granted for large-scale mining operations in which capital investment exceeds US$100 million. The licence grants an exclusive right to the holder to conduct operations in the mining area for the minerals specified in the licence. It is granted for the estimated life of the ore body indicated in the feasibility study or any other such period as the licensee request, whichever is shorter. A special mining licence is renewable, and an application for renewal may be submitted at any time, but no later than one year before expiry of the licence. The conditions that may apply to a special mining licence include the following:

- to develop the mining area and commence production in substantial compliance with the programme of mining operations and environmental management plan;
- to employ citizens of Tanzania and implement a succession plan on expatriate employees in accordance with proposals submitted during application for the licence, which are also appended to the licence;
- to demarcate, and keep demarcated, the mining area as prescribed;
- to prepare and update mine closure plans as prescribed;
- to implement a proposal plan for relocation, resettlement and compensation of people within the mining areas in accordance with the Land Act;
- to post a rehabilitation bond if so required by the Ministry responsible for minerals;
- to obtain an environmental certificate in line with the terms of the Environment Management Act;
- to have a plan with respect to the employment and training of citizens of Tanzania; and
- to comply with the terms of a Development Agreement if one has been entered into.

The government is entitled to have not less than 16 per cent non-dilutable free carried interest shares in the capital of a mining company; this requirement is dependent on the type of minerals and the level of investment. Though the wording of the relevant provision is to the effect that the level of investment and the type of minerals will determine the percentage of free carried interest, the provision does not detail how the type of minerals and the investment level will affect determination of the percentage. It would suggest, therefore,
that projects for certain minerals may attract a higher percentage of free carried interest. In addition, the government is entitled to acquire up to 50 per cent of the shares of a mining company, calculated on the basis of the total value of tax expenditure extended to the mining company. Tax expenditure is defined as ‘the quantified value of tax incentives granted to a mining company by the government’. This means that the more tax incentives that a mining company is granted, the higher the percentage of shares the government will be entitled to acquire in that company, up to a limit of 50 per cent.

The Mining Public Offering Regulations mandate that 30 per cent of a shareholding by holders of special mining licences be locally owned and that a minimum local shareholding should be obtained through a public offer made under the Capital Markets Securities Authority. The term local shareholding with respect to a natural person is defined as a citizen of Tanzania, and in relation to a body corporate it is defined as shares held by a company in which citizens of Tanzania or the government own a beneficial interest of at least 50 per cent of the shares of the company. The regulations empower the Minister to grant a waiver if the holder of a licence fails to secure the minimum local shareholding following an unsuccessful public offer. The waiver is granted on application by the licence holder and upon recommendation by the Capital Markets and Securities Authority.

A mining licence confers on the holder the exclusive right to carry on mining operations in the mining area for minerals specified in the licence, and is granted for operations for which the capital investment is between US$100,000 and US$100 million. A mining licence is granted for a maximum initial period of 10 years and may be renewed once for a period not exceeding 10 years. An application for renewal should be made not later than six months prior to expiry of the licence and must be accompanied by the prescribed fee and tax clearance certificate issued by the tax authority in respect of operations to be conducted during the renewal period. The conditions that may apply to the holder of a mining licence include the following:

a) the right to enter into the mining area and undertake mining operations;
b) the right to erect equipment, plant and buildings;
c) to dispose of the minerals recovered;
d) to carry out prospecting within the mining area;
e) to stack or dump any waste in accordance with the environmental management plan;
f) to pay royalties, taxes and other charges;
g) to implement the proposed plan for relocation, resettlement of and payment of compensation to people within the mining areas if they are occupied by surface rights holders; and
h) to employ and train citizens of Tanzania and implement a succession plan for expatriate employees in accordance with the Employment and Labour Relations Acts.

A primary mining licence confers on the holder the exclusive right to carry on prospecting and mining operations in the mining area. It is granted for an initial period of up to seven years and is renewable. The law does not specify either the number of years for which the licence may be renewed or the number of times that it may be renewed. In practice, however, a primary mining licence is normally renewed for the same period as the initial period for which it was granted. This type of licence is granted only to citizens of Tanzania or to companies that are exclusively composed of Tanzanians, whose directors are Tanzanians and in which control of the company is exercised from within Tanzania by persons who are all citizens of Tanzania.
The conditions that may apply to the holder of a primary mining licence include:

1. the right to erect the necessary equipment, plant and buildings for the purposes of mining, transporting, dressing or treating the minerals recovered during the course of mining operations;
2. to pay the royalties due to the government;
3. to stack or dump any mineral or waste product in a manner consistent with the Environment Management Act;
4. to implement the proposed plan for relocation, resettlement of, and payment of compensation to people within the mining areas if the area is occupied by surface rights holders; and
5. the right to prospect within that mining area for any minerals other than gemstones.

A primary mining licence may be converted into a mining licence.

There are also dealer's licences and broker's licence. A dealer's licence allows the holder to acquire minerals and sell them, including the right to export, and a broker's licence allows the holder to acquire minerals and sell them, but not to export. A broker's licence can only be issued to Tanzanians.

Mineral rights are transferable; however, special and mining licences may only be assigned if the consent of the Commission is obtained, unless the assignment is to an affiliate or a financial institution. Consent of the Commission can only be given where there is proof that substantial developments have been effected by the holder seeking to transfer his or her mineral right.12

Once granted, a mineral right cannot be suspended or cancelled except for just cause and after following due process. Causes that may justify the cancellation or suspension of a licence include non-compliance with binding provisions of the Mining Act, regulations or licence conditions, failure to comply with a lawful direction given under the legislation or the regulations, and failure to comply with conditions relating to a licence that may be contained in a development agreement. However, before a licence can be cancelled or suspended, the Commission is required to issue a default notice and allow the licence holder not less than three months to remedy the default, or, if a default cannot be remedied, the licence holder must be given an opportunity to offer reasonable compensation for the default.13

Foreign parties may be granted any type of mineral right, subject to compliance with general licensing requirements, with the exception of primary mining licences, gemstone mining licences and broker's licences. As stated above, a primary mining licence can be granted only to citizens of Tanzania, to partnerships composed solely of Tanzanians or to companies that are solely owned by Tanzanians, where the board of directors is composed of Tanzanian citizens and the company is controlled from within Tanzania by persons who are all citizens of Tanzania.14 However, if a holder of a primary mining licence requires technical support to conduct operations and the technical support cannot be sourced from Tanzania, the holder is allowed to contract a foreigner to provide that support. Such an agreement requires approval in advance by the Commission, given on the recommendation of a resident mines officer. Likewise, a mining licence for mining gemstones can only be granted to Tanzanians but the Commission may grant the licence in an arrangement in which a foreigner owns not more

12 Section 9 of the Mining Act.
13 Section 63 of the Mining Act.
14 Section 8(2) of the Mining Act.
than 50 per cent of participating shares. For the Commission to proceed in this manner, it must be demonstrated that the development of gemstone resources in the respective area is likely to require specialised skills, technology or a high level of investment.\textsuperscript{15}

\textbf{iii Additional permits and licences}

There are other permits and licences that may be required for conducting mining activities. Generally, all companies in Tanzania are required to be registered with the Business Registration and Licensing Agency (BRELA). The aim of BRELA is to regulate and facilitate businesses in Tanzania, and be responsible for the registration of companies. Anyone wishing to conduct mining business in Tanzania is required to obtain a business licence before applying for the mineral right under which he or she wishes to operate. Other permits include those related to health and safety, extraction and use of water, environmental matters, the importation and use of chemicals and explosives, etc.

\textbf{iv Closure and remediation of mining projects}

Mineral rights holders are required to prepare and submit to the Chief Inspector of Mines a mine closure plan for approval. The plan must include:

\begin{itemize}
  \item [a] a programme to reclaim and re rehabilitate land and watercourses to an acceptable condition that takes account of its previous use;
  \item [b] a programme to support socioeconomic activities to provide an alternative livelihood for local communities beyond the life of the mine;
  \item [c] comments made by the district authorities, the surrounding communities and the district mine closure committee;
  \item [d] the cost of providing statutory and other benefits to employees beyond the life of the mine; and
  \item [e] the cost of reclaiming and rehabilitating the mining area in the event that the mine is closed.
\end{itemize}

A rehabilitation bond must be posted in the form of an escrow account, capital bond, insurance guarantee bond or bank guarantee bond, as may be required by the Minister.

\section{ENVIRONMENTAL AND SOCIAL CONSIDERATIONS}

\textbf{i Environmental, health and safety regulations}

There are several pieces of legislation, regulations and rules on environmental matters that are applicable to mining projects, the main one being the Environmental Management Act and regulations made under it.\textsuperscript{16}

The Mining (Safety, Occupational Health and Environment Protection) Regulations of 2010 are directly applicable to the mining sector.

The Mining (Environmental Protection for Small Scale Mining) Regulations of 2010 apply specifically to primary mining licence holders and are not applicable to prospecting activities or medium and large-scale mining activities.

\textsuperscript{15} Section 8(3) of the Mining Act.

\textsuperscript{16} The main regulations from a mining perspective are the Environmental Impact Assessment and Audit Regulations of 2005.
Environmental compliance

As stated above, the Environmental Management Act is the major environmental law. Section 6 thereof imposes a general duty on all persons residing in the United Republic of Tanzania to protect the environment. Further, this Act requires any person who engages in mining, including quarrying and open-cast extraction, to carry out an environmental and social impact assessment (ESIA) at his or her own cost. The ESIA must be conducted before any financing or undertaking of the mining project, regardless of whether the proponent has in its possession the requisite permit or licence for carrying out the project.

Complementing the foregoing provisions, the Mining Act requires applicants of mining and special mining licences to hold a certificate of environmental and social impact assessment studies before a mineral right can be granted. The provisions of the Environmental Management Act in respect of the management and use of land will prevail over any existing land laws in the event that there is any conflict in respect of environmental aspects of land management.

The Environmental Impact Assessment and Audit Regulations 2005 (the ESIA Regulations) set out in detail how the environmental impact assessment and audit thereof should be conducted. An application for an ESIA certificate has to be made in the format of Form No. 1 (Project Brief) of the Third Schedule of the regulations. The proponent is required to submit 10 copies of the Project Brief to the National Environmental Management Council (the Council). The Council is then required to submit the Project Brief within seven days to each relevant ministry, the relevant local government environmental management officer and the relevant regional secretariat for their written comments, which in turn have to be submitted to the Council within 21 days of the date they received the Project Brief from the Council. The Council is then required to screen the Project Brief and the comments pursuant to the criteria specified in the Second Schedule of the Regulations. The Council is required to screen the Project Brief within 45 days of the date of its submission by the proponent.

The proponent will then be required to carry out an ESIA pursuant to the Fourth Schedule of the Act for the purposes of preparing an environmental impact assessment statement (the Statement). The Statement is made pursuant to Regulation 18 and in the format of Form No. 2 specified in the Third Schedule to the Regulations. The Statement is required to be submitted with a non-technical executive summary in both the Kiswahili language and English. The proponent is required to submit 15 copies of the Statement to the Council. The Council is required to submit the Statement within 14 days of the date of receipt to the Ministry of Minerals, and must notify and invite the general public to comment. The Ministry of Minerals will have 30 days within which to review the report and send its comments to the Council. Should the Ministry fail to submit its comments within this period, or an extension thereof, the Council can proceed to determine the project without its comments. It should be noted that the holding of a public hearing to discuss the Statement is not mandatory, but at the discretion of the Council if it is of the opinion that it requires the view of the public to make a fair and just decision or it is necessary for the protection of the environment. The Council is required to determine whether to hold a public hearing.

17 The Act came into force on 1 July 2005.
18 Section 83 of the Environmental Management Act imposes the requirement for all environmental and social impact assessments to be carried out by experts who are duly registered with the Council pursuant to the Environmental (Registration of Environmental Experts) Regulations 2005. The Council publishes a list of experts annually.
hearing within 30 days of receiving the Statement. Upon completion of its review of the Statement, the Council must submit the Statement with its comments and recommendation to the Minister responsible for the environment. The Minister has 30 days from the date of receiving the Statement and recommendation to make a decision. The decision must be in writing and contain the reasons for the decision. The decision must also be communicated to the proponent and a copy of it submitted to the Council’s office, where it should be made available for inspection by the general public. Further, the Minister’s decision must state whether the Statement is approved, not approved or approved subject to the proponent meeting specified conditions.19

Upon approval of the Statement, the Minister shall issue an environmental impact assessment certificate (the Certificate) in Form No. 3 specified in the Third Schedule of the Regulations. It is possible to vary the terms of the Certificate by applying to the Minister. The Certificate is transferable. Further, if the project has not started within three years of the date of issue of the Certificate, the proponent will be required to re-register, with the Council, its intention to develop.

iii  Third-party rights

Holders of land rights do not automatically hold rights over any type of natural resource, including minerals, that has formed below the ground. Once a mineral right is granted, the holder thereof becomes entitled to enter any area of land for which the mineral right is granted, subject to subscribed conditions for exercising the rights of entry. The rights attaching to a particular mineral right are provided for under the respective provisions in the Mining Act. The holder of a prospecting licence has the right to enter the prospecting area and erect installations, camps and temporary buildings.20 The holder of a special mining or a mining licences may enter a mining area and take all measures on or under the surface for the purposes of mining operations, including to erect plants, buildings and equipment as necessary for mining operations.21 Note that Section 4 of the Mining Act defines a mining area as an area of land that is the subject of a special mining licence, a mining licence or a primary mining licence. This means that the holder of a special mining licence or a mining licence has surface land rights to the land in respect of which he or she holds the respective mineral rights.

The exercise of access to surface rights in a mining area is governed by the provisions of Part VII of the Mining Act. In exercising land surface rights, one of the two things are required: (1) to obtain the consent of a government minister, local authority, other authority or landowner; or (2) to compensate, relocate and resettle the relevant landowners. Whether consent or compensation are applicable will depend on the current use of the land and the activities that a mineral right-holder wants to undertake. As stated above, licence holders are required to obtain consent from a government minister, local or other relevant authority or landowner. Examples of areas requiring ministerial consent include areas designated for burial, areas where there is a military installation, any reserved area or any protected

19 It is possible to appeal the decision of the Minister to not grant a certificate to the Environmental Appeals Tribunal.
20 Section 35(2) of the Mining Act.
21 Sections 46 and 51 of the Mining Act.
monument. Local authority and landowner’s consent are required for any inhabited area, land set aside for agricultural use, or where land use plans, compensation and relocation are involved. Consent may also be required from other authorities, for instance in national parks, forest reserves, game reserves and areas where there is a railway.

Under the terms of Section 97 of the Mining Act, compensation, relocation and resettlement may be required where rights conferred by a mineral right cannot be reasonably exercised without affecting the interests of a lawful occupier of land. In this event, the mineral right-holder will be required to advise the landowner and consult the local government authority and to submit a plan regarding compensation, relocation and resettlement. Any consideration due will be in accordance with the procedures and principles of evaluation set out under the land laws and the Land Compensation Regulations.

As regards compensation, it is required that an assessment is undertaken to identify the occupiers of the land, followed by a valuation of the land and any crops or other properties therein; this exercise must be carried out by a qualified valuer. Note that the basis for assessment of the value of land and any unexhausted improvements for the purposes of compensation is the market value of the land. Compensation normally includes:

- the value of the land;
- the value of unexhausted improvements;
- a disturbance allowance;
- a transport allowance;
- an accommodation allowance; and
- loss of profits.

Once the assessment is completed, the valuer will prepare a valuation report, which must be approved by the Chief Government Valuer in the Ministry of Lands and Human Settlements; thereafter the report must be endorsed by the Regional Commissioner, the District Commissioner and the Ward Executive Officer. When the approval and the endorsements have been completed, payment of the required compensation is made to the individuals identified in the valuation report. Note that before commencing the valuation exercise, it is a requirement to consult the local government regarding the valuation exercise, compensation and, if applicable, resettlement. Once completed, approved and endorsed, a valuation report remains valid for six months, after which the valuation exercise must be done again if the compensation payment was not made within the six months.

iv Additional considerations

Other social considerations are those pertaining to local content requirements. The recently published Mining (Local Content) Regulations of 2018 require that licence holders, contractors and subcontractors or licensees must ensure that local content requirements, including minimum local content levels, are complied with. These requirements include the fact that indigenous Tanzanian companies are given first preference in the granting of mining licences and, thus, subject to variations as may be made by the Minister, to qualify for the granting of a mining licence, there must be 5 per cent equity participation by an

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22 Section 95(1)(a) of the Mining Act provides a full list of the categories of land for which ministerial consent is required.
23 See Section 95(b) of the Mining Act.
24 These are specified in the First Schedule to the Regulations.
indigenous Tanzanian company. Mining companies, as far as is practicable, must set up a project office within the district where the project is located before carrying out any work. That being said, there are no specific requirements on how the office should be set up and therefore this should be at the discretion of the company. A company that does not qualify as non-indigenous and intends to provide goods and services to a licence holder is required to incorporate a joint venture company with an indigenous Tanzanian company, in which the latter must have an equity participation of at least 20 per cent.

The local content plan should include long-term projections of the licensee’s programme of work and an annual content plan for each year of the project. Before approval, the plan must be reviewed by the Local Content Committee. It must contain detailed provisions that ensure:

- first consideration is given to local goods and services, provided they meet the standards as established by the authority responsible for standards;
- qualified Tanzanians are considered first for employment;
- adequate provision is made for training Tanzanians; and
- there is provision for how the licensee will guarantee use of locally manufactured goods.

A local content plan may be rejected by the Commission. In that event, it may be returned and a revised plan must be submitted to the Committee within 14 days.

Mineral right-holders must also establish and implement a bidding process for acquisition of goods and services that gives preference to indigenous Tanzanian companies. There are various conditions attached to the evaluation of bids and thus the award of contracts should not be based solely on the principle of the lowest bidder, and where an indigenous Tanzanian company has the capacity to execute the job, that company should not be disqualified solely because it has not tendered the lowest bid. Furthermore, if a bid by a Tanzanian company does not exceed the lowest bid by more than 10 per cent, the contract must be awarded to the Tanzanian company, and if bids are judged to be equal, the bid with the highest level of local content should be selected. In the event that a non-indigenous Tanzanian company is engaged, then it must incorporate a company in Tanzania, operate it from Tanzania and, where practicable, execute its tasks in association with a Tanzanian company.

Another requirement under the Local Content Regulations is the submission of a local content plan for employment and training. This must include a succession plan for positions held by non-Tanzanians that makes provision to ensure that Tanzanians understudy the said positions for a period that will be determined by the Commission. After that period has elapsed, the positions must be held by Tanzanians. Note that the Local Content Regulations require that junior and mid-level positions are held by Tanzanians only.

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25 Note that the term ‘non-indigenous Tanzanian company’ is defined under the Local Content Regulations as a company that is incorporated under the Companies Act of 2002 and that has at least 51 per cent equity ownership by citizens of Tanzania and in which at least 80 per cent of its executive and senior management positions and 100 per cent of its non-managerial and other positions are held by Tanzanians.

26 The Committee is established under Regulation 5 of the Local Content Regulations and is composed of a full-time member of the Commission, the Director of Labour and Employment, a representative of the Tanzania Private Sector Foundation, the Chief Executive Officer of the Geological Survey of Tanzania, the Head of Legal Services in the Ministry and the Executive Secretary of the Commission.

27 Junior and middle-level positions are defined as including foreman, supervisor positions or any other designated position.
It is also a requirement to prepare a programme for research and development and budgeting for the promotion of education, practical attachments and training in relation to a licensee's overall work programme and activities. The plan must outline a revolving three to five-year programme for research and development initiatives to be undertaken internally, provide details of the expected expenditure in implementing the plan, and provide public calls for proposals for research and development initiatives and criteria for selecting proposals that qualify. The plan must be updated annually. Licensees are also required to support and carry out a published plan for a technology transfer programme for the promotion of technology transfer to Tanzania. Thus a sub-plan must be prepared, which should include a programme of planned initiatives for the effective transfer of technology from a licensee to an indigenous Tanzanian company and citizens of Tanzania. Licensees are required to support the technology transfer as regards formation of joint ventures, partnering of licensing agreements between indigenous Tanzanian companies and foreign contractors or service companies.

The Local Content Regulations require licensees to insure risks through an indigenous brokerage firm or, where applicable, an indigenous reinsurance brokerage firm. Offshore insurance services require the approval of the Commissioner for Insurance.

Legal services must be sourced through a Tanzanian legal practitioner or a firm of Tanzanian legal practitioners. A legal services sub-plan must be prepared, which should include a comprehensive report of the legal services used in the preceding six months in terms of expenditure, a forecast of the legal services required during the ensuing six months, and an annual budget for legal services for the ensuing year quoted in Tanzanian shillings and US dollars.

Financial services must also be secured through a Tanzanian financial institution or organisation. A financial services sub-plan must be prepared, which should include a comprehensive report of the financial services used in the preceding six months in terms of expenditure, a forecast of the financial services required during the ensuing six months, the projected expenditure on financial services, and a list of financial services used in the preceding six months, the nature of the financial service provided and the cost for that financial service. Further, it is required to maintain a bank account with an indigenous Tanzanian bank and to transact business through banks in Tanzania.

Note that the Local Content Regulations require the Commission to establish a Common Qualification System for registration and pre-qualification of local content in the mining industry. This is intended to be used for:

- verification of a contractor's capacities and capabilities;
- evaluation of local content submitted by licensees;
- tracking and monitoring of performance and provision of feedback; and
- ranking and categorisation of mining service companies based on capabilities and local content.

The information may be inspected and a certified copy of the extract from any document may be requested and provided on payment of a fee. At the time of writing, the Commission is yet to establish a Common Qualification System.

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28 Indigenous Tanzanian bank is defined as a bank that has 100 per cent or majority Tanzanian ownership.
V OPERATIONS, PROCESSING AND SALE OF MINERALS

i Processing and operations
Under the provisions of the Mining Act, a mineral right-holder undertaking mining activities is required to construct secure storage facilities on site for storing extracted raw minerals. Stored minerals can be kept in a storage facility for a maximum of five days, after which they must be moved to the Government Minerals Warehouse to wait beneficiation or, if the government so permits, export. Beneficiation and processing of minerals is governed by the Mining (Mineral Beneficiation) Regulations, which provide for application and granting of a processing, smelting or refining licence. The licence holder has the right to process, smelt or refine minerals and for that purpose is allowed to buy, acquire, sell and dispose of minerals, including by exporting them. The licence holder is mandatorily required to employ and train Tanzanians and implement a succession plan on expatriate employees. Further, the holder must prepare and implement a plan that ensures procurement of goods and services that are available in Tanzania.

ii Sale, import and export of extracted or processed minerals
Among the rights granted to holders of mineral rights for conducting mining activities is the right to dispose of minerals, including the right to export minerals. However, the disposal of minerals comes with conditions. As stated above, mineral right-holders can only keep minerals for five days, after which they have to be moved to a government warehouse. Under the provisions of the Mining (Minerals and Mineral Concentrate Trading) Regulations of 2018, holders of mining and special mining licences, holders of processing, refining and smelting licences and holders of dealer’s licences may export or import minerals subject to obtaining an export or import permit issued by an authorised person. Import and export permits are issued upon receipt of evidence that the applicable royalties have been paid. In addition, non-residents who have purchased minerals from an authorised miner or a licensed dealer may upon application be issued with special permits for exporting acquired minerals, should they wish to. However, special permits cannot be issued to the same person more than twice in any one year.

iii Foreign investment
There are no restrictions on repatriating capital. Under the terms of the Foreign Exchange Act, any person who is a resident of Tanzania may for purposes other than general travel remit through commercial banks such an amount of foreign currency as shall be prescribed by the bank from time to time for a specified purpose. Any person maintaining foreign currency in a Tanzanian bank account may at any time and without restriction draw any amount of foreign currency for the purpose of making payment within or outside Tanzania.

Foreign investment in domestic mining companies or mining projects is not generally subject to government review. Further, foreign loans to residents are permitted unless the repayment term exceeds 365 days. However, the loan must be approved by and registered

29 Government Notice No. 5 of 10 January 2018.
30 Sections 46 and 51 of the Mining Act.
31 Under the Mining Act, authorised persons include the Commissioner for Minerals, the Chief Inspector of Mines or such officers as may be appointed by the Commission.
with the Bank of Tanzania. Among other things, the bank will consider the relevant debt instruments to determine whether the interest rate reflects the prevailing market conditions for the relevant currency of borrowing, and the loan’s term is tied to the ability of the project to meet its repayment obligations.

Foreign investments are protected through recognition and protection of private property by the Tanzania Investment Act and the Constitution of the United Republic of Tanzania of 1977.

VI CHARGES

i Royalties
Royalties are payable on the basis of a percentage calculated according to the gross value of minerals but one-third of the payment is to be made in kind by depositing refined minerals equivalent to the ascertained royalty into the National Gold and Gemstone Reserve. The process entails all extracted minerals being sorted and valued in the presence of a mines resident officer, a representative of the Tanzania Revenue Authority and a representative of the relevant responsible state organ. The report made after valuation will be used to calculate the royalties payable to the government. Note that the government retains the right to reject a valuation on account of deep negative volatility and, in such a case, it may purchase minerals at the lowest value ascertained.

The percentage of royalty payable for metallic minerals, gemstones and diamonds is 6 per cent. The royalty percentage for uranium is 5 per cent, that of gems is 1 per cent and that of building materials, salt and industrial minerals is 3 per cent.

ii Taxes
The Income Tax Act contains specific provisions that apply to the mining industry. Although mining companies continue to be subject to 30 per cent corporate income tax on their taxable profits, a new income tax regime has introduced ring-fencing requirements along the value chain and changes with regard to both deduction and depreciation. There is no limit on the carry-forward period for tax losses. However, losses from one mining licence area can only be offset against profits from the same mining licence area. Gains from the disposal of investments in Tanzania, either directly or indirectly, are subject to income tax if the investments fall within the source rules, and, in such a case, the gain will be taxed at a rate of 30 per cent. An alternative minimum tax applies at a rate of 0.3 per cent to the turnover of companies with perpetual unrelieved tax losses for the current and preceding two income years.

Mining companies are required to withhold tax when making payments in relation to dividends (10 per cent), interest (15 per cent), service fees provided by non-residents (15 per cent), and local professional and consultancy services (5 per cent).

The VAT rate is 18 per cent and there is no reduced rate. Mining companies enjoy VAT exemption on the import of goods for exploration or prospecting activities to the extent that those goods are eligible for relief from customs duties under the East African Customs Management Act. There is also a restriction on input VAT credit where raw minerals are exported without the addition of local value.

33 The term gross value is defined as ‘the market value of minerals as determined through valuation’.
iii  Duties

Tanzania is a member of both the East African Community and the Southern African Development Community. If goods are subject to a lower rate of duty from either of these trading blocs, the lower duty rate applies until such time as the trading arrangements between the trading blocs are harmonised. Goods eligible for relief are specified under the East African Customs Management Act (when imported by a registered and licensed explorer or prospector for exclusive use in mineral exploration or prospecting activities). All other imported goods are subject to either 10 per cent (on spare parts and semi-processed goods) or 25 per cent (on finished goods) on all other imports. A 1.5 per cent Railway Development Levy applies to the freight on board value of imported goods. The levy is not applicable to goods in transit or imported goods that qualify for relief or exemption under the East African Community Customs Management Act 2004.

iv  Other fees

Mineral right-holders are required to pay annual rental fees with respect to the mining areas on which the rights are granted. The fees are charged for each square kilometre and vary depending on the type of mineral rights that a person holds. Rental fees for prospecting licences range from US$100 to US$200 depending on the category of minerals for which the prospecting licence is issued. The fees are US$5,000 for a special mining licence, US$3,000 for a mining licence for metallic minerals, energy minerals, gemstones or kimberlitic diamonds and US$2,000 for building materials and industrial minerals.

VII  OUTLOOK AND TRENDS

Since mid 2017, the government of the United Republic of Tanzania has embarked on significant changes to the mining regulatory framework. These range from revising the licensing regime whereby the Commission is responsible for issuing mineral rights subject to the approval of the Cabinet, meaning that the central government is now directly responsible for the issuance of mineral rights. Agreements relating to mining activities must be governed by Tanzanian law and be subject to arbitration in Tanzania. The government also retains the right to review agreements with mining companies. Other changes relate to the introduction of local content requirements, which ensure the participation of local entities in mining activities.
I OVERVIEW

i Government policy towards mining and international investment

The US government values the mining industry for its production of domestic raw materials and strategic minerals, and high-wage jobs, despite the United States’ 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 be subject to 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 has been 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.

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 Peabody Energy Corporation (coal), US Steel (iron ore) and Freeport-McMoRan.

1 Karol L Kahalley is of counsel and Erica K Nannini is an associate at Holland & Hart.
(copper). Many other operations are owned by foreign companies, including Barrick Gold’s and Newmont Goldcorp’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 addresses 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

Notable developments in the legal and regulatory landscape for the US mining industry include President Trump’s efforts to repeal and replace the prior administration’s ‘Clean Power Plan’ with the ‘Affordable Clean Energy’ (ACE) rule, which the US Environmental Protection Agency (EPA) finalised in June 2019. The ACE rule directs US states to take the initiative as to how to regulate power plant emissions, but establishes emissions guidelines for states to limit carbon dioxide at coal-fired power plants. This, along with the Trump administration’s recent decision to lift a moratorium on coal sales from public lands, could result in a long-range increase in coal mining activity. The Trump administration has continued efforts to define critical minerals, which began in 2017 through Executive Order 13807 in an effort to reduce US vulnerability to critical mineral supply disruptions. As part of this effort, the US Department of Commerce recently released a report entitled ‘A Federal Strategy to Ensure Secure and Reliable Supplies of Critical Minerals’, which outlines the following goals: improve the ability of the advanced technology, industrial and defence manufacturing sectors that use critical minerals to adapt to emerging mineral criticality issues; reduce risks for US businesses that rely on critical minerals; create a favourable US business climate for production facilities at different stages of critical mineral supply chains; and support the economic security and national defence of the United States. Additionally, the EPA and Army Corps of Engineers have proposed a revised waters of the US (WOTUS) definition pursuant to the prior administration’s 2015 WOTUS rule, which dictates the waters that are federally regulated under the Clean Water Act. Renewed efforts to impose federal royalties on both new and established US hard rock mining operations were introduced in the legislature. The United States also saw an increase in tariffs imposed on significant Chinese imports in 2018 and early 2019, and, in turn, China imposed increased tariffs on US exports, with many mineral commodities subject to these increases. However, recent negotiations suggest that the increased tariffs may be reduced or lifted. President Trump’s imposition of 25 per cent tariffs on imported steel and 10 per cent on imported aluminium has seen winners and losers with a temporary boost for domestic producers, but supply chain disruptions and increased prices for metals consumers.

Effective 1 July 2019, the Bureau of Land Management (BLM) issued a final rule to adjust location and maintenance fees for federal unpatented mining claims, mill sites, and tunnel sites. Under the new rule, for new claims and sites located on or after 1 September 2019, location fees will increase from US$37 to US$40. For maintenance year 2020, the annual claim maintenance fees will increase from US$155 to US$165 per claim for each lode claim and US$165 for each 20 acres or portion thereof for each placer claim. Mining claimants
who timely paid claim maintenance fees for the 2020 assessment year, relying on the fee in
effect immediately before the adjustment was made, will be given an opportunity to cure any
payment deficiencies without penalty upon notice from the BLM. Locators also will have an
opportunity to cure deficient location fee payments until 31 December 2019.

The US Geological Survey reports that, in 2018, US mines produced an estimated
US$82.2 billion raw mineral materials – up 3 per cent from the revised total of US$79.7
billion in 2017. The US$82.2 billion worth of nonfuel minerals produced by US mines
in 2018 is made up of industrial minerals, including natural aggregates and metals. The
estimated value of US industrial minerals production in 2018 was US$56.3 billion – up
about 7 per cent from the revised value in 2017. However, the United States experienced
a decrease in the value of metal production in 2018, with an estimated value of US$25.9
billion – 4 per cent less than in 2017. The decrease is attributed to lower average metal prices
and lower production of many metals. The primary contributors to the total value of metal
mine production in 2018 were gold, copper, iron ore and zinc. Up from 11 US states in
2017, 12 US states individually produced more than US$2 billion worth of non-fuel mineral
commodities in 2018. These states were Nevada, Arizona, Texas, California, Minnesota,

Consolidations continue to define the mining industry as evidenced by the recent
activity among two major US precious metals producers. After Barrick Gold Corp.’s
acquisition of Randgold Resources Ltd and Newmont Mining Corp’s acquisition of Goldcorp
Inc., the resulting companies subsequently entered into a historic joint venture, combining
large portions of their US Nevada assets in what is touted to result in the world’s largest
gold-producing operations. The joint venture, owned 38.5 per cent by Newmont Goldcorp
and 61.3 per cent by Barrick Gold with Barrick as operator, emerged after Newmont rejected
Barrick’s takeover bid.

II LEGAL FRAMEWORK

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 pre-empting
conflicting state and local laws. In many legal areas, the different authorities have concurrent
jurisdiction, requiring regulated entities to comply with several levels of regulation. Mining
on federal lands, for example, is generally subject to many 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).

2 See, e.g., 43 CFR Sections 3000.0-5 to 3936.40 (Bureau of Land Management minerals management
regulations).
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 the 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-metals (asphaltum, bog iron, cement, diamonds, feldspar, granite, 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:

- 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
- 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) 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’ and provides that the FLPMA shall not impair GML rights, including, but not limited to, rights of ingress and egress. However, the FLPMA also provides that mining authorisations must not ‘result in unnecessary or undue degradation of public lands’. More generally, the BLM and the USFS have promulgated extensive regulations governing mineral development on public lands.

The National Environmental Policy Act (NEPA) 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 examining environmental impacts. The NEPA process will involve consideration of other substantive environmental statutes.

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3 30 USC Sections 21 to 54 and Sections 611 to 615, as amended.
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 to 3936.40; 36 CFR Sections 228.1 to 228.116.
9 42 USC Sections 4321 to 4370m-12.
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. On 31 October 2018, the SEC adopted amendments to modernise the property disclosure requirements for mining registrants that more closely align with current industry and global regulatory practices and standards, including the committee for Reserves International Reporting Standards. Under the new rules, Guide 7 has been replaced with a new subpart of Regulation S-K that, among other new requirements aimed at protecting investors, requires mining registrants to disclose both mineral resources and mineral reserves and to support all disclosures with a technical report prepared by qualified persons with mining expertise. The SEC adopted a two-year transition period with the initial compliance year beginning on or after 1 January 2021, but registrants may voluntarily comply immediately.

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 for which 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 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 notices 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
additional requirements for mineral patents (as mentioned above, there is a moratorium on patents).

The Mineral Lands Leasing Act of 1920 provides US citizens with 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:

- pay rent;
- file an exploration plan;
- pay royalties based on production; or
- furnish a bond covering closure and reclamation costs.

These permits and leases are often subject to conditions and stipulations directed at protecting resource values.

### Additional permits and licences

Additional permits and licences required to conduct mining activities may include:

- a mine plan of operations;
- a reclamation plan and permits;
- air quality permits;
- water pollution permits (pollutant discharge elimination system permit, storm water pollution prevention plan, spill prevention control and countermeasure plan);
- dam safety permits;
- artificial pond permits;
- hazardous waste materials storage and transfer permits;
- well-drilling permits;
- road use and access authorisations;
- right-of-way authorisations; and
- water rights.

### Closure and remediation of mining projects

The FLPMA requires the BLM and the USFS to prevent ‘unnecessary or undue degradation’ of public lands. 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. Plan-level operations require a plan of operations that includes a detailed reclamation plan. BLM reclamation standards include saving topsoil for reshaping disturbed areas, erosion and water control measures, toxic materials measures, reshaping and revegetation where possible.
reasonably practicable, and rehabilitation of fish and wildlife habitat.¹⁴ Mining in BLM wilderness study areas additionally requires that surface disturbances be ‘reclaimed to the point of being substantially unnoticeable in the area as a whole’.

Mining activities on national forest lands must be conducted so as to minimise adverse environmental impacts on National Forest System surface resources.¹⁵ Operators must take measures that will ‘prevent or control on-site and off-site damage to the environment 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.¹⁷

State laws may also include closure and reclamation requirements, including, for example, water and air pollution controls, recontouring and revegetation, fish and wildlife protection 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 environmental assessment 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, generally the agency 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,¹⁸ the Clean Water Act,¹⁹ and the Endangered Species Act.²⁰ 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 Water Act regulates pollutant discharges into the ‘waters of the United States, including the territorial seas’.²¹ The Clean Air Act and the Clean Water Act are administered by the Environmental Protection Agency, the 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.

¹⁴ 43 CFR Section 3809.420.
¹⁵ 43 CFR Section 3802.0-5(d).
¹⁶ 36 CFR Section 228.1.
¹⁷ 36 CFR Section 228.8(g).
¹⁸ 42 USC Sections 7401 to 7671.
¹⁹ 33 USC Sections 1251 to 1388.
²⁰ 16 USC Sections 1531 to 1544.
²¹ 33 USC Section 1311(a); 33 USC Section 1362 (defining ‘navigable waters’).
The Federal Mine Safety and Health Act requires the Mine Safety and Health Administration (MSHA) to inspect all mines each year to ensure safe and healthy work environments. The MSHA is prohibited from giving advance notice of an inspection and may enter mine property without a warrant. 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 protection, illumination and others. 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 a mine.

Currently, there are no specific mining sustainable development regulations. However, issues of socioeconomic impact, cumulative effects and environmental impact often are addressed during a NEPA review.

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 an environmental analysis. Where analysis is required by different agencies, it may be possible to pursue an agreement between 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 more than a year to complete. Larger project reviews usually take even 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.

iii Third-party rights

The United States contain 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) and the Native American Graves Protection and Repatriation Act (NAGPRA). NEPA analysis will include social and cultural impacts and may require tribal

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22 30 USC Sections 801 to 966.
23 30 USC Section 813.
24 id.
25 See, e.g., 30 CFR Sections 56.1 to 56.20014 (safety and health standards for surface metal and non-metal mines).
26 30 CFR Sections 5.10 to 36.50, 46.1 to 49.60, 50.10.
27 54 USC Sections 300101 to 307108.
28 25 USC Sections 3001 to 3013.
consultation. Section 106 of the NHPA requires federal agencies to draw up inventories of historic properties on federal lands and lands subject to federal permitting, and to consult with interested parties and the State Historic Preservation Office.\(^{29}\) NAGPRA imposes procedural requirements that apply to inadvertent discovery and intentional excavation of tribal graves and cultural items on federal or tribal lands.

### 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 imports of 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.\(^{30}\)

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.\(^{31}\)

#### 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

As discussed above, the GML and the MLA require that mining rights acquired under those statutes be held by citizens of the United States, or associations of such citizens, or a corporation organised under the laws of the United States, or of any state or territory thereof. Under the MLA, citizens of another country, the laws, customs, or regulations of which deny similar or like privileges to citizens or corporations of this country, shall not by stock

\(^{29}\) 54 USC Section 306108.

\(^{30}\) 15 CFR Sections 730.1, 774 Supp. No. 1.

\(^{31}\) 8 USC Section 1153(b)(3)(C).
ownership, stock holding, or stock control, own any interest in any lease acquired under the provisions of this chapter.32 Due to the statutory language and BLM’s implementing regulations, a domestic corporation – not a limited liability company, master limited partnership or other association – must appear in the ownership chain between the mineral lessee and the alien company or person. While the GML does not specifically mention corporate eligibility, the requirement of proof of citizenship refers to a corporation organised under the laws of the United States or any State or Territory thereof and an association of persons unincorporated. These requirements have generally been interpreted to mean that for a corporation, it is the jurisdiction of formation that determines its citizenship, but for unincorporated associations such as partnerships and limited liability companies the entity is disregarded, and the association’s members need to satisfy the citizenship requirement. The interest in mining claims by a person or entity not qualified by citizenship is voidable by the United States, rather than void, and such defects may be corrected by conveying the interest to a qualified holder.

Most state governments do not prohibit foreign ownership of real property as long as such entities properly register to do business in the state. However, the laws of the state jurisdictions in which the property is located should be reviewed before an alien company acquires real property in the United States or a company that owns real property.

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 The President may exercise this authority if he finds that the foreign interest might take action that impairs 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 others 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 Rental and holding fees

Locatable minerals claimants must pay an annual maintenance fee of US$165 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.

32 30 USC Section 181; and see, e.g., 43 CFR Sections 3472.1-1 – 3472.1-2 for coal.
33 50 USC Section 4565.
34 50 USC Section 4565(d)(4).
35 43 CFR Sections 3834.11(a), 3830.21.
36 43 CFR Section 3836.15.
Leasable minerals permittees and lessees must pay annual rent based on acreage. The rental rates differ by mineral and some rates increase over time.\textsuperscript{37} Prospecting permits automatically terminate if rent is not paid on time; the BLM will notify late lessees that they have 30 days to pay.\textsuperscript{38}

### iii Tax considerations

There are no federal taxes specific to mineral 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 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.

### iv Duties

There are no federal duties on minerals extraction.

### v Indemnification

State laws may also include closure and reclamation requirements, including water and air pollution controls, recontouring and revegetation, fish and wildlife protection, 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

The US minerals industry is showing an overall positive trend in production of raw mineral materials, despite the decrease in the value of metal production described herein. The US Geological Survey reported select mine reopenings and found that increased construction activity resulted in increased prices and production of some industrial minerals, especially those used in infrastructure, oil and gas drilling operations, and construction. Despite Trump administration efforts to boost coal mining, the US Energy Information Administration projects that US coal production will decline by 72 million short tons – a 9 per cent decrease – in 2019, and that the decline will continue through 2020. The decline is attributed to the projection that both exports and domestic consumption are expected to weaken more than they already have, with US coal consumption reaching a 39-year low of 687 million short tons.

\textsuperscript{37} 43 CFR Section 3504.15.
\textsuperscript{38} 43 CFR Section 3504.17.
tons in 2018. Decreasing consumption reflects increases in the share of electricity generation from other energy sources, particularly from natural gas and renewables. As a result, US coal companies likely will continue to look to foreign markets such as India and China.

The minerals industry will continue to experience volatility related to tariffs and trade policies pursued by the Trump administration. Although unsuccessful to date, members of the US Congress routinely introduce legislation to overhaul the GML to impose federal royalties on locatable minerals and to transform the location system to a leasing system. After a year marked by Newmont’s acquisition of Goldcorp, Barrick’s acquisition of Randgold, and the resulting companies’ historic joint venture combination of US assets, the trend toward consolidations to achieve efficiencies and synergies in the mining industry is likely to continue.
Chapter 20

BRAZIL

Carlos Vilhena and Adriano Drummond Cançado Trindade

I INTRODUCTION

The mining sector is a significant part of the Brazilian economy and accounts for a large proportion of exports. According to the Brazilian Mining Association (IBRAM), national mineral production in 2018 was US$34 billion, which represented a US$2 billion increase in relation to the previous year. IBRAM further reports that mineral exports in 2018 reached approximately US$30 billion. Iron ore was the most exported mineral substance in 2018, representing approximately 68 per cent of overall mineral exports, followed by gold (9 per cent), copper (9 per cent) and niobium (7 per cent). According to the US Geological Survey, in 2018, Brazil was the largest world producer of niobium (88.2 per cent), iron ore (19.6 per cent), gold (9.5 per cent), bauxite (8.1 per cent), vanadium (8.6 per cent) and manganese (6.6 per cent).

Despite these 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 Ferbas), 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 the Australian Securities Exchange. Junior 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 more than 30 companies with mining assets in Brazil are listed on the TSX or TSXV, with particular reference to Nexa Resources, part of the Votorantim Group with more than 60 years of existence and several operations in Brazil. 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 experienced in the mining sector worldwide during the past few years, although it has now started to recover. The second reason is attributable to the political crisis that led to President Rousseff being impeached in 2016 and replaced by President Temer, whose term of office ended in December 2018. President Bolsonaro took office on 1 January 2019, for a four-year term. He has adopted

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1 Carlos Vilhena is a partner and Adriano Drummond Cançado Trindade is a counsel at Pinheiro Neto Advogados.
a pro-business approach and already implemented some measures to favour businesses in general and reduce red tape. The third reason is the lack of culture within the Brazilian market to invest in stock exchanges in the mining industry.

These factors might explain why investors much prefer to invest or float on the TSX. In the past few years, the number of public offerings in the Brazilian market has reduced significantly, although some successful listings – such as the Nexa Resources one – showed that the market is turning its eyes towards Brazil again. That example confirms that companies with mining assets in Brazil are becoming interested again in listing in traditional jurisdictions such as Toronto, and this change in market behaviour may be seen as the start of a new 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 and Exchange Commission of Brazil.

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.

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, at a certain point there were studies to create benefits so that the shareholders of listed exploration companies could deduct exploration-qualified expenditure for tax purposes, but it is still not clear (as at the time of writing this article) if the new government will pursue such initiatives.

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 part 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 2018, in the amount of US$61.2 billion. In terms of the overall investment in Latin America, Brazil was the main destination for more than 41 per cent of investment in general.

Foreign investors are not subject to any legal restrictions on acquiring stakes in Brazilian mining companies in general, although the government interprets the restrictions on non-Brazilian ownership as applying to border areas (i.e., areas within a 150km-wide strip of land parallel to national borders), as in other countries of the region. Hence, for those companies based in or that have mining assets in a border area, non-Brazilian equity interest is limited to 49 per cent, directly or indirectly.

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. 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 had 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. The BNDES teamed up with the Funding Authority for Studies and Projects (Finep) to financially support investment in projects that deal with scientific or technological development. This initiative is known as Inova Mineral and, following a first successful round of projects that were financed under this programme, the second round took place in 2018 for which US$460 million have been earmarked. The new government of President Bolsonaro, who took office in 2019, has been reviewing the role of BNDES and the various financing programmes supported by the bank, so as at the time of writing this article, it had not been determined what will the conditions to financing mining activities.

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 political turmoil. Banks not based in Brazil may also provide funding for mining projects and usually do so through pre-export finance mechanisms that ensure more favourable taxation.

**Market overview**

Investors in the mining sector are both Brazilian nationals and non-Brazilians. The number of Brazilian investors 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/Nexa. In addition, private equity funds are frequently seen in the market, as are 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, or companies that seek to secure the supply of raw materials for their industries.

**Structural considerations**

Given the economic downturn and the market conditions within the mining sector (which was also influenced by the political situation), alternative methods of access to funding have been developed and have become more popular.

Royalty transactions are common and there are now 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 the 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. This situation may be remedied by the
newly created National Mining Agency (ANM – further details below), which replaced the National Department of Mineral Production (DNPM) and has the ability of enacting further streamlined regulations.

During the past few years, there have also been a number of streaming transactions in Brazil. Streaming arrangements are contracts for the regular 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 a loan.

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 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 for 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 obligations for reporting to the 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 Canada’s National Instrument 43-101 – Standards of Disclosure for Mineral Projects or standards set by the JORC Code.2 To bridge that gap, 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.

In June 2018, the government enacted a new Regulation to the Brazilian Mining Code as part of a reform of the sector to encourage investment. One of the changes made has enabled the possibility of adopting international standards for reporting and abiding by best international practices, which allows room for more market-oriented reporting requirements. This will be subject to a further regulation to be enacted by the newly created ANM.

In the environmental field, the accidents involving the Samarco tailings dam in November 2015 and the Brumadinho tailings dam in January 2019 resulted 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 on tailings dams have already been issued by the DNPM, which contain more requirements for those companies that operate such dams. Dams that use the upstream raising methods are banned and need to be decommissioned over

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2 The Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves.
a few years. Mining companies also need to remove most of premises located downstream tailings dams. In addition, there is a number of bills under consideration at the National Congress and state legislature, which adopt more stringent rules and impose obligations such as environmental bonds and insurance for environmental damages.

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 a liability, the general practice 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. The implementation of a National Monetary Council regulation involving the liability of financial institutions started in 2015. This regulation requires each financial institution to put in place a social and environmental policy. This may result in increasing the possibility of financial institutions facing liability claims 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 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 provisions for tax exemption once a company’s taxable profit has been ascertained.

Moreover, 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 taxable profits, which can result in deferral of the utilisation of the losses in the event that the legal entity sustains 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 base for IRPJ’s calculation is determined by the application of predetermined rates (which 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’s gross income cannot be more than 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) are (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. These rates may reach 25 per cent for income paid to a person residing in a jurisdiction deemed to be 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. As regards countries and regimes aligned with international standards of fiscal transparency, in accordance with rules established by the Brazilian tax authorities (on a par with standards set by the Organisation for Economic Co-operation and Development), the 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).

Federal taxes — PIS (Programme of Social Integration) and COFINS (Contribution for the Financing of Social Security) — 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 valued added tax levied by the state 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). ICMS tax exemptions, breaks and incentives are granted or cancelled via agreements entered into between Brazilian states; however, 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. ISS is levied by the local municipality at a rate of between 2 per cent and 5 per cent on the service value.

Mining activities are subject to a statutory royalty (CFEM) calculated based on the revenue arising from the sale of the mineral product. The rate varies depending on the substance and, in most cases, the applicable rate is 2 per cent. The highest rate currently is applicable to iron ore, at 3.5 per cent (although it may be reduced to 2 per cent for marginal projects). The rate for gold is 1.5 per cent.

Allowable deductions are restricted only to those taxes that are levied on the sale of products. External transportation and insurance costs are no longer deductible, which increases significantly the CFEM payable by those producers that have logistics associated with their mining business. For those companies that use a mineral substance in their industrial process to create an industrialised product, the statutory royalty will be calculated based on current market prices or a reference price, both to be defined by the ANM.

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3 Financial Compensation for the Exploitation of Mineral Resources.
In addition, three states (Minas Gerais, Pará and Amapá) have created inspection fees. A close review of these state fees 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 a 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 for which there is no equivalent in the domestic market that will be used in the production of goods for export.

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

The new administration of President Bolsonaro is the most relevant development for business in general in Brazil. President Bolsonaro presents a more liberal agenda for business to ease governmental procedures, reduce red tape and increase economic activity. He also sent to Congress a long-expected pensions reform, which is key to the Brazilian economy. At the time of writing, the pensions reform has been approved in the first ballot by the House of Representatives and, after the second approval, it will be reviewed by the Senate. In terms of mining policy, President Bolsonaro may propose amendments to legislation in order to allow exploration and mining in areas that currently cannot host such activities, such as indigenous lands.

In addition to the new administration, the relevant developments specific to the mining sector in the past year were the creation of the ANM to replace DNPM and the enactment of the Regulations to the Mining Code. By creating a new standard of agency for the mining sector, the government places the mining industry within the same management model that has been applied to the oil and gas, power and telecommunications sectors for two decades. The ANM was actually installed in December 2018 with 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 agency follows 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. This practice is already being implemented: 12 public consultations have been organised to discuss proposed regulatory changes, and board meetings take place monthly. It may bring significant gains for the industry, but the key is that the ANM is not just a change of name, but an agency that will be endowed with budgetary funds to implement the new administrative framework and meet the purposes expected from a regulatory body. These administrative measures still need to be implemented.

The second important development was the enactment of the new Regulations of the Mining Code, which came into force simultaneously to the implementation of the ANM. Among the favourable measures pursuant to the new Regulations is the possibility of
Continuing exploration after submission of the final exploration report, and the adoption of internationally employed resource and reserve reporting standards are useful measures to deal with the transition from exploration to mining. Further developments on important matters are still required and may come up in the form of regulations to be issued by the ANM, such as measures to facilitate mining finance, updating the Mining Cadastre and the registration of liens against title, among others. The new Regulations to the Mining Code have been an important step towards the development of mining, but further steps that could actually benefit the investor and the mining sector are still required.
Chapter 21

CANADA

Erik Richer La Flèche, David Massé and Jennifer Honeyman

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 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 United States 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 northern territories. While there have been 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 United States. Given the

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importance of 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 northern 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 of raising 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, the company becomes a ‘reporting issuer’ under applicable securities laws and is subject to continuous disclosure requirements.
The OSC 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 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 discussions and analyses, 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 to the reporting issuer any trades in the reporting issuer’s securities, and interests in related financial instruments and changes in economic exposure, 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 that is ‘material’ to the 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 fossilised 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 that is 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 that is material to the issuer and 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 the 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 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 an 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:

a) the issuer expresses the estimate of the quantity and grade in terms of ranges for both quantity and grade;
b) the issuer explains how the estimate was made; and
c) 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 a 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,\(^2\) 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.

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\(^2\) Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves.
Qualified persons

NI 43-101 introduced the requirement that all disclosures of a scientific or technical nature (including resources and reserves) made 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 a 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 the 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 the 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 one 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 judgement regarding preparation of the technical report’.

Technical reports

Technical reports are of fundamental importance, as the information they contain will form the basis of the whole 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 (1) a first-time disclosure of a preliminary assessment, mineral reserves or mineral resources on a property material to the issuer and where the disclosure constitutes a material change in respect of the affairs of the issuer, or (2) a change in a preliminary assessment, mineral reserves or mineral resources on a property material to the issuer and where the 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 the information is presented and describes 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 the disclosure in a press release or other written disclosure if the 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 the 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 the 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. All technical reports are required to follow exactly 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 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 a 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 a 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, legal counsel who are experienced regarding NI 43-101 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 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 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-SOEs 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.3

**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, and 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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3 Additional information relating to the Investment Canada Act and foreign investment restrictions in Canada is provided in Section V of the Canada chapter in Part I: Mining of this book.
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, 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 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 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:

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 a 20-year operating loss carry-forward period; and
e 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 expenditure on Canadian exploration expenses within a specific period, and the company will renounce those 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 (1) 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 that year, and (2) restrictions on the use 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 United States) 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 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 affect 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, which 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.
INTRODUCTION

London is a leading financial market for international mining companies seeking to access the equity capital markets. London Stock Exchange’s (LSE) 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. 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 2019, there were 51 mining companies admitted to trading on the Main Market and 106 mining companies admitted to trading on the AIM market.\(^2\)

New admissions

In the 12-month period from 30 June 2018 to 30 June 2019, seven new mining companies were admitted to the Main Market of the London Stock Exchange – Resolute Mining Limited, Pure Gold Mining Inc., Ferro-Alloy Resources Limited, MOD Resources Limited, Joint Stock Company National Atomic Company Kazatomprom, Kavango Resources plc and Danakali Limited.

Joint Stock Company National Atomic Company Kazatomprom is a Kazakhstani uranium producing company representing circa one-fifth of the global primary production. This was a major event due to the size of the company and its holdings. All the company’s 13 mining assets are located in Kazakhstan. Sovereign Wealth Fund Samruk-Kazyna sold 15 per cent of its shareholding in the flotation. The company is dual listed on the Astana International Financial Centre and the LSE. The opening price market capitalisation was £2.410 billion and raised approximately £311.26 million in the process.

Resolute Mining Limited is an Australian gold mining company with ownership of three mines, namely the Syana Gold Mine in Mali, the Ravenswood Gold Mine in Australia and the Bibiani Gold Mine in Ghana. The company is dual listed on the Australian Securities Exchanges (ASX) and the LSE. The opening price market capitalisation was approximately £515.5 million.

Pure Gold Mining Inc. is a Canadian gold mining development company with ownership of the Madsen Red Lake Gold Mine in Canada. The company is targeting the

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1 Kate Ball-Dodd is a partner at Mayer Brown.
second half of 2020 for first production. The company is dual listed on the Toronto Stock Exchange (TSX) and the LSE. The opening price market capitalisation was approximately £84.33 million.

Ferro-Alloy Resources Limited is a Guernsey vanadium mining and mineral processing company with operations in Southern Kazakhstan, notably the Balasausqandiq Vanadium Project. The company is dual listed on the Kazakhstan Stock Exchange and the LSE. The opening price market capitalisation was £200.31 million and raised approximately £5.26 million in the process.

MOD Resources Limited is an Australian copper exploration and development company focused on the central and western Kalahari Copper Belt in Botswana, notably with its wholly owned T3 Copper Project. The company is dual listed on the ASX and the LSE. The opening price market capitalisation was approximately £53.44 million.

Kavango Resources plc is a UK mining group focusing on mineral deposits in Botswana. The opening price market capitalisation was £4.36 million and raised approximately £1.5 million in the process.

Danakali Limited is an Australian potash company focused on the development of the Colluli Potash Project in Eritrea. The company is dual listed on the ASX and the LSE. The opening price market capitalisation was approximately £118.88 million.

### Secondary offerings

The largest Main Market secondary offering by a mining company in the period from 30 June 2018 to 30 June 2019 was by SolGold Plc, an Australian gold and copper mining company that is also listed on the Toronto Stock Exchange. SolGold raised approximately £45 million through a private placement.

During the same period, the largest secondary offering by a mining company on AIM was by Yellow Cake Plc, a specialist company established by Bacchus Capital Advisers operating in the uranium sector with a view to holding physical uranium for the long-term. The total proceeds of the placing was approximately £25 million. Interestingly, following strong investor demand, Yellow Cake plc agreed with the joint bookrunners to increase the size of the placing to £25.9 million from the £22.9 million originally proposed.

### CAPITAL RAISING

#### 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 Prospectus Regulation, such as the Main Market, or to AIM, which has a more flexible regulatory structure.

#### Official List

To be admitted to the Main Market, a company must first apply to the UK’s Financial Conduct Authority (FCA), to join the Official List.

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**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 Prospectus Regulation. A premium listing denotes a listing that meets more stringent criteria that are not required by the Prospectus Regulation but are seen as providing additional investor protections. A mineral company may apply for either a premium or a standard listing provided it complies with the relevant admission requirements.

**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 United Kingdom (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. Although the FCA 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 FCA that it has sufficient working capital to meet the requirements of the business for the

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4 Listing Rules (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.
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 FCA 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. If 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 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 an 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.

**Controlling shareholders and relationship agreements**

When 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.

A controlling shareholder is defined as any person who exercises or controls (on their own or with any person with whom they are acting in concert) 30 per cent or more of the voting rights.

The relationship agreement must include provisions to ensure that the controlling shareholder complies with the following undertakings:

- 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;
- 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

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8 LR 6.1.16R.
9 LR 6.1.19R.
10 LR 6.1.9.
11 LR 6.1.8.
12 LR 6.1.4B.
13 LR 6.1.2A.
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 be able to demonstrate that they will be carrying on an independent business as their main activity. 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;
   - 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

f. 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.

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. 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 FCA, which will assess whether the document complies with the requirements set out in the Prospectus Regulation.

14 LR 6.1.4.
15 LR 6.1.4A.
16 Section 87A(2), Financial Services and Markets Act 2000.
supplemented by the Delegated Regulation\textsuperscript{17}. A prospectus must not be published unless it is approved by the FCA.\textsuperscript{18} 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.\textsuperscript{19}

**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 FCA 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.\textsuperscript{20}

**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 Prospectus Directive, with revised recommendations as to the content requirements for prospectuses published by mineral companies.\textsuperscript{21} When reviewing a prospectus, the FCA will take into account these recommendations (to the extent applicable), which in effect supplement the requirements of the LR and the Prospectus Regulation Rules (PRR).

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):

\begin{itemize}
  \item [a] details of mineral resources and, where applicable, reserves and exploration results and prospects;
  \item [b] anticipated mine life and exploration potential or similar duration of commercial activity in extracting reserves;
  \item [c] 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;
\end{itemize}

\begin{itemize}
  \item [18] A company that has its home Member State in a Member State other than the United Kingdom may also have a prospectus approved by the competent authority in that jurisdiction and seek to have the prospectus ‘passported’ into the United Kingdom pursuant to Articles 24 to 26 of the Prospectus Regulation.
  \item [19] PRR 5.3.
  \item [20] LR 6.1.10.
\end{itemize}
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

e 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 if 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 European Union that are 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 depositary, 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 depository 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 Regulation. 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 Rule Book.

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.22

**AIM**

AIM is the London Stock Exchange’s market for smaller and growing companies. Owing to its status as an ‘exchange regulated market’ for the purposes of the Prospectus Regulation, 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.23

There are also no express minimum requirements regarding 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.

**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.24 To be eligible for fast-track admission, a company must have had its securities traded on an AIM designated market25 for at least the previous 18 months, and should have substantially traded in the same form during this period. Examples of mining companies who have used the fast-track process

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22 Guidance Note 2 to Rule 2.1 of the High Growth Segment Rule Book.
23 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.
24 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.
25 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 FCA Official List.
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.  

In view of the less onerous disclosure requirements, and as the admission document is reviewed and approved by the company’s nomad rather than the FCA, 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 Prospectus Regulation, if 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 FCA unless it can avail of an applicable exemption. If 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).

**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).27

The Guidance Note states that nomads are expected to conduct full due diligence on mining companies seeking admission to AIM, including 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, the company’s title to its assets and the validity of any licences.

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26 Schedule 2(k), AIM Rules for Companies.
27 AIM Guidance Note for Mining, Oil and Gas Companies (June 2009, as updated on 21 July 2019).
**Competent persons report**

A mining company seeking admission to AIM is required to include in its admission document a CPR on all 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.

When 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-ins for new mining companies**

The Guidance Note and the AIM Rules require that, if 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.

**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 (due 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. Losses arising from 1 April 2017 can be carried forward and set off against taxable profits of different activities within a company, or be surrendered within a group to set off against taxable profits either in the same period or future periods. However, the amount of annual profit that can be relieved by carried-forward trading losses is limited to 50 per cent, subject to an allowance of £5 million per group. It was announced in the Autumn 2018 Budget that, from 1 April 2020, the government proposes to introduce a similar restriction on the use of carried-forward capital losses. The usual withholding taxes regime applies to mining companies. 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.

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28 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.
The usual capital allowances regime for long-life assets and integral features (6 per cent writing-down allowance per annum) and other plant and machinery (18 per cent writing-down allowance per annum) applies to mining companies. The writing-down allowance for long-life assets and integral features was reduced from 8 per cent to 6 per cent per annum effective from 1 April 2019 for businesses within the charge to corporation tax and from 6 April 2019 for businesses within the charge to income tax. 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 imports) of gravel, sand and rock, currently charged at £2 per tonne. This is subject to various exemptions, including 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 £91.35 per tonne or the lower rate of £2.90 per tonne, 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. Disposals in Scotland have been subject to the Scottish landfill tax since 1 April 2015 and Wales has imposed its own landfill disposals tax since 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.

Apart from the mineral extraction allowance, there are no special allowances or incentives for persons engaged in mining activities, or their investors or lenders.

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29 These rates are subject to annual increases in line with the retail price index, rounded to the nearest five pence.
III DEVELOPMENTS

i Prospectus Regulation

On 21 July 2019, the Prospectus Regulation came into force, providing a new legislative structure containing the requirements governing prospectuses. The scope of the Prospectus Regulation is similar to that of the Prospective Directive and local implementing legislation which it has now repealed and replaced. The reform of the prospectus requirements is underpinned by the European Commission’s overarching objectives of facilitating fundraising on capital markets and making prospectuses less burdensome to issuers; better protecting investors; and harmonising the scrutiny and approval of prospectuses across EU Member States. Among some of the significant changes, the new Prospectus Regulation introduces a more prescriptive regime on risk factors; a new Q&A format for the prospectus summary and imposes a seven A4 pages limit; simplified disclosure regime for secondary issues; abolishment of the requirement for auditor reports on profit forecasts and estimates; and the introduction of new obligations on financial intermediaries for supplementary prospectuses.

ii UK leaving the European Union

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 the Prospectus Regulation (previously, principally the EU Prospectus Directive). While leaving the European Union 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, at least in the short term. As the Prospectus Regulation is already in operation in the UK, in the event of leaving the EU, it is expected to automatically become law, under the European Union (Withdrawal) Act 2018. 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 Regulation’s ‘passport’ regime. Leaving the European Union will mean that it will no longer be possible for a prospectus approved by the FCA to be passported to another EU Member State. 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 Member States.

iii Market abuse regulation

At the EU level, concerns of market distortion arising through regulatory arbitrage have led to the introduction of harmonising measures in the form of an EU Regulation on Market Abuse (MAR), which has a direct effect on all EU Member States, 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 the rules applicable in all Member States to insider dealing, market manipulation and unlawful disclosure of inside information.

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 the 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 a requirement for 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 a requirement to maintain insider lists with details of persons who have 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.
KATE BALL-DODD

*Mayer Brown*

Kate Ball-Dodd is a partner in the corporate department of Mayer Brown. She has a wide-ranging corporate practice that encompasses corporate finance, mergers and acquisitions (including public takeovers), equity fundraising, joint ventures and corporate governance. She advises a number of quoted companies and financial intermediaries on the FCA Listing Rules and Disclosure Guidance and Transparency Rules, the Prospectus Regulation, the AIM Rules, the Takeover Code and general company law.

Ms Ball-Dodd speaks regularly at external conferences on corporate governance and takeovers.

RODRIGO BORJA CALISTO

*Lexim Abogados*

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 enables 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, project finance, 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 was 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.

STÉPHANE BRABANT

*Herbert Smith Freehills*

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 for 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 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.

JIE CHAI
Tian Yuan Law Firm

Jie Chai is a senior partner at Tian Yuan. He received his LLM degree from Tulane University in the United States (honoured with a scholarship at Tulane Law School) and his LLB degree from Peking University. He is fluent in both English and Mandarin.

Before joining Tian Yuan in 2001, he was director for legal affairs of, and later chief counsel to, China Metallurgical Group Corp, a major state-owned enterprise. During his 13 years as in-house attorney there, he advised on a number of large-scale overseas projects and participated in the establishment and management of overseas subsidiaries. He was a member of a working group under the Ministry of Foreign Economic Relations and Trade (now the Ministry of Commerce), in charge of claims by Chinese citizens and companies for damages, losses and injuries suffered during the first Gulf War.

His main areas of practice have included construction, public procurement, foreign direct investment, mergers and acquisition, minerals and natural resources, international trade, outsourcing and intellectual property, serving industries from energy and infrastructure to minerals and natural resources. In addition to advising on suitable contractual frameworks and legal arrangements, project finance and bonding, he also provides legal advice on claims and dispute resolution.

JEANDRI CLOETE
Falcon & Hume Inc

Jeandri holds a BCom (Law) and an LLB degree from the University of Pretoria. Jeandri was admitted as an attorney in 2018, having served articles and currently practising as an associate at Falcon & Hume Inc. Jeandri specialises in general and commercial litigation and alternative dispute resolution within the mining industry, with practice areas including mining, minerals and natural resources, regulatory laws, administrative law and business rescue proceedings.

ALBAN DORIN
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Alban Dorin is a partner in the banking and finance and global projects practice of the firm’s Paris office. He regularly advises on international asset and project finance transactions.

Alban has extensive experience of advising on all types of project finance transactions, acting on behalf of borrowers, sponsors as well as lenders and has developed a particular expertise in complex mining projects in Africa.
His experience includes advising on project finance transactions in almost all of the
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He also represents arranging banks, investment funds and sponsors in areas of
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João has assisted in the negotiation, structuring and implementation of several mining projects in Angola, Mozambique, Timor-Leste, Congo and the Democratic Republic of the Congo.

A frequent guest speaker in international mining and oil and gas upstream and downstream events, João has a detailed and comprehensive understanding of all typical projects and transactions of both industries.

He is a member of the Portuguese Bar Association, the Timorese Bar Association, the Association of International Petroleum Negotiators, and the board of the World Initiative of Mining Lawyers (2014–2018) and is chairman of the Portuguese Law Firms Association (2014–2018).

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Emma’s experience in the mining sector includes advising a number of international clients on mining projects, acquisitions and divestments in francophone Africa. She has also advised on a range of power, infrastructure and oil and gas matters.

Emma is admitted to the Paris Bar. She holds professional master’s degrees in public business law and in energy law from the Pantheon-Sorbonne University of Paris. She also holds a degree in public affairs from Sciences Po Aix-en-Provence.

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Mr Federico has been involved in the organisation of new corporations, and 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 a speaker at several training programmes related to tax matters in different institutions such as Colegio de Contadores Públicos de México, AC, Instituto Mexicano de Ejecutivos de Finanzas, AC, Cámara Nacional de la Industria Restaurantera and CONCANACO Servytur.
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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.

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Jay is considered one of the leading resources and infrastructure lawyers. Several industry bodies have profiled him as a leading lawyer, including Chambers and Partners (Band 1 category), The Legal 500 (Leading individual), Doyle’s Guide (Pre-Eminent category) and Best Lawyers from 2009 to 2019.
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He has been recognised by the publication *The Best Lawyers in Canada* as a leading practitioner in the areas of corporate law and securities laws, and by *The Canadian Legal Lexpert Directory* as a leading practitioner in the corporate finance and securities and mining sectors.

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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Thomas is an active member of Tanganyika Law Society, the East African Law Society and the Zanzibar Law Society. He is qualified as an Advocate of the High Court of Tanzania and the High Court of Zanzibar. Thomas holds a master of laws (LLM) degree and a bachelor of laws (hons) degree from the University of Dar es Salaam.
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Bertrand 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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Erica Nannini is an associate in the energy, environment and natural resources practice group of Holland & Hart LLP in Reno, Nevada. Ms Nannini advises clients in the natural resources and mining industries on a range of disputes and regulatory issues involving public lands. Ms Nannini also works on a variety of other regulatory issues, including public utilities, water law and renewable resource project development.

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Daniel Palomino graduated from Pontificia Universidad Catolica del Peru and holds an LLM in law and technology from Tel Aviv University. Also, he got a scholarship to pursue the Entrepreneurship and Innovation programme – InnovNation in the Rothberg International School of the Hebrew University of Jerusalem, and another scholarship to study the digitalisation and law programme at Julius-Maximilians Universität Würzburg. Presently, he is an administrative law professor in the School of Law of Universidad de San Martin de Porres in Lima, Peru.

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She has vast experience and knowledge in administrative and public law in domestic and international matters with expertise in natural resource projects. Her main practice areas include mining, minerals and natural resources, regulatory law, administrative law, public procurement and litigation.

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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, dealing with mining corporations in general and building community relationships.

Mr Vázquez is also a skilled lawyer in migration matters, including obtaining immigration documents for foreign executives from other jurisdictions who have come to work in Mexico.

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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.
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