ACKNOWLEDGEMENTS

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

ANDERSON & ANDERSON
EAST AFRICAN LAW CHAMBERS
FALCON & HUME INC
GENI & KEBE
HERBERT SMITH FREEHILLS
HOLLAND & HART LLP
HOLLAND & KNIGHT
LEXIM ABOGADOS
LIEDEKERKE WOLTERS WAELE BROECK KIRKPATRICK SCRL
MAYER BROWN
PINHEIRO NETO ADVOGADOS
QUINZIO & ANRÍQUEZ NOVOA ABOGADOS
RSM BOGARÍN Y CÍA SC
SION ADVOGADOS
SQUIRE PATTON BOGGS
STIKEMAN ELLIOTT LLP
TIAN YUAN LAW FIRM
VHG SERVICIOS LEGALES SC
VIEIRA DE ALMEIDA
CONTENTS

PREFACE.......................................................................................................................................................... vii

Erik Richer La Flèche

Part I  Mining Law

Chapter 1  ANGOLA........................................................................................................................................... 1

João Afonso Fialho and Ângela Viana

Chapter 2  AUSTRALIA..................................................................................................................................... 12

Jay Leary and Geoff Kerrigan

Chapter 3  BRAZIL.......................................................................................................................................... 25

Alexandre Oheb Sion and Luiza Mello Souza

Chapter 4  BURKINA FASO ................................................................. 37

Alban Dorin

Chapter 5  CANADA....................................................................................................................................... 51

Erik Richer La Flèche, David Massé and Jennifer Honeyman

Chapter 6  CHILE........................................................................................................................................... 61

Marcelo Olivares

Chapter 7  CHINA.......................................................................................................................................... 71

Xiong Yin, Jie Chai, Yanli Zhang and Rong Cao

Chapter 8  COLOMBIA................................................................................................................................... 85

José Vicente Zapata and Daniel Fajardo

Chapter 9  DEMOCRATIC REPUBLIC OF THE CONGO................................................................. 97

Aimery de Schoutteete, Thibaut Hollanders and Edwine Endundo
Chapter 10  ECUADOR........................................................................................................................106
           Rodrigo Borja Calisto

Chapter 11  GUINEA ..............................................................................................................................115
           Stéphane Brabant and Bertrand Montembault

Chapter 12  IVORY COAST ..................................................................................................................128
           Emma France

Chapter 13  MEXICO ............................................................................................................................139
           Alberto M Vázquez and Rubén Federico García

Chapter 14  MOZAMBIQUE ................................................................................................................156
           João Afonso Fialho and Diogo Prado Alfaiate

Chapter 15  SENEGAL ..........................................................................................................................164
           Mouhamed Kebe

Chapter 16  SOUTH AFRICA ...............................................................................................................174
           Pieter Willem Smit

Chapter 17  TANZANIA .......................................................................................................................185
           Thomas Mihayo Sipemba

Chapter 18  UNITED STATES ............................................................................................................200
           Karol L Kahalley, Kristin A Nichols and Erica K Nannini

Part II  Capital Markets

Chapter 19  AUSTRALIA .....................................................................................................................213
           Simon Rear, Chris Rosario and Michael Van Der Ende

Chapter 20  BRAZIL ............................................................................................................................225
           Carlos Vilhena and Adriano Drummond Caçado Trindade

Chapter 21  CANADA ..........................................................................................................................233
           Erik Richer La Flèche, David Massé and Jennifer Honeyman
I am pleased to have participated in the preparation of the seventh 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 18 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 five 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.

Much of the mining sector continues to emerge from a lengthy down-cycle. The world economy continues to expand, albeit at a deliberate pace. Demand for minerals is generally sustained and exploration in many parts of the world – in Canada in particular – has rebounded.

But new risks beyond the control of miners are gathering on the horizon. The threat of trade wars, economic nationalism and increased sanctions risks derailing the mining industry just as it is reaping the fruits of its hard work.

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 2018
Part I

Mining Law
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, Angolan 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 (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 disbelief 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.
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 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:

- Presidential Decree 175/18, of 27 July 2018, which approves the policy for the marketing of rough diamonds;
- Joint Executive Decree 316/17, of 27 June 2017, which approves the list of equipment and machinery that may benefit from customs exemptions;
- Presidential Decree 231/16, of 8 December 2016, which classifies rare metals and rare earth elements as strategic minerals;
- Presidential Decree 158/16, of 10 August 2016, which approves the mineral administrative offences and relevant penalties regime; and
- 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:

- the National Diamond Company of Angola – Endiama, EP (Endiama): the national concessionaire for diamonds, rare metals and rare earth elements;
- the National Iron Company of Angola – Ferrangol, EP (Ferrangol): the national concessionaire for noble materials, ferrous and non-ferrous metals;
- the Gold Agency: the market regulatory agency for gold entrusted with the organisation, regulation and supervision of the gold market; and
- the Diamond Trading Company of Angola – Sodiam, EP: the single channel for the marketing of all diamond productions extracted from Angola.
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 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 right-holder 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.

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 and Presidential Decree 175/18 of 27 July 2018 (which approves the policy for the marketing of rough diamonds). According to Presidential Decree 175/18, all rough diamonds extracted from the Angolan territory must be sold through the Single Marketing Channel, which is overseen by Sodiam, EP.

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 reimbursement of 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:

a  Strategic minerals: 5 per cent
b  Precious stones and precious metallic minerals: 5 per cent
c  Semi-precious stones: 4 per cent
d  Non-precious metallic minerals: 3 per cent
e  Construction materials of mining origin and other minerals: 2 per cent

ii  Taxes

Income tax
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
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
The diamond marketing policy recently enacted is now the centre of attention. Everyone – from diamond producers to traditional buyers of Angolan diamond productions – is anxious and willing to see the effects of the new policy in the process of sales of Angolan diamond productions. The new policy is expected to bring transparency to the marketing of Angolan diamonds, something that has been claimed by diamond producers for many years.

One of the short to medium-term goals of the Angolan government expressed in the new diamond marketing policy is the dynamisation and enhancement of local diamond processing, in particular by promoting the establishment of local diamond cutting and jewellery industries with special privileges in the process of acquisition of rough diamonds.

Another notable trend of the Angolan mining industry is the continuing search for diversification of the industry. While diamonds will always have a differentiated and singular role in the industry, serious efforts are being made with the aim of boosting national and foreign investment in other minerals, and artisanal and semi-industrial projects.

It is important to stress the continuing efforts by the Angolan government to attract foreign investment into the country. The recently enacted Private Investment Law promotes investment through a de-bureaucratised and streamlined process and is a clear sign of the state’s commitment to developing and modernising the Angolan economy. Particularly in respect of the mining industry, one must emphasise the impact of the 2017 presidential elections that brought President João Lourenço into office, not only at the government level by bringing a new executive team into office (including the new MMRP that superseded the former Ministry of Geology and Mines) but also at the level of the national concessionaires that are now keen to take a more ‘investor friendly’ approach to the industry.

The current political environment 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.
Chapter 2

AUSTRALIA

Jay Leary and Geoff Kerrigan

I OVERVIEW

The first half of 2018 has seen continued growth 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, examples of the latter including the recent approval 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), and Rio Tinto’s feasibility studies for its Koodaideri project (US$2.2 billion). In contrast to previous investment cycles, the current investment cycle is directed at replacing existing mine capacity and improving grade, as opposed to large-scale increases in overall output. Increased global demand for rare metals used in battery technologies (principally lithium) has also supported capital investment and merger and acquisition activities in that sector, although pricing for those commodities has become more volatile in the past 12 months.

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.

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

---

1 Jay Leary is a partner and Geoff Kerrigan is a senior associate at Herbert Smith Freehills. They gratefully acknowledge the assistance of Jo Kwok, graduate at Herbert Smith Freehills, in the preparation of this article.

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 elected in July 2016. Federal governments in Australia have three-year maximum terms before another election must occur, meaning a federal election must occur within the next 12 months. 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 of the importance that a favourable foreign investment culture provides the 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:

<table>
<thead>
<tr>
<th></th>
<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>
<td>Allows for development and commercial extraction and disposal of minerals from the tenement area.</td>
</tr>
<tr>
<td><strong>Typical term</strong></td>
<td>Usually granted for an initial term of five years (with the 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>
<td>Varies depending on jurisdiction (e.g., 21-year initial term in Western Australia and for a variable period in Queensland, usually determined by the mine life).</td>
</tr>
<tr>
<td><strong>Rights</strong></td>
<td>• Entry to land to carry out exploration operations. &lt;br&gt;• Extracting certain quantities of minerals for assessment. &lt;br&gt;• Right to apply for conversion into retention licence or mining lease.</td>
<td>• Entry to land to carry out appraisal (and resource maintenance) activities. &lt;br&gt;• Right to apply for conversion into mining lease when production becomes commercially viable.</td>
<td>• Exclusive possession of tenement area for mining operations. &lt;br&gt;• Right to construct and operate production facilities (subject to additional approvals). &lt;br&gt;• Extracting commercial quantities for sale or export.</td>
</tr>
<tr>
<td><strong>Features</strong></td>
<td>• Minimum annual exploration expenditure commitments apply to ensure proper appraisal and analysis occurs. &lt;br&gt;• 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). &lt;br&gt;• Yearly rental payments are required.</td>
<td>• Royalty obligations, payable to government based on extracted mineral. &lt;br&gt;• Yearly rental payments are required. &lt;br&gt;• Environmental rehabilitation bond payments.</td>
</tr>
</tbody>
</table>

A decision at the High Court of Australia in 2017 raised concerns regarding the validity of certain mining tenure granted in Western Australia.\(^4\) The Western Australia and Federal governments are working on a legislative change to rectify the issues arising out of this decision, although that remedial legislation is yet to be enacted.

**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. There is a range of disclosure obligations imposed by the ASX Listing Rules, but the key principle is that any information that a reasonable person would expect to have a material effect on the price or value of the shares of the company must immediately be released to the market.

---

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

a. 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;

b. the consent of the ‘competent person’ is not required for subsequent disclosure of the same material;

c. 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;

d. a feasibility or pre-feasibility study must be carried out prior to the declaration of an ore reserve; and

e. 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.

---


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),7 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, which 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 tonnes per annum greenfield iron ore project) required an estimated 4,000 separate government approvals to reach the final commissioning and construction phase.8

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. (Note that Western Australia dispensed with this requirement in July 2013, moving completely to a mine rehabilitation fund model, and legislation has been tabled in the Queensland parliament to implement such a model into


its financial assurance framework.) Additionally, most regimes require a mining lease holder to put in place a detailed rehabilitation plan, which generally requires complete costings of full rehabilitation activities to be submitted to the Department of Mines and 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. In November 2017, the New South Wales Department of Planning and Environment released a ‘Mine Rehabilitation Discussion Paper’ seeking feedback on proposed methods to improve the regulation of mine rehabilitation in New South Wales.10

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 and land or habitat;
b environmental pollution and contamination of land; and
c management and use of water resources, including protections against contamination of groundwater.

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.

Legislative reform in this area is frequent. In 2015–2016, new mine safety legislation was introduced in New South Wales, a process of assessing options to modernise the mine safety legislation in Western Australia is continuing, and reforms were made to rail safety and legislation governing the transport of goods by road in several states. In 2017, Queensland introduced additional legislation relating to a statutory compensation regime for sufferers of coal miner’s pneumoconiosis.

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 at the High Court of Australia\(^{11}\) recognised the ‘native title’ rights of Aboriginal people in relation to land in which those rights survived the acquisition of sovereignty by non-indigenous people. Native title law in Australia is complex and cannot be covered extensively here, but generally speaking, the key provisions in respect of native title rights are set out in the Native Title Act 1993 (Cth) (NTA), 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. A full Federal Court decision in 2017 raised concerns regarding the valid execution of such agreements where not all members of the claimant group had signed the agreement.\textsuperscript{12} However, the federal government promptly amended the legislation to rectify the issue.\textsuperscript{13} The federal government also released a native title Options Paper in November 2017, which may result in amendments to the NTA to improve the native title system. Public consultation closed in February 2018 and attracted a wide range of submissions from industry, academia, native title groups and government.

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

There are also Aboriginal cultural heritage rights that may exist on certain land independent of any native title rights that may arise, and there are defined mechanisms (usually enshrined in state and territory legislation) 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 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{14} Port and rail infrastructure is typically privately

\textsuperscript{12} McGlade v. Native Title Registrar [2017] FCAFC 10.
\textsuperscript{13} Native Title Amendment (Indigenous Land Use Agreements) Act 2017.
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.15

ii  
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 who 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 the uranium mining.

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

iii  
Foreign investment

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

In considering proposals, the FIRB assesses whether it is ‘contrary to the national interest’; however, the Act does not define ‘national interest’. This is intentional and allows proposals to be assessed case by case, recognising that national interests change over time 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 the proposed bids for a 99-year lease of 50.4 per cent of the NSW electricity distributor Ausgrid by Chinese state-owned company State Grid and Hong Kong-based Cheung Kong Infrastructure (CKI), although a subsequent acquisition of a gas pipeline business by CKI 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

15  
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 China, New Zealand, United States, Chile, Japan, South Korea, Singapore and Thailand) to which Australia has agreed different thresholds pursuant to certain free trade and other agreements (agreement country investors, not including foreign government investors) and all other investors (foreign persons).

<table>
<thead>
<tr>
<th>Investor</th>
<th>Relevant threshold for acquisition (indexed, as at 1 January)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Foreign persons</td>
<td>Exploration tenure: Approval generally not required</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$57 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$1,094 million; all others – A$0</td>
</tr>
<tr>
<td></td>
<td>Acquisitions in operational or producing mining projects: A$1,134 million</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>

* Investors from Singapore and Thailand are subject to lower thresholds

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

In addition, 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$1,134 million for agreement country investors and A$57 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. This is intended to replace the Exploration Development Incentive Scheme that ended in May 2017.

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 2017, foreign direct investment in Australia across all sectors increased by 3 per cent to A$3,266.4 billion, drawing on capital inflows from major trading partners such as the United States, the United Kingdom, Belgium, Japan, Hong Kong and Singapore.16

In 2017 and 2018, a combination of productivity improvement, cost reduction and investment in output 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 the seasonally adjusted estimate for mineral exploration expenditure increasing by 11 per cent (A$51.4 million) to A$516.7 million in the March 2018 quarter, an increase of 24.4 per cent from the March 2017 quarter estimate.17

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.\(^\text{18}\) 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 spikes in gold and lithium prices, have generated greater market activity. This is particularly the case for Australia’s production of seaborne coal and iron ore, which are generally of a high grade and quality, allowing producers to realise a price premium and meet the requirements of customers 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, 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$20.19 to A$26.47 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. Offtake 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 merger and acquisition 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.

v Corporate consolidation in the mining sector
Two key trends in mining mergers and acquisitions continued during 2017, 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). The largest M&A transactions in the mining sector in 2017–2018 were Rio Tinto’s divestment of its Queensland metallurgical and thermal coal assets to Glencore (US$1.7 billion), Adaro/EMR Capital (US$2.25 billion) and Whitehaven Coal (US$200 million), Yancoal’s and Mitsubishi’s divestment of a 49 per cent interest in Rio Tinto’s Hunter Valley Operations thermal coal mines to Glencore (US$1.1 billion) and Wesfarmers’ divestment of its Queensland metallurgical and thermal mine to Coronado Coal (US$700 million). Herbert Smith Freehills acted for either the buyer, the seller or a potential buyer in relation to each of these transactions.

The lithium sector has continued to be active, with major lithium producers General Lithium, Jiangxi Ganfeng Tianqi and Ablemarle all holding interests in jointly owned Australian projects. They were joined by Sociedad Química y Minera (SQM) in 2017–2018, via its acquisition of an 50 per cent interest in Kidman Resources’ Mount Holland Project, through both equity investment and underwriting long-term offtake contracts to support those projects as they ramp up production, and the development of downstream processing capacity in Australia. Herbert Smith Freehills advised SQM in relation to this transaction.

vi 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 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 Oheb Sion and Luiza Mello Souza

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 21.3 per cent of the country’s exports in 2017, or approximately US$217.7 billion.\(^2\) The second half of 2017 showed an increase of 14.7 per cent of the exported value compared to the second half of the previous year, with China being responsible for almost 40 per cent of the country’s exports.\(^3\)

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. According to the World Mining Data 2018, Brazil was the eighth largest ore producer in the world in 2016,\(^4\) with the majority mined in the states of Minas Gerais and Pará (86.9 per cent of the total metallic mineral production in 2016).\(^5\)

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.\(^6\) 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.

---

1. Alexandre Oheb Sion is a founding partner and Luiza Mello Souza is an associate attorney at Sion Advogados.

The Investment Attractiveness Index takes both mineral and policy perception into consideration.
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.

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 federal government launched the Mineral Industry Revitalisation Programme in July 2017. The Programme included three provisional measures:

a Provisional Measure No. 789/2017, which substantially modified the mining royalties legal framework;
b Provisional Measure No. 790/2017, which provided for amendments to the Brazilian Mining Code; and
c Provisional Measure No. 791/2017, which abolished the National Department of Mineral Production (DNPM) and created the National Mining Agency (ANM).

Nevertheless, provisional measures in Brazil are considered as legal acts enacted by the President that necessarily concern urgent and relevant matters. Therefore, provisional measures are enacted without prior approval by the legislative bodies. However, as the name suggests, provisional measures have a limited time span and are valid for a period of 60 calendar days.

---

7 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.
which may be extended for another 60 days maximum. If the National Congress does not approve them – with or without amendments – and turn them into law within this period, they lose their effect.

In this particular case, the National Congress duly approved both Provisional Measure No. 789/2017 and Provisional Measure No. 791/2017 within the deadline and turned them into 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 Provisional Measure that provided for amendments to the Brazilian Mining Code was not approved within the legal period and therefore it lost its effect.

As a consequence of the loss of effect of Provisional Measure No. 790/2017, 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. Despite that, the new Mining Code Regulation shall only enter into force when the ANM is functioning, which is still pending.

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:

- Law No. 13,575/2017, which abolished the DNPM and created the ANM;
- 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;
- Law No. 7,805/1989, concerning small-scale mining consent;
- Law No. 12,334/2010, which establishes the National Dams Safety Policy;
- Law No. 8,176/1991, criminalising illegal mining; and

It is important to highlight that mining activities are subject to a huge range of administrative rules, ordinances and regulations, mostly issued by the DNPM 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 properties and landholding regularisation.

### Administrative competence and regulatory bodies

In general, the Ministry of Mines and Energy (MME) and the 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 DNPM’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,\(^8\) granting prior consent for assignments and transfers of mining concessions and claim-stake mines,\(^9\) 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 DNPM, 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 (CPRM), 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.

Finally, it is important to point out that the law responsible for abolishing the DNPM and creating the ANM became effective on 27 December 2017. However, the actual implementation of the ANM depends on a decree, which will define its organisational structure. Until this decree is published, the DNPM will continue to exist, which is why this chapter is still referring to it.

### 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 ‘authorization’ or ‘concession’, by Brazilians or companies incorporated under Brazilian law and having their registered office and administration in the country.\(^{10}\)

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 DNPM/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 DNPM/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.

---

\(^8\) Except for those under the mineral licensing regime (see Section III.ii).
\(^9\) See Section III.ii.
\(^{10}\) Article 176 of the Constitution of the Federative Republic of Brazil.

© 2018 Law Business Research Ltd
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 DNPM/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\(^{11}\) 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 DNPM/ANM.\(^{12}\) 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 the 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 DNPM/ANM. Failure to comply may be subject to sanctions ranging from warnings, fines and even the loss of mining rights.

---

11 Autorização de Pesquisa e Concessão de Lavra.
12 This title is known as a Guia de Utilização.
Mineral licence
A mineral licence\(^\text{13}\) 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\(^\text{14}\) 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,\(^\text{15}\) 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.

---
\(^{13}\) *Regime de Licenciamento.*
\(^{14}\) *Permissão de Lavra Garimpeira.*
\(^{15}\) 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:

a. 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

b. 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 DNPM/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:

a. at least 51 per cent of the capital must belong to Brazilians;

b. at least two-thirds of the workers must be Brazilians; and

c. 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:

a. Law No. 6,938/1981, which provides for the National Environmental Policy;
b. Law No. 9,605/1998, which deals with crimes and environmental administrative offences;
c. Law No. 12,305/2010, which provides for the National Policy on Solid Waste;
d. Law No. 9,985/2000, which deals with the National System of Conservation Units (environmentally protected areas); and
e. 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/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 (IBAMA) 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.16

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.17

V OPERATIONS, PROCESSING AND SALE OF MINERALS

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,18 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).

ii Foreign investment

The Brazilian legal framework does not make a distinction between foreign and national investors, although the Profit Remittance Law19 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.

16 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.
17 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.
18 However, it is important to note that foreigners may obtain work visas in order to work in Brazil.
19 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.20

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.

---

20 Business transactions that result in direct or indirect transfer of rural lands are subject to the same restrictions.
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\(^\text{21}\) 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

Recent changes relating to mining royalties generated concern within a significant portion of the sector, which was already affected by the country’s political and economic instability.

Nevertheless, the new Mining Code Regulation and the creation of the ANM promise to improve the state of the industry. However, considering that the new regulatory agency has not yet been established, and that new standards are expected to be introduced when it does become operational, it is not possible to clearly delimit the future of the mineral industry in Brazil in the short to medium term. Nevertheless, expectations are positive.

\(^\text{21}\) According to Article 136, first paragraph, of Law No. 9,985/2000 and Article 31-A of Decree No. 4,340/2002.
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) from 3.7 per cent in July 2015 to around 6.7 per cent in January 2018, supported by a significant increase in public investment in the mining sector.

The proportion of GDP originating from mining activity has increased by 500 per cent between 2008 and 2017 and the government of Burkina Faso anticipates that the mining sector will contribute to 10.2 per cent of annual GDP in 2020, 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 12 at the exploitation phase (11 gold projects and 1 zinc project). Roxgold, Iamgold, Endeavour Mining, Teranga Gold Corporation and Semafo are some of the mining companies that are active in the country. In terms of mining exploration investments, Burkina Faso is the second most dynamic country 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 a predicted total of 55 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 popular 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.

In order 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 but has not yet been admitted.

---

1 Alban Dorin is partner in the banking and finance practice of Mayer Brown in Paris. The author would like to thank Alhassane Soukouna and Elise Baha of Mayer Brown for their kind assistance in reviewing this chapter.

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.
II LEGAL FRAMEWORK

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

- Law No. 036-2015/NTC dated 26 June 2015 relating to the Mining Code;
- Decree No. 2017-023 dated 23 January 2017 relating to mining taxes and royalties;
- Decree No. 2017-024 dated 23 January 2017 relating to the organisation, operation and collection of the local development fund;
- Decree No. 2017-0035 dated 26 January 2017 relating to the model mining convention;
- Law No. 2017-028/AN dated 18 May 2017 relating to the trade of gold and other precious minerals in Burkina Faso;
- Decree No. 2017-036 dated 26 January 2017 relating to the management of mining titles and authorisations;
- Decree No. 2017-068 dated 15 February 2017 relating to the organisation, operation and collection of the fund for rehabilitation and closure of mines;
- Decree No. 2018-0232 dated 26 March 2018 relating to the level of production for semi-mechanised exploitation and industrial exploitation of small-scale mines;
- 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;
- Law No. 006-2013 dated 2 April 2013 relating to the environmental code (the Environmental Code); and
- the General Tax Code of Burkina Faso (as amended).

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

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.
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.

**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.5 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.6

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.

**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.7 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.8

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.9

---

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.
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:

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

An industrial exploitation licence is granted by a decree of the Council of Ministers based on a report by the Minister of Mines 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.

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.

Semi-mechanised exploitation licence

A semi-mechanised exploitation licence can be granted only to companies created under Burkinabe 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.

10 Article 41 of Law No. 036-2015/NTC.
11 Article 100 of the Mining Code.
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.
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.

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 Burkinabe law and have its registered office in Burkina Faso.

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

\(a\) 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.\(^19\)

\(b\) 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.

\(^17\) Article 89 of Law No. 036-2015/NTC.
\(^18\) Article 98 of the Mining Code.
\(^19\) Articles 36 and 37 of the Mining Code.
\(^20\) Articles 51 to 54 of the Mining Code.
**Term of validity of mining rights**

- Exploration licence: 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).
- Industrial exploitation licence for large-scale mine: 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.
- Industrial exploitation licence for small-scale mine: 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.

- Semi-mechanised exploitation licence: valid for five years from its issuance and renewable for three additional years.
- Authorisation for industrial exploitation of quarry substances: valid for five years from its issuance and renewable for three years.
- Authorisation for semi-mechanised exploitation of quarry substances: valid for three years from its issuance and renewable for three years.
- Authorisation for artisanal exploitation of quarry substances: valid for two years from its issuance and renewable for two years.
- Authorisation for temporary exploitation of quarry substances: valid for the period defined in the authorisation without exceeding one year.

**Assignment of mining rights**

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

---

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.
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 period of 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 exploitation\(^{24}\) or exploration licences.

Mining titles and authorisations, and mining conventions, shall be published in the Official Gazette of Burkina Faso.\(^{25}\)

**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.\(^{26}\)

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.\(^{27}\) 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, in order to secure the environment protection and rehabilitation programme costs.\(^{28}\)

---

23 Article 16 of the Mining Code.
24 Article 169 of the Mining Code.
25 Article 15 of the Mining Code.
26 Article 35 of the Mining Code.
27 Article 50 of the Mining Code.
28 Article 141 of the Mining Code.
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.29

IV 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

29 Article 12 of Decree No. 2017-068 dated 15 February 2017 relating to the fund for remediation and closure of mines.
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.

© 2018 Law Business Research Ltd
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

Local development and mining funds

The Mining Code has created funds that may require a contribution from the holders of mining titles, including:

a) 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;

b) a rehabilitation and closure fund;

c) a rehabilitation and securement fund in relation to artisanal mining sites and the fight against the use of prohibited chemical products; and

d) 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

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.
38 Article 11 of the Mining Code.
39 Article 172 of the Mining Code.
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 to employing 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

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 activities of purchase, holding, processing, sale and export of gold produced artisanally 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 minerals44 produced artisanally or in a semi-mechanised way.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

40 Article 101 of the Mining Code.
41 Article 102 of the Mining Code.
42 Article 101 of the Mining Code.
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.
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. Note that repatriation requirements also apply (see below).

iv 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.

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:

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

b) 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

c) 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.

48 Article 9 of WAEMU Regulation No. 09/2010/CM/ of 1 October 2010 on external financial relations of members of WAEMU.

49 Article 176 of the Mining Code.

50 Article 174 of the Mining Code.

51 Articles 9 to 11 of Decree No. 2017-023 dated 23 January 2017 relating to mining royalties and taxes.
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:

a for the first five years: 7,500,000 CFA francs per square kilometre per year;
b from the sixth to the 10th year: 10,000,000 CFA francs per square kilometre per year;
and
c from the 11th year: 15,000,000 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.52

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 exempted 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.

52 Article 146 of the Mining Code.
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 commercial production commences.

**Exploitation phase**

Holders of exploitation licences are liable to pay:
- a tax on profits at the standard rate; and
- a tax on securities income at a rate of 6.25 per cent.

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.\(^{57}\)

---

53 Article 157 of the Mining Code.
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.
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.

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.

Eleven gold mines have been built in the past 10 years and a number of new projects are in the development or production phase. In 2017, 46.4 tons of gold were produced in Burkina Faso, representing an increase of 1,300 per cent over 10 years.

58 Article 164 of the Mining Code.
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.

---

1 Erik Richer La Flèche, David Massé and Jennifer Honeyman are partners at Stikeman Elliott LLP.
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.

iii 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:

a prospecting permits or licences required in most provinces prior to commencing prospecting work; and

b 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.

iv 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 2018, the threshold is C$1 billion. The threshold is increased to C$1.5 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$398 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'.
CHILE

Marcelo Olivares

I OVERVIEW

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

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

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

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

1 Marcelo Olivares is a partner at Quinzio & Anríquez Novoa Abogados (formerly Quinzio & Cía Abogados). The information contained in this chapter is correct as at October 2017.
operations, however, as a result of legal responsibilities, the owners of such concessions must have a company incorporated in Chile, which can be a subsidiary of the parent company duly integrated into the country.

II LEGAL FRAMEWORK

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

a. Constitution of the Republic of Chile, Article 19, No. 24, subparagraphs 6 to 10 (CRC);

b. Organic Constitutional Law No. 18,097 on Mining Concessions (from 21 January 1982) (OCL);

c. Mining Code (Law No. 18.248, from 14 October 1983) (MC); and


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

III MINING RIGHTS AND REQUIRED LICENCES AND PERMITS

i Title

In accordance with Article 19, Paragraph 24 of the CRC, the state has absolute, exclusive, inalienable and non-prescribable ownership of all mines, which includes guano deposits, metalliferous sands, salt beds, coal and hydrocarbon deposits and other fossil substances, with the exception of surface clays, regardless of the property of natural or legal subjects on the lands that hold deposits. Surface lands are subject to the obligations and limitations established by law in order to facilitate the exploration, exploitation and benefits of such mines.

The law sets out which of these substances, except liquid or gaseous hydrocarbons, may be subject to concessions for exploration or exploitation. These concessions are always awarded by court ruling and have the duration, entail the rights and impose the obligations that the relevant law expresses. A mining concession requires the owner to undertake the necessary activity to meet the public interest that justifies the concession being awarded. Its responsibilities in terms of legal protection are established by law, with the aim directly or indirectly of obtaining compliance with that request and providing the grounds for revocation in the event of a breach or termination of single domain over the concession. In any case, the grounds and their effects must be established at the time of granting the concession.

ii Surface and mining rights

The CRC provides that the state has absolute, exclusive, inalienable and non-prescribable ownership over all mines, and is able to explore and exploit the mineral substances the OCL stipulates are subject to such labours through mining concessions.
The mining concession is an *in rem* right that is independent from ownership of the land upon which that right is established, even though both belong to the same person; therefore, separation of the ownership of the mining concession (which grants the rights to explore and exploit minerals) and the surface soil property where the exploration work and consequent mining exploitation work is intended to be executed is established.

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

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

Regarding the area and extent of a mining concession, it must be a parallelogram with right angles (square or rectangle), the size of which can vary depending on the type of concession:

- **Exploration concession**: a minimum of 100 hectares and a maximum of 5,000 hectares for each concession. Only one concession request is allowed.
- **Exploitation concession**: a minimum of 1 hectare and a maximum of 10 hectares. Applicants are allowed to request a group of concessions together up to 1,000 hectares.

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

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

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

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

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

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

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

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

iv Geological exploration work information

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

v Closure and remediation of mining projects

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

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

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

Sernageomin is the authority in charge of the review and approval of the technical aspects of a mining site’s closure plans and any updates for the sector, and reviewing compliance.

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

**Warranties**

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

The types of warranties include:

- **a** cash;
- **b** bank guarantee forms;
- **c** debt instruments;
- **d** letters of credit;
- **e** bonds guaranteed by financial institutions;
- **f** deposits, bonds or other titles representing catchment;
- **g** Treasury, Central Bank or other state bonds; and
- **h** bonds or debentures of public or private companies and insurance policies.

**Audits**

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

**Tax benefits**

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

**Post-closure fund**

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

i  Environmental, health and safety regulations

As regards safety standards and regulations, Chile has special regulations contained in its Labour Code and Law No. 16,744, which regulate social insurance against the risk of accidents at work and occupational diseases.

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

ii  Environmental compliance

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

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

a  Law No. 19,300, the Environmental Act;

b  Law No. 20,417, which creates the Ministry, the Assessment Service and the Superintendence of the Environment;

c  Law No. 19,880, on the Basis of the Administrative Procedures that regulate the Acts of the State Administration's Bodies;

d  DFL No. 1-19653, which sets the Consolidated, Coordinated and Systematised Text of Law No. 18,575, the Constitutional Organic Law on General Principles of the State Administration;

e  Supreme Decree No. 95 of 2001 by the Ministry of General Affairs, on the Regulation System of Environmental Impact Assessment;

f  Supreme Decree No. 40 of 2012 by the Ministry of Environment, on the Regulation System of Environmental Impact Assessment; and

g  Law No. 20,749, which creates the Environmental Courts.

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

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

iii Third-party rights

Chile has approved ILO Convention 169, which establishes for the subscribing governments the following obligations:

- to consult the people concerned, through appropriate procedures, whenever legislative or administrative measures may affect them directly;
- to establish means by which these people can freely participate in the decision-making process within the institutions responsible for policies and programmes concerning them; and
- to establish means for the complete development of these people’s institutions and initiatives.

Under the new indigenous institutional framework that Chile has promoted, within the consultation procedure and public participation with the SEA for the evaluation of projects, there is also a specific consultation with indigenous peoples whose regions are affected by a project. All communities and associations recognised under the framework of Indigenous Law No. 19,253 can participate.

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

iv The Environmental Conservation Right

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

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

The title-holder of this environmental conservation right may be any public or private person, or legal entity, that differs from the original owner. The right is awarded by public deed and signed by the landowner and the new title-holder. This form of contract must have, as a minimum, one of the following conditions:

- It is forbidden or restricted for the land to be destined for the real estate business, commerce, tourism, industry and certain other purposes.
- There is an obligation to assume or hire services for maintenance, decontamination, repair and administration, or other services required for the rational use of the land.
- There is an obligation to execute and supervise the management plan established in the contract for the proper and rational use of the natural resources of the land.

The creation of this right is of interest to every third-party private entity that wishes to promote conservation actions towards environmental heritage, such as the owner of the contracted land or the new title-holder, for the development of preservation activities.
V  OPERATIONS, PROCESSING AND SALE OF MINERALS

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

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

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

i  Foreign investment

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

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

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

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

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

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

a  guaranteeing access to the formal foreign exchange market and repatriation of capital and profits, in full agreement with the Central Bank foreign exchange authority;

b  value added tax exemption for capital goods imports, under certain conditions; and

c  no arbitrary discrimination guarantee with relation to local investors.

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

i  Royalties

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

ii  Taxes

Following amendments introduced by Law No. 20,780 in 2017, the shareholders or partners of enterprises subject to first category income tax must choose between the ‘attributed income’ or ‘semi-integrated’ systems depending on whether taxpayers wish distributions to be taxed on an accrual or a cash basis, respectively.

VAT

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

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

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

iii  Duties

Municipal licence

Every company carrying out primary or extractive activities in exploitation projects involving a process that develops products, such as slag separation work, milling or concentration of minerals, must pay an annual municipal licence fee to the municipality in which it conducts its commercial activities.

This licence fee is between 0.25 and 0.5 per cent of taxpayer equity, with a cap of 8,000 UTM. This payment is an expense for the purposes of determining income tax.
Labour charges

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

VII OUTLOOK AND TRENDS

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

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

a. establish a new regulatory framework;
b. define operating conditions and establish a link with local communities;
c. strengthen coordination between the two major public actors for the exploration and exploitation of the resource: CODELCO and The National Production Development Corporation; and
d. allocate resources for innovation in this field for full expansion.
Chapter 7

CHINA

Xiong Yin, Jie Chai, Yanli Zhang and Rong Cao

I  OVERVIEW

i  Government policy on mining in general and on international investment

In recent years, the Chinese government has made great efforts to push forward reforms to streamline administration and improve services, such as inclusion of mineral resources with proved reserves in the pilot work of unified registration of rights with respect to natural resources, promotion of reform of the systems of mineral rights transfer and mineral resources royalty, and implementation of the publication system for exploration and exploitation information of mineral rights, so as to improve mineral resource management.1

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 28 June 2018, the National Development and Reform Commission (NDRC) and the Ministry of Commerce (MOFCOM) issued the Special Management Measures for the Market Entry of Foreign Investment (Negative List) (2018 Version) (the 2018 Negative List), which, as of 28 July 2018, will remove the foreign investment restrictions on exploitation of rare kinds of coal and on exploitation of graphite, smelting and separation of rare earth, and 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.2 The change of laws or regulations may create risks or uncertainty for investors in mineral projects.

1 Xiong Yin and Jie Chai are senior partners and Yanli Zhang and Rong Cao are associates at Beijing Tian Yuan Law Firm.
3 See Notice on Further Enhancing the Supervision and Management of Exploration and Construction Activities in Natural Protection Areas, Article 4.
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.4

iv Investment and development

China has continued to promote bilateral and multilateral cooperation in the field of geology and mineral resources. With the China Mining Congress & Expo, China-ASEAN Mining Cooperation Forum and other international exchange platforms, as well as geological survey projects, the exchange and cooperation with ASEAN, Africa, South America and other mining countries has expanded further. According to publicly available information, memoranda of understanding and agreements on cooperation have been signed with geological survey agencies of 15 countries such as the United States, Russia and Switzerland. Thirty-eight international cooperation projects for joint geological survey with 32 countries have been established, mainly in relation to geological mapping, geochemical mapping, technical training, research on methods and technical cooperation, research on metallogenic rules and cooperative mapping.5 Geological and geochemical mapping at various scales was conducted with 27 countries, such as Uzbekistan, Russia, Pakistan, Laos, Ethiopia, Australia and Peru, covering an area of 3.64 million square kilometres.6 There has been close cooperation with Laos, Cambodia, Papua New Guinea, Ethiopia, Namibia, Nigeria, Argentina, Peru, Mexico and other Asian, African and Latin American countries with important resources in geo-scientific research, geological surveys, mining management and other fields.7 Cooperation with Canada has also been maintained in mineral exploration and reserves appraisal.

II LEGAL FRAMEWORK

i Overview

The legislation 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 relevant rules of ministries, relevant local regulations and regulatory documents published by regulatory agencies.

---

4 See generally, Outline of the 13th Five-Year Plan for Economic and Social Development of the People’s Republic of China (2016–2020).
5 See footnote 2.
6 id.
7 id.
ii  **Regulatory agencies**  
The ministry in charge of geology and mineral resources under the State Council is the Ministry of Natural Resources (MNR), 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. 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 by ownership, or the right to the use, of the land to which the mineral resources are attached. 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.

---

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.

© 2018 Law Business Research Ltd
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:\(^{12}\)

\(a\) 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 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:\(^ {14}\)

\(a\) 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;

\(b\) passing through the exploration areas and neighbouring areas; and

\(c\) using the land temporarily as may be required for construction work.

---

\(^{12}\) 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.

\(^{13}\) 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.

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.\textsuperscript{15}

Mining licence holders are granted the following surface rights:\textsuperscript{16}

\begin{itemize}
\item[a] constructing within the mining area such production and living facilities as may be needed for mining; and
\item[b] obtaining the land use right according to the law required for production.
\end{itemize}

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.\textsuperscript{17}

\textbf{Conditions for maintaining mining rights}

Exploration licence holders should:\textsuperscript{18}

\begin{itemize}
\item[a] start the exploration operation within the prescribed time limit and complete the exploration within the time limit stipulated by the exploration licence;
\item[b] report the commencement of operations, and other related issues, to the exploration registration authorities at the beginning of exploration work;
\item[c] conduct the exploration in accordance with the exploration construction designs; any unauthorised mining activities are not allowed;
\item[d] conduct a comprehensive exploration and evaluation of any co-product minerals or by-product minerals while ascertaining the primary minerals;
\item[e] compile a mineral resources exploration report and submit it to the relevant departments for examination and approval;
\item[f] submit the mineral resources exploration achievement files in accordance with the relevant regulations of the State Council;
\item[g] comply with the relevant laws and regulations regarding labour safety, land reclamation and environmental protection; and
\item[h] 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.
\end{itemize}

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:\textsuperscript{19}

\begin{itemize}
\item[a] 2,000 yuan per square kilometre for the first exploration year;
\item[b] 5,000 yuan per square kilometre for the second exploration year; and
\item[c] 10,000 yuan per square kilometre for each exploration year from the third onwards.
\end{itemize}

\textsuperscript{15} id.
\textsuperscript{16} ibid., Article 30.
\textsuperscript{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.
\textsuperscript{18} Rules for the Implementation of the Mineral Resources Law of the People's Republic of China, Article 17.
\textsuperscript{19} Measures for Registration Administration of Exploration Blocks of Mineral Resources (2014 Amendment), Article 16.
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:

a) conduct mine construction or mining within the approved term;
b) conduct efficient protection, rational mining and comprehensive utilisation of mineral resources;
c) pay the resources tax and the mineral resources compensation fees pursuant to the law;
d) comply with the applicable laws and regulations regarding safety of workers, water and soil conservancy, land reclamation and environmental protection; and
e) 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 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

---

22 ibid., Article 7.
23 ibid., Article 15.
24 ibid., Article 12.
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

Generally, mineral resources in China are open to foreign investors for exploration or mining except those specifically prohibited. According to the 2018 Negative List, foreign investment in the exploration and development of oil and natural gas (except for coal-bed gas, oil shale, oil sand and shale gas) is allowed only by forming a joint venture or cooperation with a Chinese party. Foreign investors are prohibited from exploring or developing certain kinds of mineral resources, such as:

a investment in the exploration or mining of wolfram, molybdenum, tin, antimony and fluorite;
b investment in the exploration, mining or ore dressing of rare earth; and
c investment in the exploration, mining or ore dressing of radioactive minerals.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

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.
29 Law on Safety in Mines of the People’s Republic of China, Article 8.
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

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

32 ibid., Article 34.
to the relevant regulations of the state.\(^\text{36}\) 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.\(^\text{37}\)

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.\(^\text{38}\)

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.\(^\text{39}\) 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.\(^\text{40}\)

**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.\(^\text{41}\)

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.\(^\text{42}\) 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

\(^{36}\) ibid., Article 29.

\(^{37}\) ibid., Article 31.

\(^{38}\) Opinions of the General Office of State Council on Further Strengthen Production Safety in Coal Mines, Articles 1(1) and 2(4).

\(^{39}\) Labour Law of the People's Republic of China, Articles 58, 59 and 64.


\(^{41}\) Regulations on Environmental Protection Management for Construction on Projects (2017 Amendment), Article 9.

\(^{42}\) ibid., Article 12.
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.

V OPERATIONS, PROCESSING AND SALE OF MINERALS

i Processing and operations

The import of the 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 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 for 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. As mentioned...
above, the 2018 Negative List has removed some of the restrictions on foreign investment in the mining sector and the Special Management Measures for the Market Entry of Foreign Investment (Negative List for the Market Entry of Foreign Investment) in the Catalogue of Industries for Guiding Foreign Investment (2017 Revision) was repealed, while the Catalogue of Industries in Which Foreign Investment is Encouraged will continue to be effective.

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

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 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 value added tax (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

48 Interim Regulations of the People’s Republic of China on Resource Tax, Article 4.
50 Interim Regulations of the People’s Republic of China on Value-Added Tax, Article 2.
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

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

---

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.
53 Interim Regulations of the People’s Republic of China on Property Tax, Article 4.
54 Interim Regulations of the People’s Republic of China on Urban Maintenance and Construction Tax, Article 4.
55 Interim Provisions on Collection of the Education Surcharge, Article 3.
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 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.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.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

57 ibid., Article 13.
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.

\section*{VII 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{58} Measures for Registration Administration of Mineral Resources Exploitation (2014 Amendment), Article 9.
\textsuperscript{59} ibid., Article 10.
Chapter 8

COLOMBIA

José Vicente Zapata and Daniel Fajardo

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.

The Colombian government is currently facing two international arbitration proceedings initiated by two major mining companies seeking compensation. Moreover, the Constitutional Court is about to make an historic decision with respect to the future of mining consultations in Colombia, which consists of a participation mechanism used by the municipalities to endorse or veto mining and hydrocarbon extractive projects. The debate is critical and has two opposing positions. On the one hand, the government states that local communities are lacking constitutional and legal faculties to the extent that the Constitution provides that the extraction of natural resources is a matter of national interest; and on the other hand, social organisations and local communities argue that public consultations constitute a sovereign mechanism with decision-making power.

Mining in Colombia is developed at 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

---

1 José Vicente Zapata is an equity partner and Daniel Fajardo is an associate at Holland & Knight.

© 2018 Law Business Research Ltd
product (GDP)), in 2017 the sector suffered a contraction, having fallen from a GDP share of 6.92 in 2015 to 6.03 per cent in 2017.\(^2\) This situation derives from a combination of several factors, among others, legal instability and uncertainties, a drop in commodity prices, 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, and the reactivation of the peace dialogues between the National Liberation Army and the government, has made Colombia an even more attractive country to foreign investors.\(^3\) Furthermore, the election of Ivan Duque as the next president of Colombia over the left-wing candidate, Gustavo Petro, is very likely to encourage foreign investment in both the mining and energy sectors.

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\(^4\) 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.

---


\(^4\) Articles 332 and 334, Colombian Political Constitution.
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.

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.

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 on the fact that mining titles grant rights only for the exploration and exploitation of minerals in the subsoil and, thus, any right or title 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 45 business days. Should the ANM not issue a motivated resolution within this period, the assignment will be understood to have been accepted and the assignment agreement will be registered in the Mining Register.

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 a financial inability 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;

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

b an infringement of provisions on excluded and restricted areas for mining;

c a gross and repeated breach of any other obligation deriving from the concession contract; and

d 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 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.

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.

6 Articles 18, 19 and 20, Law 685 of 2001.
Pursuant to the Colombian insurance regulations (Law 1328 of 2009 and Decree 2555 of 2010), only those insurance companies authorised by the Finance Superintendence 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*, (1) the status of construction and exploration activities, (2) production and sales, (3) programme of work, (4) employment and work conditions, and (5) 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.

### 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.

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;
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, has ruled that the failure to undertake the consultation process results in a violation of fundamental rights and, as a result, has ordered the temporary suspension of the project or activity.\(^ {10}\)

---

8 Articles 2.2.2.3.2.2 and 2.2.2.3.2.3, Decree 1076 of 2015.
9 The 'Acción de Tutela' is a constitutional action with a special procedure that seeks the protection of fundamental rights.
10 See www.urosario.edu.co/getattachment/340e1f11-842c-49d4-8341-6a6a0349dd27/Corte-Constitucional-orden-suspension-del-proyect/.
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) have been legally allowed and entitled to restrict or simply ban mining activities in their territory.\(^{11}\) Subsequently, the Constitutional Court decided that regional entities have the competence to regulate the use of the soil and to guarantee environmental protection, even if when exercising the said prerogative they end up prohibiting mining activity.\(^{12}\)

As a corollary of the above, local authorities have the power to convene public consultations, at which the inhabitants of the territories where mining projects are to be executed can vote on whether or not they agree with these projects, and to veto them in the event of a negative vote. Following this, according to the Colombian Mining Association, more than 100 municipalities have shown interest in banning mining activities in their territory and several municipalities have chosen to set up public consultations to determine whether they wish to allow mining activities to be carried out in their territory or not. As at 31 December 2017, approximately eight territories are known to have chosen to prohibit mining activities within their territories.\(^{13}\)

### 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 continue, but with no possibility of extension,\(^ {16}\) 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

---

11 Constitutional Court of Colombia, Decision C-237 of 2016.
13 See www.eltiempo.com/colombia/otras-ciudades/municipios-de-colombia-que-le-han-dicho-no-a-la-mineria-131988.
14 Constitutional Court of Colombia, Decision C-035 of 2016.
16 Article 173, Law 1753 of 2015.
February 2010. On 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. On 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 the 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.

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: (1) traders who buy and sell minerals regularly in order 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

---

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

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 \textbf{CHARGES}

i \textbf{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.\(^\text{20}\)

\(^{18}\) Article 100, Colombian Political Constitution.

\(^{19}\) ibidem.

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.

<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>
</tr>
<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 + 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.
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 is equivalent to one minimum legal daily wage per hectare if the area in question is less than 2,000 hectares. If the area is between 2,000 and 5,000 hectares, the fee will be two minimum legal daily wages per hectare. If the area is larger than 5,000 hectares, but smaller than 10,000, the fee will be three minimum legal daily wages per hectare.

iv  Other fees

In addition, if a party establishes an easement for exploration or exploitation of mining activities, it must pay 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 388 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.
VII 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$7,000 million are yet to become a reality.21 According to the ANM, Colombia produced approximately 89.4 million tons of coal in 2017 (a 1 per cent decrease compared to 2016)22 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.23

Notwithstanding the above, as of the issuance of Decision C-035 of 2016, which formally banned all mining activities within páramo areas, Decision C-192 of 2016, which restated the view of the Constitutional Court according to which there are no acquired rights in environmental matters, and Decision T-445 of 2016, which allows territorial entities to hold public consultations and decide whether mining activities are allowed in these territories or not, the outlook for mining in Colombia is still uncertain. In addition, with the announcement 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 Ivan Duque as the new 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,24 (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.

24 Constitutional legal action to demand protection of constitutional rights.
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 has been 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 years 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.
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

---

2 Act No. 007/200 of 11 July 2002 establishing the Mining Code, as amended by Act No. 18-001 of 9 March 2018.
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.

### 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.

### 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.

### ENVIRONMENTAL AND LABOUR CONSIDERATIONS

#### 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 In order to be granted an environmental exploitation permit, the holder of a mining right is required to submit an environmental impact study and an environment management plan to the Ministry of the Environment for approval.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 it 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:

\[ \begin{align*}
\text{a} & \quad \text{the export or import of funds equal to or above US$10,000 is subject to a licence called ‘Modèle RC’ issued by the Central Bank as an approved intermediary; certain documents justifying the transfer will need to be provided;} \\
\text{b} & \quad \text{subject to the relevant tax being paid, the filing of the Modèle RC form and the delivery of other supporting documents required by the Central Bank, commercial banks in the DRC are authorised to transfer dividends, capital gains, interest, principal, fees and commissions on foreign loans outside the DRC. There is no exchange control restriction on transfers abroad of profit by a foreign company;} \\
\text{c} & \quad \text{there is a restriction for the payment in cash of amounts above or equal to US$10,000;} \\
\text{d} & \quad \text{repatriation of incomes is within 60 days;} \\
\text{e} & \quad \text{transactions are paid for in local currency, unless otherwise agreed; and} \\
\text{f} & \quad \text{taxes are paid in local currency.}
\end{align*} \]

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.

i Royalties

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

---

10 Articles 220 et seq. of the Mining Code.
11 Ordinance-Act No. 10/001 of 20 August 2010 relating to the introduction of value added tax (VAT).
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, 0 per cent for common construction materials and 10 per cent for strategic minerals to be determined by the government.\textsuperscript{12}

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).

ii Taxes

The corporate income tax rate is set at 30 per cent of turnover, as compared with 35 per cent under the DRC’s common regime.

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.

iii Duties

The customs regime\textsuperscript{13} 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:

\begin{enumerate}
  \item 2 per cent for all goods and products strictly for mining use, which are imported before exploitation of the mine has commenced;
  \item 5 per cent for all goods and products strictly for mining use, which are imported after exploitation of the mine has commenced; and
  \item 5 per cent for fuel, lubricants, reagents and consumer goods, which are destined for mining activities throughout the duration of the project.
\end{enumerate}

\textsuperscript{12} Article 241 of the New Mining Code.

\textsuperscript{13} 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 uncertainty regarding the presidential elections\(^{14}\) is harmful for the Congolese business climate.

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.

\(^{14}\) Scheduled for 23 December 2018.
Chapter 10

ECUADOR

Rodrigo Borja Calisto

I OVERVIEW

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

Since 2009, Ecuador has adopted a new legal framework under the Mining Act and an enthusiasm for the large-scale mining industry, supported by the government of former President Rafael Correa, which began negotiation processes for the mining exploitation agreements for three of the five strategic projects in Ecuador – Mirador (Ecuacorriente-Chinese), Fruta del Norte (Lundin Gold Inc-Canadian) and Loma Larga (INV Minerals-Canadian).\(^2\)

During the tenure of the former government, the Mirador and Fruta del Norte contracts were signed, the Loma Larga project was agreed and several of the legal and regulatory reforms discussed later in this chapter were made. The current government also supports the mining industry, especially as a new source of revenue for the country.

The whole of Ecuador is rich in terms of mining. Top-level enterprises have surveyed the country for several years and have discovered gold and copper reservoirs in several provinces, including Azuay, Zamora Chinchipe, Morona Santiago and Imbabura. Ecuador has granted mining concessions to private companies; some of these projects are under exploration and others are coming into the exploitation phase.

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

\(a\) high mineral-recovery rate;
\(b\) low land-clearing ratio (closeness of mineral to surface);
\(c\) access to water;
\(d\) sufficient electric power at low cost;
\(e\) modern road, port and airport infrastructure;
\(f\) monetary stability;
\(g\) tax stability and incentives; and
\(h\) accelerated depreciation of machinery.

---

1 Rodrigo Borja Calisto is a partner at Lexim Abogados.
2 The other strategic projects are Rio Blanco-Junefield and Panantza San Carlos-Ecuacorriente.
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. 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:

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

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

II LEGAL FRAMEWORK

According to the Mining Act, its regulations and directives, in harmony with the constitutional principles mentioned above, all mineral substances are state-owned and can be delegated to private parties through metallic mining concessions (there are also mining concessions for metallic, non-metallic and construction materials but in this analysis we will focus on the metallic concessions), which can be obtained through public tender or auction processes. The public auction processes are for those mining areas that the state decides to delegate to a private party and that have not been subject to prior concession processes, while the process of public tender of mining concessions applies to those concessions that have been expired or have been returned or reverted to the state. There is an exception for public tender or auction processes, which is the right of the national mining company or the foreign state company or its 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 the large mining projects currently at the exploration or exploitation phase 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 Ministry of Mines allows exploratory drilling during the initial exploration period (which before was only authorised during the advanced exploration period, which is a positive move). The aforementioned mining periods do not apply to small-scale concessions, as they 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:

<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 needed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Small</td>
<td>300 tm. underground or 1,000 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 to 1,000 tm. underground or 1,001 to 2,000 tm. open pit</td>
<td>5 to 8 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</td>
<td>300 tm. underground or 1,000 tm. open pit</td>
<td>5 to 8 per cent</td>
<td>2.5 per cent, 5 per cent and 10 per cent per mining phase</td>
<td>12 per cent workers, 3 per cent state</td>
<td>Yes, services or exploitation contract</td>
</tr>
</tbody>
</table>

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

The Ministry of Mines is the government body charged with directing the public policies that relate to geological mining, as well as granting, administering and abolishing mining rights. ARCOM is the technical and administrative body responsible for exercising the state’s power to supervise, audit, intervene and control the phases of mining activity carried out by all the mining actors. The Ministry of Environment is in charge of drawing up 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 necessary environmental permits. SENAGUA is the entity that exercises leadership in guaranteeing fair and equitable access to water, in terms of both quality and quantity, through policies, strategies and plans that allow the integrated management of water resources. It also issues authorisations and permits for the access, use and benefit of water.

The National Assembly and the former president denounced the bilateral investment treaties with Argentina, Bolivia, Canada, China, Chile, Italy, Netherlands, Peru, Spain, Switzerland, the United States and Venezuela, but the current government plans to renegotiate.

President Lenin Moreno decided by an Executive Decree to merge the Ministries of Hydrocarbon, Mines and Electricity into one body headed by the current Hydrocarbon minister, Carlos Perez. This process was is under way and must finish by September 2018.

### 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 would be to exploit these natural resources through state-owned companies, but until now no state-owned companies have taken part in exploiting and none are near the exploitation phase.

In addition to the public tender and auction processes mentioned above, mining concession titles can be transferred between private parties, subject to written consent being
granted by the Ministry of Mines. Mining concessions can also be the subject of agreements, such as an irrevocable promise to transfer, assignment as security of the mining rights, property such as buildings, or 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 of planning, during which time neither existed. During the planning process, several national and international companies demonstrated their interest in acquiring mining concessions (almost 500 petitions, of which 275 have been granted to date) and an investment commitment for the following four years of US$470 million. The President decided to suspend the public tender and auction processes until the government has analysed and defined what would be the best way to reopen the mining cadastre, since the previous processes revealed a number of errors regarding committed investments.

ii Surface and mining rights
Under Ecuadorian legislation, mining rights are independent from surface rights. 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 title-holders have the right to acquire, buy, rent, lease or lend the surface lands required for the development of a mining project or related infrastructure.

The Mining Act 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 may be renewed for equal periods provided that, prior to expiry, the mining concessionaire has presented a written petition to the Ministry of Mines to that end and favourable reports have previously been obtained from ARCOM and the Ministry of Environment.

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

The aforementioned minimum operational and investment requirements 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, expiry of the mining concession may be avoided by paying an economic compensation equivalent to the amount of the investments not made, provided that investments equivalent to at least 80 per cent of the total have been made.

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

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

Several other permits are required to develop mining activities during each of the phases and periods, including for the use of explosives, special labour shifts, fire department, and construction permits from ARCOM and the municipalities.

iv  Closure and remediation of mining projects

The mining concessionaire and other mining rights title-holders (beneficiation plants, smelting and refining plants) should include in their environmental impact studies a closure plan for all activities, as incorporated in the environmental management plan and relevant warranty. The closure plan will be reviewed and updated periodically in relation to the annual programme of work and environmental budget, and in the environmental compliance audits, which should include information regarding investments, estimates of closing costs, activities for closure of a mine, or for partial or total abandonment of mining operations, and the rehabilitation of affected areas.

Within the two years prior to the scheduled completion of a project, the mining concessionaire or mining rights title-holder shall submit a definitive closure plan to the National Environmental Authority for its approval, including rehabilitation of the sector or area, a plan for verification of compliance, the social impact and compensation plan, and the guarantees as 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 establish the standards for application of the Mining Act, to ensure health and safety at work during all phases of mining activity, and include general guidelines for prevention of risks to workers under special mining regimes (artisanal, small-scale, medium and large-scale).

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

Mining companies are also required to draw up internal occupational health and safety regulations, which must be approved by the Ministry of Labour and shall contain a health and safety management system.

ii  Environmental compliance

Mining rights title-holders and mining concessionaires must 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. The studies or documents shall be approved by the competent environmental authority, which will then award the relevant environmental licence.

The Mining Activities Environmental Regulations set out the requirements and procedures for applying for environmental permits.
For a small-scale mining project, the environmental permit should be granted for simultaneous exploration and exploitation activities, requiring specific and simplified environmental studies.

For a medium-sized or large-scale mining project, approval of an environmental file is required during the initial exploration period, an environmental declaration is required during the advanced exploration period, and environmental impact studies are required during the exploitation phase and subsequent phases, which will be changed or updated depending on the results. On the basis of submitted documentation, the corresponding environmental licences shall be issued.

Once a mining rights title-holder or mining concessionaire satisfactorily complies 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 an application being submitted. If the authorities fail to do so within that period, it shall be understood that there is no opposition or impediment to mining activities being started. It is important to mention that in view of the large number of new mining concessions granted, the Ministry of Environment is not complying with this six-month term.

If mining activities are carried out before the required environmental regulatory approval has been granted, certain financial guarantees must be presented, as established in the applicable mining environmental regulations.

A year after an environmental licence has been issued, the mining rights title-holders or mining concessionaires are required to submit an environmental audit of compliance to enable the inspection body to monitor, oversee and verify compliance with the applicable environmental management plans and environmental regulations. Once this has been done, 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 free and informed way, within a reasonable period of time, regarding any plans or 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 any social, cultural and environmental damage caused to the people.

These consultations are mandatory and should be carried out by the competent authorities and successfully completed 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 regard, the Mining Act establishes that the consultation process is intended to promote the sustainable development of mining activities, safeguarding the rational use of mining resources, respect for the environment, social participation in environmental matters and the development of communities located in the areas affected by a mining project.

---

4 ‘Environmental file’ is a general description of the applicable legal framework, the main activities of the project, work or activities that, according to the national environmental categorisation, are considered low impact; it also describes the physical, biotic and socio-economic aspects of the project and proposes measures through an environmental management plan to prevent, mitigate and minimise the possible environmental impact.

5 Article 78 of the Mining Act.
the event that, following a consultation process, there is opposition from a majority of the relevant community, a decision regarding whether or not to go ahead with the project shall be made by the Ministry of Mines.

Under the Mining Activities Environmental Regulations, the measures for social participation are defined according to the predicted level of impact and environmental risk associated with the mining activity and the level of conflict identified, as detailed below:

\(a\) Projects with 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 necessary report and supporting documents.

\(b\) Projects with medium impact and environmental risk: 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.

\(c\) Projects with high impact 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 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 national providers of such goods. In Ecuador, there is a shortage of local providers of goods for the mining industry, so almost all mining equipment and machinery has to be imported.

As regards the right to exploit, benefit, smelt, refine, market and dispose of all mineral substances obtained within a mining concession area, the mining rights title-holder has the right to freely sell the minerals.

Under the Mining Act, a mining concessionaire has the right to install and operate beneficiation, smelting and refinery plants by virtue of its concession without the need to apply for authorisation from the Ministry of Mines, provided that the plant is only intended to process minerals from the mining concessionaire’s concession. The processing of minerals from a third party’s concessions requires the relevant authorisation.

A mining concessionaire may freely market its products within 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 or private economic agents previously authorised by the Bank.

With regard to foreign workers, a mining concessionaire is required to employ not less than 80 per cent Ecuadorian personnel for carrying out mining activities and shall preferably engage workers resident in the locations and areas near the mining project. It is preferable for specialised Ecuadorian technical personnel to be engaged to fill the remaining percentage of posts. In the event that there are none, foreign personnel may be engaged; however, they must comply with Ecuadorian legislation.
ii  **Sale, import and export of extracted or processed minerals**

As part of the government plan to denounce bilateral investment treaties, the National Assembly approved the Production, Commerce and Investments Organic Code, which contains and recognises several rights for investors, such as:

a  freedom to produce and market 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 unfair competition practices;

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.

iii  **Foreign investment**

The Production, Commerce and Investments Organic Code allows investors to execute an investment protection contract that sets out the conditions for 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. For medium and large-scale metallic minerals mining projects, it can also grant legal (mining legislation) and tax stability. The requirements for executing an investment protection contract are an investment amount exceeding US$100 million and a technical report issued by the competent ministry.

VI  **CHARGES**

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

a  Royalties (metallic concessions) are charged at:

- 3 per cent for small-scale mining; and
- between 3 and 8 per cent for medium-scale and large-scale mining.

b  The main taxes applicable are:

- income tax (25 per cent);
- VAT (12 per cent);
- capital outflow tax (5 per cent);
- labour profit-sharing (see chart in Section II); and
- sovereign adjustment (not a tax per se, but an economic compensation to the state to fulfil the 50/50 profit distribution between 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 on certain goods in order to protect the local industry.
VII OUTLOOK AND TRENDS

From the date of issuance of the current Mining Act (29 January 2009), which replaced the previous Mining Act of 1991, and its General Regulations issued on 16 November 2009, Ecuador has seen a growing interest by international mining companies in developing large-scale mining projects in our country. As a result of the negotiation processes for 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 2014, December 2015 and April 2016. These reforms to the Mining Act have resulted in the following changes 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) for metallic minerals;
c. establishment of a due process in cases of caducity of mining rights and the right to remedy or comply with the non-compliance;
d. clarity regarding the ownership of certain assets;
e. creation of the medium scale as a mining category, with more favourable economic conditions and without the obligation to enter into an mining exploitation agreement with the state;
f. payment of the windfall tax and sovereign adjustment after the recovery of an initial investment;
g. inclusion of formulas to calculate and pay the sovereign adjustment;
h. reimbursement of VAT paid as of 1 January 2018; and
i. legal and tax stability for medium and large-scale metallic mining thanks to the execution of the investment protection agreement.

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

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

Despite the fact that a number of these deposits were discovered decades ago, Guinea has often been considered a prime example of the ‘resources curse’ affecting resource-rich developing countries. Indeed, 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 130 of 195 nations in terms of gross domestic product (GDP) in 2017 and 183rd of 188 nations listed on the human development index in the 2016 United Nations Human Development Report. In addition, the agricultural sector still provides employment and income to the bulk of the population.

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

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

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.

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.

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 and Salimatou Diallo.

2 Source: https://globaledge.msu.edu/countries/guinea/economy.

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 remains above 6 per cent and is projected to average 6.2 per cent in 2018–2019.4 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.5

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 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 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.

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.

---

5 http://mines.gov.gn/sommet-de-lua-la-guinee-retenue-pour-abriter-le-cadm/.
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 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 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

---

6 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.

7 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]’.

8 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’.
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:

a) 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);
b) the requirement for minimum investment obligations for the issuance of concessions;
c) a prohibition for mining conventions to derogate from the terms of this new Code;
d) the requirement for holders of exploitation permits and concessions to enter into ‘development agreements’ with local communities living around the areas of operations;
e) detailed environmental and rehabilitation obligations;
f) the introduction of a new tax regime, including amendment of the surface royalty and extraction tax;
g) 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; and
h) the setting up of a National Mining Commission, comprising a Strategic Committee and a Technical Committee, in charge of supervising the activities of the CPDM.

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

By the time the 2011 Mining Code was published and entered into force, commodity prices had declined and the 2011 Mining Code was criticised for being influenced by ‘resource nationalism’. As a consequence, Guinea amended the 2011 Mining Code by Law No. L/2013/053/CNT of 8 April 2013 (the 2011 Mining Code as amended in 2013, ‘the Mining Code’), with a view to introducing:
a) decreased maximum area limitations for exploration permits;
b) reduced investment thresholds for the issuance of a mining concession;
c) reduced royalty and tax rates and increased stabilisation periods for certain tax rates from 10 to 15 years; and
d) 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.

---

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

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.

### Key rights and obligations

<table>
<thead>
<tr>
<th></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>
</tbody>
</table>
| **Key requirements** | • 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.‡ | |
| **State participation** | N/A | 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 |
| **Transferability** | No | Yes – subject to approval by the Minister of Mines, an environmental audit and a health and safety audit |

* 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>Conditions for grant</th>
<th>Exploration permit</th>
<th>Exploitation permit</th>
<th>Concession</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Sufficient financial and technical capabilities</strong>*</td>
<td>N/A</td>
<td>Guinean-registered entities</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>N/A</td>
<td></td>
<td></td>
</tr>
<tr>
<td>If exploration work has been undertaken by the state, the state may seek reimbursement on the basis of an assessment by an independent auditor.</td>
<td>If the exploitation permit or concession is granted to someone other than the entity that made the discovery, a fair compensation must be paid to the latter to cover the exploration costs that have been incurred.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### Process for grant

<table>
<thead>
<tr>
<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></td>
</tr>
<tr>
<td>If a deposit has been discovered, based on a competitive tendering process.</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></td>
</tr>
<tr>
<td>Granted by an order of the Minister of Mines upon recommendation of the CPDM following approval of the Technical Committee.</td>
<td>Granted by ministerial decree upon recommendation of the Minister of Mines following approval by the National Mining Commission.</td>
<td></td>
</tr>
</tbody>
</table>

**Key documents for grant**

- Work and expenditure commitments deemed acceptable.
- Environmental impact notice to be filed before the start of the work and no later than six months after the date of award.
- A feasibility study including:
  - a detailed schedule of the work;
  - 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);
  - a plan for supporting Guinean companies; and
  - 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.†

* 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>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>
</tr>
<tr>
<td><strong>Term of renewals</strong></td>
<td>Two years</td>
<td>Five 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>
</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>
</tr>
<tr>
<td><strong>Relinquishment</strong></td>
<td>50 per cent on each renewal</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 adopting a model mining agreement and dated 17 January 2014. Mining agreements are

© 2018 Law Business Research Ltd
intended to supplement the provisions of the Mining Code. Although mining agreements are to be ratified by the legislature, as was the case under the 1995 Mining Code, the Mining Code provides that mining agreements may not deviate from the terms of the Mining Code.

iii Additional permits and licences

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

iv Closure and remediation of mining projects

According to Article 131 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’.

10 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:

- 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;
- title-holders must provide reasonable and adequate compensation to the legitimate occupants of the land;
- the state will assist in procuring the necessary consent from the landowner, if any; and
- 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:

- title-holders and related contractors must give preference to Guinean companies, provided that they offer comparable prices, quantities, qualities and delivery schedules; and
- 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></td>
<td>Year 1 to Year 5</td>
</tr>
<tr>
<td>10 per cent</td>
<td>20 per cent</td>
<td>15 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:

1. Fixed-term work permits for foreigners in the mining sector must be approved by the mining administration and may be renewed only once;
2. 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
3. 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>Position</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:

1. As of the date of the first commercial production, the assistant managing director of the title-holder must be a Guinean national;
2. 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
3. Title-holders must file an annual report on measures taken for employing Guineans.

V OPERATIONS, PROCESSING AND SALE OF MINERALS

1. 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’.  

---

11 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.
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’.

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.

i  Royalties

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

<table>
<thead>
<tr>
<th>Type of Permit</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>


### Taxes

#### Extraction tax

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

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

#### Export tax

An export tax is payable 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.

### 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.\(^\text{12}\)

### 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></th>
<th>Rate</th>
<th>Basis</th>
</tr>
</thead>
<tbody>
<tr>
<td>Transfer of exploitation permit or concession</td>
<td>35 per cent</td>
<td>Difference between price and net book value of the title</td>
</tr>
<tr>
<td>Transfer of shares of a title-holder</td>
<td></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></td>
<td></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.

---

\(^{12}\) 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).
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:

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

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

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). Despite the fall in cocoa prices and social demands, GDP growth remained very strong in 2017 at 7.8 per cent.\(^3\)

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 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 considering social and environmental parameters.

The mining sector was very dynamic in 2017. The annual turnover was 539 billion CFA francs, up 10.27 per cent compared to 483 billion CFA francs in 2016. In addition to the increase in mining revenues, the number of individuals directly employed also increased, by 21.2 per cent, and the number of individuals indirectly employed increased from 24,800 to 31,500. Tax revenues generated by mining companies totalled 56.4 billion CFA francs in 2017, up 39.8 per cent as compared to 2016.\(^4\)

---

1 Emma France is an associate at Herbert Smith Freehills Paris LLP.
2 International Monetary Fund (IMF) ‘World Economic Outlook April 2018’.
3 ibid.
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. Twenty-nine new mining exploration permits were granted in 2017.\(^5\)

Gold mining remains at the forefront of the sector. Gold production increased by 2.15 per cent to 25.4 tonnes in 2017\(^6\) and is expected to increase up to 30 tonnes per year between 2017 and 2020. These optimistic forecasts rely on the exploitation of two mines for which permits were granted at the end of 2016. One of them is operated by Australian Perseus Mining at Sissingué and started production at the end of January 2018.\(^7\) The other is located at Aféma. Recent transactions in the gold sector include an agreement reached in May 2017 by Endeavour Mining with SODEMI (the state-owned mining company) to increase its interest in one of its gold mines at Ity by acquiring 25 per cent of the interest held by SODEMI. Endeavour Mining has also announced its intent to carry out further investment in Ivory Coast.\(^8\)

The mining sector initiated diversification of exploitation in 2016 and in 2017. The Ivorian government delivered an exploitation permit for bauxite to an Ivorian society, Lagune Exploration Afrique. It should be the first exploitation of bauxite in the country. Furthermore, the first nickel mine entered into exploitation in July 2017. After obtaining an exploitation permit in November 2016, the subsidiary CMB (of Greek Company IC Nickel) plans to extract at least one billion tonnes of nickel per year. To attain this objective, the company needs to invest around 130 billion West African CFA francs.

## II LEGAL FRAMEWORK

The Ivorian legal system has been strongly influenced by the French civil law tradition of codifying the law. Under the current Third Republic regime and the Fourth Constitution, the prerogatives of the executive power, although within the framework of a presidential regime, have been restricted. Within the entire national territory, justice is delivered by the Court of Cassation, the State Council, the Courts of Appeal, the High Courts and their separate sections.

The main laws applicable to mining activities are the Code, the decree implementing the Code dated 25 June 2014, the Environment Code and the Labour Code. Additional regulation must also be scrutinised, such as the Order on Surface Royalty dated 26 March 2014 and proportional taxes in the mining sector.

The Ivory Coast’s economy is highly integrated within the West African region. It is a Member State of the Organisation for the Harmonisation of African Business Law (OHADA) and of the West African Economic and Monetary Union (WAEMU), which enacted a mining code in 2003. The WAEMU Mining Code 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. Each Member State must, in theory, comply with it. The Ivory Coast is also a member of the

---

\(^5\) ibid.


\(^7\) Agence Ecofin, ‘Côte d’Ivoire : la mine d’or de Sissingué entre en production’, 29 January 2018.

Economic Community of West African States (ECOWAS), which enacted a Directive on the harmonisation of guiding principles and policies in the mining sector in 2009, the main objectives of which are to harmonise mining laws in the region, to improve transparency and to protect the environment and local communities. The Code is, for the most part, compliant with these two organisations.

At the international level, the Ivory Coast has made good progress in terms of transparency. It joined the Kimberley Process Certification Scheme in 2013, 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. Since May 2013, it has been considered to be complying with EITI principles.

According to the Code, the main regulatory bodies in the Ivory Coast are the President of the Republic and the Ministry of Industry and Mines (the Ministry), the department in charge of implementing mining policy.

These authorities require, *inter alia*, mining operators to provide reports and keep various documents available, depending on the nature of the permit issued. The main reporting requirements are in respect of statistics on performance, employment, advancement of exploitation and exploration operations.

### III MINING RIGHTS AND REQUIRED LICENCES AND PERMITS

#### i Title
The Code reaffirms the sovereign ownership of the Ivorian state of the 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 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.

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.9

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.

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

---

9 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.
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 VAT, on various imported materials.

---

VII OUTLOOK AND TRENDS

The long-awaited decree implementing the Code was published in August 2014, and contains provisions that generally follow the Code's investor-friendly orientation. Some restrictive provisions, however, have been included, for instance, the approval of the Ministry is required to perform any majority-stake acquisition in the permit holder’s share capital. Grey areas also remain, such as the conditions for withdrawal of permits that may occur in the event of any breach of the legislation, according to Article 187 of the Code, relating to administrative sanctions. More recently, Decree No. 002/MIM/CAB dated 11 January 2016 was enacted to set out the procedures for the award and renewal of mining titles and authorisations, as well as general dispositions regarding the handling and sale of gold.

Trends in the Ivory Coast mining industry point to positive outcomes. In April 2017, BMI Research reported that the mining sector will experience the fastest mining value growth rate in the continent. It has been estimated that the annual value growth in the Ivorian mining industry will rise to 15.6 per cent between 2017 and 2021. This growth will be supported by solid infrastructure development and the strong incentives provided by the implementation of the new Code.

With major gold players such as Randgold Resources and Endeavour Mining planning to increase the life expectancy of their mines, and the Australian Newcrest Mining multiplying partnerships to find new resources, gold mining should remain the principal driver of the mining sector in the next few years. In this respect, Randgold Resources and Endeavour Mining have announced that they have established a joint-venture exploration covering the adjacent Sissedougou and Mankono exploration properties in Ivory Coast.\(^\text{11}\)

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. Any policies that have been implemented to fight the problem (seizures, granting traditional permits)\(^\text{12}\) have been rather inefficient. For instance, 142 sites, closed illegally in 2015, were reoccupied in 2016, and 47 others have been created.

In addition, the recent removal of the exemption from corporate tax has sent a negative signal to the mining sector.

Despite that, the future of the mining sector should remain bright. Investment should continue to be boosted by the decision by the United States to lift its decade-old economic sanctions against the Ivory Coast in 2016. This should encourage investors to trust the potential of the new political and economic stability and invest in infrastructures supporting the mining industry.

Finally, the Ivorian authorities' objective is to raise the country’s economy to the level of an emerging economy by 2020. This aim is currently being furthered by large investment in infrastructure and power projects, which are likely to have a positive 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.

---


\(^{12}\) See for instance the rational programme of gold mining (Programme de rationalisation de l’orpaillage).
Chapter 13

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.

1 Alberto M Vázquez is senior partner at VHG Servicios Legales SC and Rubén Federico García is a partner at RSM Bogarín y Cía SC.

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:

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),4 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.

---

4 Amendments to the Mining Law published in the Official Journal of the Federation on 11 August 2014.
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; 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 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 laws. The legal provisions relative to works of exploitation of the minerals and substances to which paragraph four refers, shall regulate the execution and proof of works carried out or to be carried out from their effective date, independently of the date of issuance of the concessions, and the non-observance thereof shall cause their cancellation.

There is a clear constitutional differentiation between:

- **a** surface land (ground) that may constitute private property when title has been transferred to private persons (either individuals or legal entities); and
- **b** the right to use, utilise and dispose of mineral resources located within the Mexican territory, which may only be carried out by individuals or private legal entities through the granting of concessions for such purposes by the Mexican government.

As such, a landowner owns not only the surface of its property, but also (with some limitations), in principle, the matter located under the land,\(^5\) 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);

---

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

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


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.

---

\(^6\) Amendments to the Mining Law published in the Official Journal of the Federation on 11 August 2014.
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;

f. 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.\(^8\)

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.\(^9\)

---

\(^7\) *Elementos del Derecho Administrativo*, Luis H Delgadillo Gutiérrez y Manuel Lucero Espinosa, p. 99; first edition, published by Editorial Limusa SA.


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 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:

- land for human settlement;
- parcelled land; and
- 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:

- the creation and extension of industrial development areas;
- the exploitation of natural resources owned by the nation and the installation of beneficiation plants related to that exploitation; and
- 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:

- through an official communication;
- through publication in the Official Journal of the Federation; and
- 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 said concessionaire may:

- obtain free access to the surface covering the mining concession for the performance of mining work;
- 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
- 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:

- lease agreements;
- commodatum contracts;
- private agreements for the occupation and use of the surface land, or any other similar purposes; and
- 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.

\textbf{iii Additional permits and licences}

\textbf{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.

\textbf{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.

\textsuperscript{10} Published in the Official Journal of the Federation on 4 August 1994, amended on 19 May 2000.
The National Water Commission has a policy of not granting any new concessions; therefore, mining companies must negotiate with holders of water concessions that have been previously granted.

Finally, under the Mining Law, mining concessionaires may use water obtained directly from the mine.

iv Closure and remediation of mining projects

Environmental impact authorisations (EIAs), 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 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.

### 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.

### 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.

### 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.

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 proceeds 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.

### iii 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
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.

**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. 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.

As a fiscal stimulus, it is admitted that companies whose income in the previous year was less than 100 million pesos can be subject to an accelerated depreciation, applying a depreciation rate of 87 or 77 per cent.

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

**Value added tax**

Individuals 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; 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 to 35 per cent and 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 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.

In the 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.

**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 – 1,266 pesos;
- cancellation of a registration – 633 pesos;
- registration with a mining society – 2,531 pesos;
- registration of changes to the by-laws of a mining society – 1,266 pesos;
- notarial notices – 633 pesos;
- other notices – 633 pesos; and
- review of documents – 633 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. 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.

Sources: 5th Annual Report of the President of the United Mexican States, and ‘Abandonan concesiones mineras’, Reforma, 9 September 2014.
Chapter 14

MOZAMBIQUE

João Afonso Fialho and Diogo Prado Alfaiate

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. Currently, coal is almost single-handedly responsible for a projected growth in gross domestic product (GDP) of 5 per cent in 2018.

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

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 for 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.

1 João Afonso Fialho is a partner and Diogo Prado Alfaiate is an associate at Vieira de Almeida.
c Law on the Taxation and Fiscal Benefits of Mining Operations (Law 28/2014 of 23 September 2014) sets out the tax regime, including tax rates and exemptions, applicable to the mining sector.
d Mining Tax Regulations (Decree 28/2015 of 28 December 2015) sets out the rules for the assessment of mining production tax and surface tax.
e 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.
f 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.
g 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.
h 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.
i 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.
j Regulation on the Hiring of Expatriates for the Petroleum and Mining Sectors (Decree 63/2011 of 7 December) contains the applicable rules for hiring expatriate personnel in these sectors.
k 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.

The main regulatory bodies are the Ministry of Mineral Resources (MIREM) and the National Directorate of Mines. MIREM is responsible for the award of mining rights and the National Directorate of Mines is responsible for the administrative procedures within the industry.

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. Private prospecting, exploration and mining 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 to the interested party by MIREM on a first come, first served basis. However, awards are subject to public tender whenever there is more than one application for the same mineral rights. MIREM may also 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.

There are seven main types of mineral titles:

a prospecting and exploration licences;
b mining concessions;
c mining certificates;
d mining passes;
e mineral handling 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 25,000 hectares and can be extended upon request to MIREM. 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 a 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 exclusively to their holders.

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 handling 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 per cent 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 per cent 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 (1) an environmental licence, and (2) 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 (metrical). 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.
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, 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).
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

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 in order 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 15

SENEGAL

Mouhamed Kebe¹

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.

¹ Mouhamed Kebe is the managing partner of Geni & Kebe.

The information contained in this chapter is correct as at October 2017.
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 (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.

- 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.

- 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.

- 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

c respect the principles and obligations under the Extractive Industries Transparency Initiative (EITI), such as declaring all payments made to the state to the EITI authorities.

The passing of the new law follows a three-year consultation and legislative drafting process and introduces many initiatives that have been used within the region.

The bill will now be presented to the president for promulgation and, after that time, it will be published in the National Gazette.

The 2003 Code was designed to attract and foster investment and development in mineral resources in the country. 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:

a diversification of mineral production and the beneficiation of mineral products before export is encouraged;
b the lawful rights and interests of investors are guaranteed;
c foreign investments are governed by the non-discriminatory principle, meaning that foreign investors will be treated no less favourably than comparable domestic investors;
d the protection of the environment and the sustainability of mining will be a key objective; and

e projects will be designed using a comprehensive information system for mineral resources management, integrated with other natural resources (such as land, forest reserves and water) with proper regard for environmental and social issues.

II LEGAL FRAMEWORK

Mining in Senegal is mainly regulated by:

a Act No. 27/2016 on the Mining Code dated 30 October 2016, enacting the 2016 Code;
b 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:

a Regulation No. 18/2003/CM/WAEMU, dated 22 December 2003, enacting the West African Economic and Monetary Union (WAEMU) Mining Code;²
b the Environmental Code, No. 2001-01 of 15 January 2001;
c the Tax Code, No. 2012-31 of 31 December 2012;

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.
d the revised Uniform Act of OHADA³ relating to general commercial law, dated 15 December 2010;
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:

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. a description of the mineral substances for which the application for the permit is being made;

c. the coordinates of the exploration area;

d. an estimate of the surface area of the exploration permit area being sought;

e. 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;

f. a presentation of the planned exploration work and the methods to be used; and

g. 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:

a. three original copies of the application addressed to the Minister four months before expiry of the exploration permit;

b. 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;

d a report detailing the results of the exploration phase indicating, in particular, the reserves, grades, types of mineral deposits and metallurgic tests;

e a plan for the development and start of mining operations;

f an investment plan and a timing chart for the undertaking of the mining project;

g an environmental impact study concerning the mining operation (approved by the Ministry of Environment, which issues a confirmatory certificate); and

h a draft of the convention between the state and the exploration permit holder if the demand does not derive from a current, valid exploration permit.

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:

a take samples of mineral substances extracted during exploration work;

b an exploitation permit or a mining concession; and

c be prioritised for the granting of an exploration permit for all substances other than those relative to its mining title and that could be discovered within the perimeter of the valid exploration permit.
A mining exploitation title confers on its holder:

\( a \) the exclusive right of exploitation and the free disposal of mineral substances for which the mining exploitation title has been issued, within the limits of the perimeter attributed and indefinitely in depth;

\( b \) the right to renew the title;

\( c \) 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);

\( d \) 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.

### 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.
ii Environmental compliance

All mining projects require the completion of an environmental assessment.

As previously noted, each applicant for a mining permit must prepare, at its own expense, an EIS to assist in 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:

a import, without financial settlement, any equipment belonging to it;

b import to Senegal any possessions and services necessary for such activities; and

c export the mineral-extracted substances, their concentrates, primary derivatives and all other derivatives after performing legal and regulation formalities for 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:

a collect in Senegal all funds acquired or borrowed from abroad, including receipts from the sale of their share production;

b transfer abroad:
   • the dividends and products of capital invested, as well as the product of clearings or realisation of their assets; and
   • funds destined for the reimbursement of loans (capital and interest) contracted abroad, and payment of foreign suppliers of materials and services for mining operations; and

c import all funds acquired or borrowed abroad 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:

- **a** equipment, materials, supplies, machines and spare parts not produced or manufactured in Senegal, and specific materials required for mining operations;
- **b** fuel, oil products, materials and spare parts, and complements required for mining operations; and
- **c** temporary admission to full exoneration from import and export taxes and duties in relation to materials, machines and equipment that, once used, may be re-exported or transferred.

The period expires 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:

- **a** research permits: 500,000 West Africa CFA francs;
- **b** mining concessions: 7.5 million West Africa CFA francs; and
- **c** 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.
I OVERVIEW

For more than a century, South Africa’s mining industry has been one of the main driving forces of its economy, which is generally considered to be the wealthiest in Africa. This state of affairs is attributable to a number of factors, including the country’s extraordinary mineral wealth, relatively good access to infrastructure, a well-developed financial sector and relative political stability and predictability.

In recent years, South Africa’s mining industry has come under some pressure, as a result of creeping regulatory uncertainty (especially in relation to the manner in which existing laws are implemented and enforced), a shortage of electricity and reduced spending on infrastructure maintenance and development.

The government’s formal position on mining and international investment is that South Africa is ‘open for business’ and that investment in the mining sector is to be welcomed. In practice, the situation is rather more complicated, as the promotion of investment in mining is often subordinate to the 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, which was put into force 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 the late 2000s in an international investment dispute brought in the International Centre for Settlement of Investment Disputes under South Africa’s bilateral investment treaties with Belgium and Luxemburg. The issue in question was the allegation that South Africa’s Mineral and Petroleum Resources Development Act 2002 (MPRDA) constituted an indirect expropriation of the mineral rights held by Finstone Sàrl and its subsidiaries prior to the commencement of the MPRDA on 1 May 2004.

Nevertheless, foreign investors continue to hold the majority of mining interests in South Africa, including large mining projects owned by Anglo American, AngloGold Ashanti, BHP Billiton and the like. A number of smaller mining companies, especially Canadian and Australian, are also developing new projects in South Africa.

---

1 Pieter Willem Smit is a director at Falcon & Hume Inc.
2 Piero Foresti, Laura de Carli & Others v. The Republic of South Africa, ICSID Case No. ARB(AF)/07/01.
II LEGAL FRAMEWORK

Mining legislation is based on a system of state ‘custodianship’ of mineral resources, in which the state, acting through the Minister of Mineral Resources, issues different types of licences to applicants on a first-come, first-served basis and upon satisfactory demonstration of an 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 and the Diamonds Act 1986.

The most important licences relating to mining are:

a. prospecting rights, which authorise invasive exploration work, on an exclusive basis, but not mining;

b. mining rights, which authorise mining and exploration on a large scale and for long periods, on an exclusive basis; and

c. mining permits, which authorise small-scale mining on areas of 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 because of, for example, adverse economic conditions).

The commencement of the MPRDA signified an important departure from the preceding regulatory environment, which had existed for more than 100 years, whereby the right to mine was based on a system of private ownership of ‘mineral rights’ (being essentially limited real rights and servitudes in respect of land), which could be freely traded. In order to accommodate the transition, the MPRDA contains detailed provisions allowing for the conversion of ‘old order rights’ into prospecting rights and mining rights regulated by the MPRDA. This process seems to be largely completed, with old order rights and conversion having 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 are the bilateral investment treaties concluded between South Africa and various foreign states. However, as mentioned before, the South African government has adopted the Protection of Investment Act 2015, and has announced that it is not renewing its bilateral investment treaties. The net effect of this development is the watering down of protection for foreign investors in the South African mining industry.

Other notable 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 Organization.

Mineral reporting requirements are largely regulated by the rules of the JSE Limited, South Africa’s premier stock exchange. Under the 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 is administered and enforced by the Department of Mineral Resources (DMR). The DMR is further divided into five main branches, namely, mineral
policy and promotion, mineral regulation, mine health and safety, corporate services and the chief financial officer. The mineral regulation branch is primarily responsible for the processing of applications, awarding of licences and enforcement of the MPRDA. The mine health and safety branch is primarily responsible for the administration and enforcement of the Mine Health and Safety Act 1996 (MHSA), including investigations into safety incidents, injuries and fatalities occurring at mines in South Africa. In both cases, there are regional DMR offices in each of the nine provinces of South Africa, which are primarily responsible for the administration of the MPRDA and the MHSA. However, especially in the case of mineral regulation, the ultimate decision-making, including the granting of licences, consideration of internal appeals and decisions to suspend or revoke licences owing to non-compliance, are taken at national level by officials in the DMR head office in Pretoria.

III MINING RIGHTS AND REQUIRED LICENCES AND PERMITS

i Title

For all practical purposes, the state could be regarded as the ‘owner’ of underground minerals. However, to avoid large numbers of claims for expropriation of mineral rights as a result of the transition from the old system of private ownership, the MPRDA does not refer to the state as having ‘ownership’ of underground minerals. Instead, the MPRDA provides that the mineral resources are the ‘common heritage’ of all South Africans and that the state is the ‘custodian’ thereof for the benefit of all South Africans.

The right to mine underground minerals is conferred on (private) third parties by the state, acting through the Minister of Mineral Resources (or his or her delegate), based on a first-come, first-served application system and upon satisfactory demonstration of an applicant’s ability to comply with the financial, technical, environmental, health and safety and socio-economic development requirements set out in the legislation.

For the duration of the mining right in question, the holder of the mining right may, for all practical purposes, be regarded as the owner of the minerals. In any event, the holder of the right to mine becomes owner of the minerals at the latest upon extraction of the mineral from the land where it naturally occurred.

Once a private party holds a prospecting right or mining right, it is possible for the private party to transfer that right (or a portion thereof) to another private party, subject to the consent of the Minister of Mineral Resources under the 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 the business entity is a listed company.

ii Surface and mining rights

As described in Section II, the most important licences relating to mining are prospecting rights, mining rights and mining permits.

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 because of, for example, adverse economic conditions.

Under the terms of Section 5 of the MPRDA, prospecting rights and mining rights are limited real rights in respect of the land and minerals to which they relate. In simple terms, this means that prospecting and mining rights constitute limitations on the rights of
ownership of the person who owns the land. Moreover, Section 5 of the MPRDA expressly authorises the holder of a prospecting right or mining right to enter the land in question, 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 exercising the right.

In order to make sure that the landowner or lawful occupier of the land in question does not suffer undue hardship as a result of prospecting or mining activities on the land, the MPRDA provides that the holder of a prospecting right or mining right must compensate the landowner or lawful occupier for any loss or damage suffered by the landowner or lawful occupier as a result of the prospecting or mining activities. The amount of compensation payable may be agreed contractually between the parties, or it may be determined by the court or by way of private arbitration. It has become common practice for mining companies to enter into surface leases or ‘surface use agreements’ with landowners or lawful occupiers, which set out the parties’ respective rights and obligations, and fixes a compensation amount for purposes of the MPRDA.

Neither payment of compensation nor agreement between the mining right holder and the landowner as to the quantum of compensation are prerequisites for access to land for the purposes of mining or prospecting activities.3

Prospecting rights and mining rights are obtained by means of an application submitted in prescribed form to the Regional Manager of the DMR in the province or region where the proposed mining operation is to take place. The application must be submitted online, must be accompanied by the prescribed application fee and must be motivated by means of detailed documents describing the manner in which the applicant proposes to conduct the prospecting or mining operations in question and comply with the other requirements set out in the legislation. These documents include, for example:

a a programme of work 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 finance plan setting out the economics of the operation and the proposed method in which it will be financed;

b documents demonstrating how the applicant will comply with black economic empowerment requirements;

c a social and labour plan, indicating how the mine will contribute to the sustainable socio-economic development and empowerment of its workers, surrounding communities and labour-sending areas; and

d an environmental impact assessment and environmental management programme.

The environmental impact assessment is not submitted with the other documents when the application is first submitted to the DMR, but is conducted and developed during the time when the mining right application is being processed.

Many applicants have expressed great frustration at the amount of time it takes to finalise mining right applications and prospecting right applications – periods of up to five

---

years from the date of application until the date of grant are not unheard of. These delays may be ascribed in part to the massive backlog created upon the commencement of the MPRDA, when thousands of old order right-holders submitted their rights for conversion within a period of two to five years. Further, the DMR does not have sufficient staff to process all the applications efficiently. In practice, it very often occurs that applications in respect of large, well-known projects are attended to first (we have seen examples of large mining right applications taking less than a year to finalise) while applications in respect of smaller projects are repeatedly overlooked for several years. This has also led to a proliferation of litigation between smaller applicants and the DMR in the form of administrative law reviews.

The duration of rights granted under the MPRDA depends primarily on the motivation submitted in support of a specific time period, subject to certain statutory limits. For example, if an applicant can demonstrate a mine life of only 20 years, that applicant cannot obtain a mining right for 30 years. As regards time limits, a prospecting right may be valid for a maximum of eight years (an initial period of up to five years and one renewal for up to three years), a mining permit may be valid for up to five years (an initial period of two years and up to three renewals for one year each) and a mining right may be renewed an unlimited number of times for up to 30 years at a time.

Prospecting rights and mining rights are generally subject to conditions that are little more than restatements of the legal principles applicable to these rights in terms of the legislation. The most important of these terms and conditions include (in the case of a mining right) the duration of the right, the payment of royalties to the state, the black economic empowerment requirements under the MPRDA, limitations on the transferability of the right and the undertakings made in terms of the mining work programme, the social and labour plan and the environmental management programme. In some cases, statutory conditions are further circumscribed by the terms and conditions of a specific right. For example, some mining rights are subject to a limitation on the transfer of any shares (not only a controlling interest) in the holder (whereas the MPRDA only limits the transferability of a controlling interest in the holder). Many commentators believe these conditions are ultra vires and therefore invalid. However, they are seldom if ever tested in South African courts.

Mining rights are protected by various means. For example, interfering with the lawful mining activities of the holder of a valid mining right constitutes an offence under the MPRDA and may be punishable by imprisonment or the imposition of a fine. The DMR further maintains a public registry of all prospecting and mining rights, so that the public is deemed to have knowledge of the existence and extent of all prospecting and mining rights. In civil law, the holder of a mining right may obtain an interdict (injunction) prohibiting all third parties, including a landowner, from hindering or interfering with its mining activities, and may enforce its rights against any third parties.

At the moment, there is no special restriction on the surface rights or mining rights that may be acquired by foreign parties, save to note that all mining rights are subject to the requirement that historically disadvantaged South Africans (HDSAs) must have at least 25 per cent plus one vote participation in the economic benefit and voting rights of the holder of a mining right.
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:

- an environmental authorisation authorising in detail the listed activities that will form part of the mining and mineral processing activities;
- a waste management licence in respect of management of tailings;
- a water use licence in respect of the 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.

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 are:

- 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
- licences for the 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 commonly issued licences.

Closure and remediation of mining projects

Under the terms of Section 24 of the National Environmental Management Act 1998 (NEMA), the holder of a prospecting right, mining right or mining permit must provide acceptable financial provision for the rehabilitation, closure and post-decommissioning management of negative effects on the environment. The financial provision may take the form of a cash deposit in a rehabilitation trust account, a bank guarantee or an approved insurance product provided by a recognised financial institution.

The manner in which rehabilitation is to be done is prescribed in terms of a closure plan, which must be developed by the mining right-holder and approved by the DMR after the cessation of mining activities. The contents of the closure plan will be dictated by the attributes of the environment, the nature and extent of the disturbances to be rehabilitated, the likely consequences of not rehabilitating (or partially rehabilitating) the disturbances concerned, the commitments and mitigation measures set out in the environmental management programme, and a value judgement as to the acceptable level of environmental degradation that may remain after the conclusion of rehabilitation.

In theory, the MPRDA makes provision for the issuing of a closure certificate upon successful finalisation of the remedial action set out in the closure plan. The issuing of a closure certificate terminates the holder’s statutory liability for rehabilitation and potential claims arising from environmental degradation remaining as a result of mining activities.
We are yet to see a successful application for a closure certificate, given that it is not in the government’s interest to release mine owners from liability for environmental degradation, even if rehabilitation seems to be complete.

IV ENVIRONMENTAL AND SOCIAL CONSIDERATIONS

i Environmental, health and safety regulations

In South Africa, mining activities are regulated under NEMA. NEMA sets out a number of core principles, aimed at sustainable development, sustainable exploitation of natural resources, management of environmental impacts from economic activities and emphasising the right of people to live in an environment that is not detrimental to their health and well-being. Under the 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 and certain detailed regulations (some dating from before the commencement of the MHSA).

The aim of the MHSA is to make the employer (i.e., 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 any situations that arise. 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.
Environmental compliance

As mentioned above, mining activities are regulated under NEMA. NEMA sets out a number of core principles, aimed at sustainable development, sustainable exploitation of natural resources, management of environmental impacts from economic activities and emphasising the right of people to live in an environment that is not detrimental to their health and well-being.

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 DMR (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 DMR for approval.

Timelines for public comments on the above-mentioned documents may (and should) be extended in cases where the reports are complicated and voluminous and any members of the public (including lobby groups) request an extension.

The EIA process may take between eight and 18 months to complete, depending on how sensitive the environment is and how many reports need to be compiled and peer reviewed.

Third-party rights

Under the terms of Section 104 of the MPRDA, communities have a ‘preferent right’ to apply for prospecting or mining rights in respect of communal land. This provision remains largely untested in our courts and it is uncertain how this provision will practically manifest itself. The interpretation of this Section poses myriad potential difficulties in the context of competing applications between communities and other applicants.
V OPERATIONS, PROCESSING AND SALE OF MINERALS

i Processing and operations
There is no general limitation on the import and export of equipment. However, under the Revised Draft Mining Charter published for public comment in June 2018, mining right-holders will be expected to source a certain percentage of their capital goods from local producers, including HDSAs. This plays a part in the level of black economic empowerment credit given to mining right-holders.

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 Revised Draft Mining Charter, mining right-holders would be expected to source certain minimum percentages of their services from local producers, including from HDSA service providers.

Use of foreign labour is regulated in terms of immigration laws, and, given South Africa's high unemployment rate, the general principle is that foreign labour should only be used for scarce skills.

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.

Under the terms of draft amendments to the MPRDA currently subject to public comment, the government proposes imposing certain restrictions on the export of unprocessed minerals, in an effort to promote local beneficiation of minerals.

iii Foreign investment
South Africa implements a system of exchange control, in terms of which Reserve Bank approval is required to transfer sums of money to and from South Africa. Reserve Bank approval may be obtained in advance in respect of a large number of proposed or potential transactions, for example in respect of all dividends payable in respect of a foreign investor's shareholding in a company. Generally speaking, the Reserve Bank finalises applications for exchange control approvals relatively quickly (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 Protection of Investment Act 2015 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 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 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 sale of refined or unrefined mineral resources. 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.

ii  Taxes
In addition to the royalties mentioned above, South African mining companies are subject to normal taxes, such as standard income tax on companies, withholding taxes on dividends to shareholders, value added tax (in certain circumstances) and transfer duties in respect of transfers of land or prospecting and mining rights. However, mining companies may deduct large portions of capital expenditure against their taxes, and may ring-fence capital expenditure and taxable income in respect of distinct mining operations. Moreover, gold mining companies enjoy a special tax dispensation 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.

iii  Duties
Duties payable by mining companies include transfer duties and custom duties for the importing of goods.

iv  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

The High Court in Pretoria recently ruled in favour of the Minerals Council South Africa (previously known as the Chamber of Mines) in a dispute with the Minister of Mineral Resources regarding the continuing consequences of historical black economic empowerment transactions. In essence, the High Court ruled that mining right-holders cannot be compelled to restore their empowerment shareholding to 26 per cent when black shareholders have disposed of their shareholding. The Minister has appealed against this finding, and that appeal is likely to be heard by the Supreme Court of Appeal towards the end of 2018.

Another important development concerns the publication (in June 2018) of a new Revised Draft Mining Charter for public comment. This follows the promulgation of a Revised Mining Charter in June 2017, which caught the mining industry by surprise and culminated in litigation between the Minerals Council South Africa and the Minister of
Mineral Resources regarding the validity of the Revised Mining Charter 2017. The operation of the Revised Mining Charter 2017 was suspended (and the litigation stayed) pending negotiations regarding the new Revised Draft Mining Charter.

The new Revised Draft Mining Charter introduces a number of new empowerment requirements for mines, including:

*a* a 10 per cent free-carried shareholding to be allocated to employees (5 per cent) and mine communities (5 per cent);

*b* an increase in the minimum empowerment shareholding requirement from 26 per cent to 30 per cent;

*c* the requirement that the 30 per cent shareholding must be allocated in a specific ratio among employees, mine communities and black entrepreneurs;

*d* a requirement that mines must pay a mandatory 1 per cent ‘trickle’ dividend to black shareholders under certain circumstances;

*e* more stringent requirements for the purchase of capital goods and services from South African and HDSA suppliers; and

*f* increased requirements for the employment of HDSAs in junior, middle and senior management roles within mining companies.

While the government’s efforts to obtain public comments and to consult extensively with the mining industry and organised labour in relation to the new Revised Draft Mining Charter should be appreciated, the current proposals contained therein appear to be very onerous from the mining industry’s perspective and may affect investment in this sector. Moreover, some of the proposals appear unrealistic given South Africa’s current capacity to produce goods, services and skills locally, especially in the context of the employment equity and local procurement requirements currently envisaged in the Revised Draft Mining Charter.

The outcome of engagements during the coming year between the government and the mining industry regarding the contents of the Mining Charter may prove critical to the future of the mining industry in South Africa.
Chapter 17

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 socio-economic 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

---

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 is further legislation and subsidiary legislation that is applicable in regulating the mining sector, some of which is 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.9 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.10

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.11

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

---

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, geochernical 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. a restriction to hold not more than 20 licences, provided that the cumulative prospecting areas do not exceed 2,000 square kilometres;

b. prospecting operations must commence within three months of the prospecting licence being granted or within such period as the licensing authority may allow;

c. the holder must give notice to the licensing authority of the discovery of any mineral deposit with a potential commercial value;

d. the holder must adhere to the prospecting programme attached to the prospecting licence; and

e. 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:

a. to develop the mining area and commence production in substantial compliance with the programme of mining operations and environmental management plan;

b. 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;

c. to demarcate, and keep demarcated, the mining area as prescribed;

d. to prepare and update mine closure plans as prescribed;

e. to implement a proposal plan for relocation, resettlement and compensation of people within the mining areas in accordance with the Land Act;

f. to post a rehabilitation bond if so required by the Ministry responsible for minerals;

g. to obtain an environmental certificate in line with the terms of the Environment Management Act;

h. to have a plan with respect to the employment and training of citizens of Tanzania; and

i. 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:

- the right to enter into the mining area and undertake mining operations;
- the right to erect equipment, plant and buildings;
- to dispose of the minerals recovered;
- to carry out prospecting within the mining area;
- to stack or dump any waste in accordance with the environmental management plan;
- to pay royalties, taxes and other charges;
- 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
- 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:

a 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;

b to pay the royalties due to the government;

c to stack or dump any mineral or waste product in a manner consistent with the Environment Management Act;

d 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

e 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.15

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.

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:

a a programme to reclaim and rehabilitate land and watercourses to an acceptable condition that takes account of its previous use;

b a programme to support socio-economic activities to provide an alternative livelihood for local communities beyond the life of the mine;

c comments made by the district authorities, the surrounding communities and the district mine closure committee;

d the cost of providing statutory and other benefits to employees beyond the life of the mine; and

e the cost of reclaiming and rehabilitating the mining area in the event that the mine is closed.

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.

IV ENVIRONMENTAL AND SOCIAL CONSIDERATIONS

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.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.

15 Section 8(3) of the Mining Act.
16 The main regulations from a mining perspective are the Environmental Impact Assessment and Audit Regulations of 2005.
ii 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

---

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.  

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. 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. 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.
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.

### 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
indigenous Tanzanian company.\textsuperscript{25} 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.\textsuperscript{26} 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.\textsuperscript{27}

\begin{footnotes}
\item[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.
\item[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.
\item[27] Junior and middle-level positions are defined as including foreman, supervisor positions or any other designated position.
\end{footnotes}
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 bank28 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:

\[\begin{align*}
\text{a} & \quad \text{verification of a contractor’s capacities and capabilities;} \\
\text{b} & \quad \text{evaluation of local content submitted by licensees;} \\
\text{c} & \quad \text{tracking and monitoring of performance and provision of feedback; and} \\
\text{d} & \quad \text{ranking and categorisation of mining service companies based on capabilities and local content.}
\end{align*}\]

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.

---

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,29 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,30 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.31 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,32 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\(^{33}\) 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. While 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.
Chapter 18

UNITED STATES

Karol L Kahalley, Kristin A Nichols and Erica K Nannini

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 is characterised by inaction in the area of mining law reform; Congress has been working towards comprehensive mining law reform for many decades, but the General Mining Law has remained relatively unchanged since its passage in 1872. Thus, there is little risk that title to land for mining operations will be threatened by government intervention as long as all required fees, rentals and royalties are paid in a timely manner.

Perhaps the biggest risk in US mining ventures is the delay caused by the environmental review, compliance and permitting of a project. These steps can be very costly and time-consuming and, even without protracted litigation, it is not unusual for a major mining project to require in excess of 10 years to obtain all the necessary environmental approvals.

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

1 Karol L Kahalley is of counsel, Kristin A Nichols is an associate and Erica K Nannini is an associate at Holland & Hart LLP.
States, such as Newmont Mining Corporation (gold), Peabody Energy Corporation (coal), US Steel (iron ore) and Freeport-McMoRan (copper). Many other operations are owned by foreign companies, including Barrick Gold’s numerous mines (gold) and Rio Tinto’s subsidiaries, such as Kennecott Utah Copper Corporation (copper-molybdenum).

iv Significant trading agreements concerning minerals

Many international treaties of general application apply to mining industry investment by foreign persons into the United States, but none specifically 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 largely flow from President Trump’s efforts to reform energy and environmental policies, recently aiming to decrease permitting barriers relating to the mining industry. For example, the Deputy Secretary of the Interior has issued three directives to simplify and expedite the permitting of hard rock mines on public lands. The timelines for the issuance of permits have been shortened, the length of environmental impact statements has been shortened to a maximum of 150 to 300 pages, and the National Environmental Policy Act approval and decision process has been simplified to ensure documents are processed in a timely manner. Along the same lines, the Trump administration has greatly reduced public land designations following the Secretary of the Interior’s national monument review (notably, the Bears Ears and Grand Staircase-Escalante National Monuments in Utah), clearing a path for the mining industry to stake new unpatented mining claims on previously protected land. The Trump administration has also launched an evaluation process for critical and strategic minerals to ensure that vital materials are defined, and a process is developed that allows for domestic production, citing the following broad policy goals: (1) identifying new sources of critical minerals; (2) increasing exploration, mining, processing, recycling and reprocessing of critical minerals; and (3) streamlining leasing and permitting processes. Additionally, actions by the Trump administration have suggested that coal and uranium – two industries that have seen a steady decline in recent decades – should be identified as strategic minerals again. Most recently, the United States has imposed tariffs on significant Chinese imports, which include coal, industrial minerals, base metals, precious metals and various mineral commodities.

The US Geological Survey reports that, in 2017, US mines produced non-fuel minerals valued at an estimated US$75.2 billion – up 6 per cent from the revised total of US$70.8 billion in 2016. The United States also experienced an increase in the value of metal production in 2017, with an estimated value of US$26.3 billion – 12 per cent more than in 2016 – with high prices to some metal commodity values increasing by more than 35 per cent. While some US metal mines and processing facilities continued to remain idle in 2017, new gold mines opened in late 2016 and 2017, and certain iron ore mines restarted or extended operations. The largest contributors to the total value of metal production in 2017 included gold (38 per cent), copper (30 per cent), iron ore (12 per cent) and zinc (8 per cent). Mirroring 2016, 11 US states individually generated more than US$2 billion worth of non-fuel mineral commodities in 2017.
II LEGAL FRAMEWORK

i Introduction

The US legal system consists of many levels of codified and uncodified federal, state and local laws. The government's regulatory authority at each level may originate from constitutions, statutes, administrative regulations or ordinances, and judicial common law. The US Constitution and federal laws are the supreme law of the land, generally 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).

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-metallics (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:

a) unpatented mining claims, which provide the locator with an exclusive possessory interest in surface and subsurface lands, and the right to develop the minerals; and

b) patented mining claims, which pass title from the federal government to the locator, converting the property to private land. However, a mining patent moratorium has been in place since 1994 and no new patents are being issued.

---

2 See, e.g., 43 CFR Sections 3000.0-5 to 3936.40 (Bureau of Land Management minerals management regulations).

3 30 USC Sections 21 to 54 and Sections 611 to 615, as amended.
The Federal Land Policy and Management Act of 1976 (FLPMA)\(^4\) governs federal land use, including access to and exercise of GML rights on lands administered by the Bureau of Land Management (BLM) and the US Forest Service (USFS). The FLPMA recognises ‘the Nation’s need for domestic sources of minerals’\(^5\) and provides that the FLPMA shall not impair GML rights, including, but not limited to, rights of ingress and egress.\(^6\) However, the FLPMA also provides that mining authorisations must not ‘result in unnecessary or undue degradation of public lands’\(^7\). More generally, the BLM and the USFS have promulgated extensive regulations governing mineral development on public lands.\(^8\)

The National Environmental Policy Act (NEPA)\(^9\) requires federal agencies to prepare an environmental impact statement (EIS) for all major federal actions significantly affecting the quality of the human environment. Mining operations on federal lands or with a federal nexus generally will involve an EIS or a less intensive environmental assessment examining environmental impacts. The NEPA process will involve consideration of other substantive environmental statutes.

The United States Securities and Exchange Commission (SEC) regulates mineral resources and reserves reporting by entities subject to SEC filing and reporting requirements. The SEC’s reporting classification system is based on the SEC’s 1992 Industry Guide 7, which provides for declaration only of proven and probable reserves. The SEC generally does not recognise other reporting codes, such as the Committee for Mineral Reserves International Reporting Standards, which provide additional disclosures and are used by many other mineral-producing nations. The SEC recently issued proposed regulations, which would lead to increased disclosure obligations for mining companies. If adopted, the SEC regulations would supersede Industry Guide 7 and require the disclosure of exploration results, mineral resources and mineral reserves.

III MINING RIGHTS AND REQUIRED LICENCES AND PERMITS

i Title

In the United States, land generally can be severed into surface and subsurface estates, creating a split estate 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.

\(^{4}\) 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).
\(^{8}\) Sec, 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.
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:

- 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;
- locating mining claims by posting notices and marking claim boundaries;
- 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;
- 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[^10] 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.

The Materials Disposal Act of 1947[^11] provides for the disposal of common minerals found on federal lands, including, but not limited to, cinders, clay, gravel, pumice, sand or stone, or other materials used for agriculture, animal husbandry, building, abrasion, construction, landscaping and similar uses. These minerals may be sold through competitive bids, non-competitive bids in certain circumstances or through free use by government entities and non-profit entities.

Although the GML and Mineral Lands Leasing Act require mine claimants, permittees and lessees to be US citizens, a ‘citizen’ can include a US incorporated entity that is wholly owned by non-US entities or corporations. There are generally no restrictions on foreign acquisition of these types of US mining rights through parent-subsidiary corporate structures.

[^10]: 30 USC Sections 181 to 287, as amended.
[^11]: 30 USC Sections 601 to 615, as amended.
iii Additional permits and licences

Additional permits and licences required to conduct mining activities may include:

a. a mine plan of operations;
b. a reclamation plan and permits;
c. air quality permits;
d. water pollution permits (pollutant discharge elimination system permit, storm water pollution prevention plan, spill prevention control and countermeasure plan);
e. dam safety permits;
f. artificial pond permits;
g. hazardous waste materials storage and transfer permits;
h. well-drilling permits;
i. road use and access authorisations;
j. right-of-way authorisations; and
k. water rights.

iv Closure and remediation of mining projects

The FLPMA requires the BLM and the USFS to prevent ‘unnecessary or undue degradation’ of public lands.12 Casual-use hardrock mining operations on BLM lands that will result in no or negligible surface disturbance do not require any reclamation planning. Notice-level exploration operations requiring less than five acres of surface disturbance must meet BLM reclamation standards and provide financial guarantees that the reclamation will occur.13

Plan-level operations require a plan of operations that includes a detailed reclamation plan.14 BLM reclamation standards include saving topsoil for reshaping disturbed areas, erosion and water control measures, toxic materials measures, reshaping and revegetation where reasonably practicable, and rehabilitation of fish and wildlife habitat.15 Mining in BLM wilderness study areas additionally requires that surface disturbances be ‘reclaimed to the point of being substantially unnoticeable in the area as a whole’.16

Mining activities on national forest lands must be conducted ‘so as to minimise adverse environmental impacts on National Forest System surface resources’.17 Operators must take measures that will ‘prevent or control 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.18

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.

---

12 43 USC Section 1732(b).
13 43 CFR Sections 3809.320 and 3809.500(b).
14 43 CFR Sections 3809.11 and 3809.401.
15 43 CFR Section 3809.420.
16 43 CFR Section 3802.0 to 5(d).
17 36 CFR Section 228.1.
18 36 CFR Section 228.8(g).
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, the Clean Water Act and the Endangered Species Act. 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’. 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.

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 socio-economic impact, cumulative effects and environmental impact often are addressed during a NEPA review.

19 42 USC Sections 7401 to 7671.
20 33 USC Sections 1251 to 1388.
21 16 USC Sections 1531 to 1544.
22 33 USC Section 1311(a); 33 USC Section 1362 (defining ‘navigable waters’).
23 30 USC Sections 801 to 966.
24 30 USC Section 813.
25 id.
26 See, e.g., 30 CFR Sections 56.1 to 56.20014 (safety and health standards for surface metal and non-metal mines).
27 30 CFR Sections 5.10 to 36.50, 46.1 to 49.60, 50.10.
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)28 and the Native American Graves Protection and Repatriation Act (NAGPRA).29 NEPA analysis will include social and cultural impacts and may require tribal 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.30 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

28 54 USC Sections 300101 to 307108.
29 25 USC Sections 3001 to 3013.
30 54 USC Section 306108.
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.\(^{31}\)

Foreign employees are governed by general US immigration laws and are required to obtain a work visa or other authorisation. A limited number of visas are available for skilled workers, professionals and non-skilled workers, but these workers must be performing work for which qualified US workers are not available.\(^{32}\)

ii Sale, import and export of extracted or processed minerals
There are no restrictions or limitations on the sale, import or export of extracted or processed minerals, unless deemed a national security risk by the US Department of Homeland Security or State Department.

iii Foreign investment
US mining laws generally do not restrict or limit foreign investment. As discussed in Section III.ii, although there is a US citizenship requirement for obtaining locatable and leasable minerals on federal lands, foreign companies are free to rely on a US subsidiary to secure such rights.

Foreign investments are subject to US national security laws. The Committee on Foreign Investment in the United States, for example, is an inter-agency committee chaired by the Secretary of the Treasury that has authority to review foreign investments to protect national security and make recommendations to the President to block the same.\(^{33}\) 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,

---

\(^{31}\) 15 CFR Sections 730.1, 774 Supp. No. 1.

\(^{32}\) 8 USC Section 1153(b)(3)(C).

\(^{33}\) 50 USC Section 4565.

\(^{34}\) 50 USC Section 4565(d)(4).
however, charge royalties on mineral operations on state-owned lands and taxes that function like a royalty on all lands, such as severance taxes, mine licence taxes or resource excise taxes. These functional royalties can differ depending on land ownership and the minerals extracted.

ii  Tax considerations
There are no federal taxes specific to 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.

iii  Duties
There are no federal duties on minerals extraction.

iv  Indemnification
Locatable minerals claimants must pay an annual maintenance fee of US$155 per claim in lieu of performing assessment work required pursuant to the GML and the FLPMA.\(^{35}\) Failure to perform assessment work or pay maintenance fees will open the claim to relocation by a rival claimant as if no location had been made.\(^{36}\) Certain waivers and deferments apply.

Leasable minerals permittees and lessees must pay annual rent based on acreage. The rental rates differ by mineral and some rates increase over time.\(^{37}\) Prospecting permits automatically terminate if rent is not paid on time; the BLM will notify late lessees that they have 30 days to pay.\(^{38}\)

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 positive trends. Both non-fuel and metal mineral production increased in 2017. The US Geological Survey forecasts that 2017 growth rates indicate strength in primary metals industry activity, and near-term strength in the

35  43 CFR Sections 3834.11(a), 3830.21.
36  43 CFR Section 3836.15.
37  43 CFR Section 3504.15.
38  43 CFR Section 3504.17.
non-metallic mineral products industry. According to the National Mining Association’s US Coal Production Trends, US coal production increased slightly in 2017. However, the US Energy Information Administration projects decreases in coal production until 2022 because of retirements of coal-fired electricity generating capacity and competitive pricing from natural gas and renewables, and that subsequently, under the Clean Power Plan, coal production is projected to decrease to 629 million short tons by 2030 and to decline gradually thereafter. However, the outlook for coal may be affected by the Trump administration’s efforts to replace the Clean Power Plan.
Chapter 19

AUSTRALIA

Simon Rear, Chris Rosario and Michael Van Der Ende

I INTRODUCTION

The Australian mining industry is extremely diverse in size, geographical focus, type of commodity and stage of development. It comprises several of the world’s largest (and generally highly profitable) diversified resource companies, including BHP Billiton and Rio Tinto, and a significant number of mid-tier producers, junior explorers and mining service providers, operating globally while maintaining an Australian base.

This vast diversity within a capital-intensive industry has generated the need for funds to be raised through many sources and structures. Many junior to mid-tier exploration companies, who produce little in the way of consistent revenue, are generally considered unsuitable for traditional debt financing, and consequently seek to satisfy their capital requirements through equity (or hybrid equity) funding. Larger producing mining companies generally have a number of options as, in addition to being able to fund activities through operating revenue, they can more readily obtain funding through debt sources.

The metals and mining sector is, at the time of writing, in terms of numbers, the largest industry sector on the Australian Securities Exchange (ASX) with more than 600 companies involved in mineral exploration, development and production in 100 countries. The diversified investor base and market liquidity provided by an ASX listing is generally considered complementary to the capital-intensive nature of resource exploration and development, and has provided access to funding for numerous companies in recent years.

This chapter discusses the regulation of equity capital markets in Australia, specifically focusing on mining companies listed on the ASX. While the mining industry also relies heavily on debt and bond markets, discussion of those markets is largely beyond the scope of this chapter.

II CAPITAL RAISING

i General overview of the legal framework

Australia has an extensive legal and regulatory framework governing equity fundraising activities. The principal legislation is the Corporations Act 2001 (Cth) (the Corporations Act) (in particular, Chapter 6D) and, additionally for companies listed on the ASX, the listing rules of the ASX (the Listing Rules).
The Australian Securities and Investments Commission (ASIC), an independent Commonwealth government body responsible for the supervision of Australian financial markets, plays a vital role in scrutinising fundraising activities.

Corporations Act – fundraising provisions

Companies seeking to raise equity capital from investors in Australia must comply with Chapter 6D of the Corporations Act. This applies, subject to certain exceptions (detailed below), to all offers of securities that are received in Australia, regardless of where any resulting issue, sale or transfer occurs.

Broadly, Chapter 6D provides that, unless a prescribed exception applies (discussed further below), an offer of securities requires disclosure to investors. When disclosure is required, the issuer must prepare and lodge with ASIC a disclosure document that complies with Chapter 6D and subsequently provide the document to potential investors. Depending on the circumstances of the offer, the disclosure document may take the form of:

a. a ‘full-form’ prospectus;
b. a ‘short-form’ prospectus (a prospectus that refers to material previously lodged with ASIC instead of setting out the information in its entirety);
c. a ‘transaction-specific’ prospectus (a prospectus for continuously quoted securities that is subject to special content rules);
d. a profile statement; or
e. an offer information statement.

Full-form and transaction-specific prospectuses are the most commonly used disclosure documents.

Prospectus

A prospectus must include all the information that investors and their professional advisers would reasonably require to make an informed assessment of, among other things:

a. the rights and liabilities attached to the securities offered; and
b. the assets and liabilities, financial position and performance, profits and losses, and prospects of the issuer.

However, this disclosure obligation is limited to information that investors and their professional advisers would ‘expect to find’ in a disclosure document, and is only required to be disclosed if a person whose knowledge is relevant (broadly being the issuer, its directors and certain persons or entities associated with the offer, such as an underwriter) actually knew of the information or might reasonably be expected to have obtained the information by making enquiries.

---

2 Continuously quoted securities are, broadly, securities in a class of securities that have been quoted on the ASX in the three months prior to the date of the disclosure document.
Full-form prospectus
A full-form prospectus is most commonly used when raising capital as part of an initial public offering (IPO) and associated listing on the ASX. The company must (among other requirements for an IPO and listing) prepare a full-form prospectus containing extensive information, including:

a. information regarding the company’s business, board, management, material projects, strategic objectives and growth prospects;

b. audited financial statements for the past two or three financial years;

c. an investigating accountant’s report commenting on the company’s financial information;

d. a technical expert’s report (which, for mining entities, consists of a geological report);

e. a summary of the material contracts to which the company is a party; and

f. various statutory compliance information (for example, information about fees paid to advisers in relation to the listing).

Transaction-specific prospectus
Once listed on the ASX, a public company whose securities are continuously quoted securities may, subject to meeting certain requirements, issue a transaction-specific prospectus to raise equity capital.

The Australian regulatory regime recognises that when a company issues continuously quoted securities, the market should generally already have all information necessary to reach an informed view about the securities, based on previous disclosures the entity has made to the market about its activities, financial standing and prospects. Theoretically, the market’s view will already be reflected in the price of those continuously quoted securities. The regime provides that, in respect of companies who satisfy certain criteria, the prospectus content rules discussed in the ‘prospectus’ subsection, above, will be satisfied if the issuer lodges a transaction-specific prospectus containing certain limited prescribed content.

Accordingly, issuers who are subject to continuous and periodic disclosure obligations (i.e., entities listed on the ASX) are not required to reproduce that information in a prospectus that offers continuously quoted securities (or options to acquire such securities). Instead, the entity must disclose the effect that the particular offer of securities will have on the issuer, and disclose the material information about the issuer that is required by the prospectus disclosure laws, but that has been excluded from the issuer’s continuous disclosure notices until that point. This differs from a number of overseas regimes (such as the United Kingdom) that require a full-form prospectus for secondary raisings from its shareholders.

Corporations Act – takeover provisions
General prohibition
Companies seeking to raise equity capital must also comply with the takeover provisions in Chapter 6 of the Corporations Act.

Broadly, unless a prescribed exception applies, Chapter 6 prohibits the acquisition of shares in a listed company (or unlisted company with more than 50 members) as a result of which a person’s voting power in the company increases from 20 per cent or less to more than 20 per cent, or from a point that is above 20 per cent and below 90 per cent.
Exceptions to the takeover prohibition

Two exceptions to the prohibition in Chapter 6 relevant to this discussion are acquisitions of voting shares resulting from:

a. an issue of shares pursuant to a ‘rights issue’ (being a pro rata offer of shares to existing shareholders) (the rights issue exception). A rights issue exception extends to an issue of shares to an underwriter of a rights issue; and

b. an issue of shares to an underwriter or sub-underwriter of a fundraising undertaken under a disclosure document (the underwriter exception).

Critically, these two exceptions enable companies to raise equity capital without breaching the Chapter 6 prohibition, while also ensuring appropriate protections for shareholders. The policy basis for a rights issue exception is that each shareholder has an opportunity to participate in the fundraising on a pro rata basis and thereby avoid dilution of an existing holding. The policy basis for the underwriter exception is that the takeover provisions should not unduly prevent an issuer from using underwriting arrangements to manage the risk of a shortfall in a fundraising. Investors should be afforded adequate disclosure about the potential control effect of any underwriting arrangements.

In recent times, owing to the volatile nature of the equity market for mining companies, issuers have increasingly structured rights issues to be underwritten or sub-underwritten by major shareholders, and those shareholders have been able to rely on either the rights issue exception or underwriter exception in the event their underwriting results in an acquisition of voting power that would otherwise breach the takeover provisions.

Anti-avoidance measures

Despite the rights issue exception and the underwriter exception, issuers need to be mindful of structuring fundraisings that could be considered as having been designed to avoid the takeover prohibition in Chapter 6. Issuers who undertake an underwritten rights issue but have failed to take sufficient steps to minimise the effect of the issue or underwriting arrangements on the control of the issuer may risk intervention by ASIC, or an application by a disgruntled shareholder or ASIC to the Australian Takeovers Panel.3 ASIC and the Takeovers Panel have broad powers to require the issuer to amend the terms of, or seek prior shareholder approval for, the fundraising if it is seen as having been structured to avoid the takeover prohibition.

ASX Listing Rules

Companies that are listed on the ASX must comply with the Listing Rules in addition to the Corporations Act.

The key Listing Rule relevant to equity fundraisings is Rule 7.1, which provides that a listed entity may not, in any 12-month period, issue new equity securities equal to more than 15 per cent of the entity’s issued share capital at the commencement of the 12-month period without the approval of its shareholders. Listing Rule 7.1 is subject to certain

---

3 The Australian Takeovers Panel was established under the Australian Securities and Investments Commission Act 1989 (Cth) and is a peer review body that regulates disputes in corporate control transactions.
prescribed exceptions, which are detailed in Listing Rule 7.2 and include pro rata issues and issues made in connection with regulated schemes of arrangement and takeovers under the Corporations Act.

The Listing Rules also restrict the issue of equity securities by an entity to its related parties (which include directors), subject to certain exceptions detailed in Listing Rule 10.12 (which are similar to the exceptions in Listing Rule 7.2). Issuers also need to be cognisant of the application of Listing Rule 10.1 to security arrangements as part of a convertible debt security issue and seek shareholder approval or a waiver from the ASX for such an arrangement.

The ASX recognises the importance of the mining industry in Australia and is cognisant of the recent challenges faced by companies (including global market conditions and declining commodity prices) in raising sufficient capital to maintain operations, particularly in the junior exploration space. The ASX has put in place measures to facilitate access to equity capital, including by:

a. ‘accelerated entitlement offers’, which are pro rata offers, conducted in two stages, that allow companies to raise capital quickly in the first stage (generally in one or two days) from institutional shareholders (who typically do not require disclosure in relation to a fundraising). The second stage involves raising funds from retail shareholders (with disclosure) on substantially similar terms but according to a lengthier, standard pro rata offer timetable;

b. reducing the minimum time frame for a standard pro rata offer timetable, to improve the timeliness of raising capital; and

c. a facility for smaller companies that obtain shareholder approval at their annual general meetings and meet certain criteria (namely having a market capitalisation of A$300 million or less and not being included in the S&P/ASX 300 Index\(^4\) at the time of the annual general meeting) to raise capital by the issue of up to 10 per cent of their issued share capital in a 12-month period in addition to the 15 per cent capacity in Listing Rule 7.1 mentioned above (a facility that has been popularly used by eligible mining companies).

**Australian Securities and Investments Commission**

As the primary supervisor of the Australian securities and financial markets, ASIC plays an important part in fundraisings by scrutinising disclosure documents. If ASIC considers there is a ‘defect’ in a disclosure document (a misleading or deceptive statement or an omission of information required to be provided under the Corporations Act), ASIC may issue a ‘stop order’ preventing the issuer from offering, issuing, selling or transferring its securities while that order is in force.\(^5\) In addition, if ASIC considers a fundraising is having an unacceptable control effect on the issuer, it may bring an application to the Takeovers Panel seeking orders protecting against the effect.

---

\(^4\) The S&P/ASX 300 Index provides exposure to Australia’s large, mid and small-cap equities listed on the Australian Securities Exchange from Standard & Poor’s.

\(^5\) Practically, before a stop order is imposed, the issuer will usually have the opportunity to discuss its concerns with ASIC and rectify any defects in the disclosure document by issuing a supplementary or replacement disclosure document.
ASIC guidance – disclosure documents

ASIC has published several regulatory guides detailing its policy regarding information that should be included in a disclosure document. While these regulatory guides are not law, ASIC may take enforcement action (such as issuing a stop order) if an issuer does not comply with its guidance.

ASIC has clearly articulated that disclosure documents must be worded and presented in a ‘clear, concise and effective’ manner and has provided extensive guidance on how this can be achieved.

ASIC also expects a prospectus to set out information about the risks associated with the offer, the securities offered and the issuer (including risks associated with the business model).

Given the inherent speculative nature of the mining industry (particularly during the exploration phase) and the often critical short-term capital requirements of mining companies, the risks section of a disclosure document for a mining company is typically extensive. It should identify specific company and industry-related risks, including risks in respect of price and exchange rate volatility, resource or reserve estimation, exploration and funding as well as sovereign risks. In recent times, ASIC (and the ASX) has placed particular emphasis on forward-looking statements relating to production targets and the forecasting of financial information disclosed by mining companies. ASIC has made it clear that there must be objectively reasonable grounds for companies to make such predictive statements.

Liability

If there is a defect in a disclosure document, certain persons involved in the offer, including the directors of the issuer and underwriters (the relevant persons), may be liable for any losses suffered as a result of the defect.

In this regard, the Corporations Act contains a due diligence defence to liability in respect of a defect in a disclosure document where the relevant person made reasonable enquiries to ensure, and after doing so believed on reasonable grounds that, the disclosure document did not contain any defects. Accordingly, it is customary for directors of the issuer and certain other persons involved in the offer to undertake a robust due diligence process to ensure that the issuer has complied with its obligations under the Corporations Act.

Exceptions to the requirement to issue a disclosure document

As previously mentioned, there are a number of exceptions to the requirement to issue a disclosure document when raising equity capital. These include:

a offers to ‘sophisticated’ or ‘professional’ investors (typically high net worth or institutional investors);

b small-scale offers (being personal offers to not more than 20 investors where the amount raised is not more than A$2 million in a 12-month period); and

c offers to certain investors through holders of an Australian financial services licence.

There is also an option for listed entities that satisfy certain conditions (including the offer being a ‘rights issue’ and the shares in the issuer not being suspended from trading for more than five days in a 12-month period) to offer securities to existing shareholders (including retail shareholders) without lodging a disclosure document. Broadly, the provisions operate on the basis that the combination of an IPO prospectus and periodic and continuous disclosure until the date of the offer is sufficient in ensuring that information is adequately disclosed.
to the market. Companies typically undertake these offers without a disclosure document by issuing an offer document, which contains limited information about the offer and the process of applying for the offered securities. Importantly, however, the aforementioned due diligence defence does not apply to a rights issue without disclosure under this regime.

ii Foreign investment

Australia’s mining industry typically requires speculative or risk capital to finance mineral exploration and development and has historically relied heavily on foreign direct investment. The relatively small population of Australia and its limited accumulated wealth has presented problems in raising adequate finance for mining ventures locally, the consequence being that foreign investment has been, and remains, crucial to the development of the industry.

Generally, the government encourages and welcomes foreign investment, with almost all proposals in recent years having been approved, subject to some notable (often politically sensitive) exceptions.

In the financial year ending 30 June 2017, mineral exploration and development ranked fifth by industry for the level of foreign investment. In 2016–2017, there were 140 foreign investment approvals in the mineral exploration and development sector for a total proposed investment of A$15.9 billion.

Regulatory regime

Foreign investment, which was the subject of reform in 2015, is regulated by the Foreign Acquisitions and Takeovers Act 1975 (Cth) (FATA). The FATA is supplemented by the Foreign Acquisitions and Takeovers Regulation 2015 (Cth) (FATR) and is guided by the federal government’s Foreign Investment Policy (the Policy). The Foreign Investment Review Board administers the FATA, FATR and Policy, and the Australian Federal Treasurer (the Treasurer) is the Minister responsible for making decisions under the regime.

The Treasurer has extensive powers to block, impose conditions on or unwind an investment (in addition to imposing penalties) if the FATA is breached or if the Treasurer considers the investment to be contrary to the national interest. The regime broadly covers two types of actions:

- significant – acquisitions concerning an Australian business or land where there is a change in control that meets certain threshold requirements. Foreign persons may, but are not obliged to, inform the Treasurer of such actions; and
- notifiable – acquisitions regarded as both ‘significant’ and ‘notifiable’ actions that meet certain thresholds must be notified to the Treasurer. Such actions (subject to applicable exemptions) broadly include acquisitions of direct interests in agribusiness, substantial interests in Australian entities, certain interests in Australian land and media businesses, and acquisitions by foreign government investors.
Whether a transaction must be notified will depend on various factors, including the type of investor, the type of investment, the industry sector in which the investment will be made and the value of the proposed investment. Proposals likely to require prior approval by the Treasurer include:

a acquisitions concerning Australian land (whether residential real estate, agricultural, vacant non-residential land or shares in land corporations or trust estates) with the following specific rules:
  • foreign persons need approval from the Treasurer to buy or take an interest in:
    • the interest provides the right to occupy Australian land and the term of the
      lease or licence (including extensions) is likely to exceed five years;
    • they provide an interest in an arrangement involving the sharing of profits
      or income from the use of, or dealings in, Australian land; or
    • a mining tenement is developed to an operational mine, which will then be
      considered to be developed commercial property. If this is the case, there
      is a monetary threshold of A$57 million (or A$1.134 billion for investors
      from Chile, China, Japan, New Zealand, Singapore, South Korea and the
      United States) before approval is required;

b acquisitions of direct interests\(^6\) by foreign governments (or their associates or separate government entities). Foreign government investors must also seek prior approval to:

  • start a new business or acquire an interest in land, including any interest in a prospecting,
    exploration, mining or production tenement;

\(c\) acquisitions of substantial interests\(^7\) in existing Australian corporations or businesses

\(d\) takeovers of offshore companies whose Australian subsidiaries or assets are A$261 million

iii Market overview

The mining sector attracts a broad range of investors with varying investment objectives. In the junior mining and exploration sector, the inherent speculative nature often renders it unattractive to debt financiers and the bond market. This has resulted in the junior sector being predominantly supported by equity investors with high-risk and high-return investment objectives or, less frequently, higher yield corporate bonds.

---

\(6\) An interest of 10 per cent or more of an Australian business or corporation (regardless of value) or gross assets of that business or corporation, or an interest of less than 10 per cent where the foreign government or state-owned enterprise has entered into a legal arrangement relating to the business or corporation, or the foreign government or state-owned enterprise obtains special influence or control over the target business or corporation.

\(7\) A foreign person acquires a substantial interest in the ownership of a corporation or business if that person (and any associates) acquires 20 per cent or more of the ownership of the entity, or that person with other foreign persons and each of their associates acquire 40 per cent or more in aggregate of the ownership. This ‘substantial interest’ threshold also applies to foreign government investors (and any associates or separate government entities).
There has also been a recent trend of junior mining companies, when facing financial difficulty, entering into convertible debt securities (being a type of hybrid debt-equity security). These securities typically provide short-term secured or unsecured loans, often on terms that are considerably more favourable to the lender and include an option to convert the debt to equity at either a fixed or variable conversion rate at the election of the investor. This rewards the investor should the issuer experience growth in share price, but protects their investment via the security over the company’s assets and any interest rate return.

In contrast, larger mining production companies with consistent, significant earnings attract a wider range of investors, including investors in the bond market.

There has been continued activity from notable private equity funds investing heavily in the mining sector and, in a number of instances, taking strategic cornerstone positions in companies.

The Australian mining industry is also a favoured destination for foreign investors, recently being ranked among the best countries worldwide for mining investment.

iv Structural considerations
The predominant methods used by mining companies to raise equity capital are via:

a placement to sophisticated and professional investors (which may or may not include existing shareholders);
b a pro rata offer or rights issue (either in standard or accelerated form) to existing shareholders; or
c a share purchase plan to existing shareholders (being a type of offer of securities designed primarily for retail shareholder participation as it limits each shareholder’s participation to a maximum of A$15,000 in a 12-month period).

As noted above, there has also been an increasing trend towards mining companies (particularly junior to mid-level) raising capital through the issue of hybrid debt-equity securities.

Each structure has its advantages, disadvantages and prescribed procedures; accordingly, a company will need to consider various factors when selecting the most suitable capital-raising structure, some of which are discussed below.

Issue price
The issue price of securities, and the number of securities to be issued, will determine the quantum of the raising.

An issuer undertaking a placement or a rights issue will generally have the flexibility to commercially agree, or set on its own, the issue price of securities. The issue price will typically be driven by factors such as market demand, urgency of the need for funding and market perception. By contrast, a share purchase plan has issue price limitations prescribed under the Corporations Act and the Listing Rules, which offer the issuer less flexibility.

Number of securities
Another critical consideration is the number of securities the company should issue.

As detailed above, other than where a specified exception applies, the Listing Rules restrict listed entities from issuing new equity exceeding 15 per cent of their share capital within a 12-month period without shareholder approval. As discussed in Section II.i (in the ‘ASX Listing Rules’ subsection), companies that meet certain criteria may issue new securities comprising an additional 10 per cent of their share capital.
There are exceptions to the 15 per cent restriction in respect of an issue of shares under a *pro rata* offer or ‘rights issue’, an issue of shares to an underwriter of a rights issue, and an issue of shares under a share purchase plan. A company can rely on these exceptions when structuring a capital raising to obtain greater flexibility in the number of securities they can issue (noting that certain exceptions have their own conditions; for example, a share purchase plan is broadly restricted to issues of securities equal to 30 per cent of a company’s issued share capital).

A placement to sophisticated and professional investors will typically be undertaken using a company’s 15 per cent (and if applicable, the additional 10 per cent) placement capacity, meaning that the number of securities issued will be dictated by these limitations.

When undertaking an offer of convertible debt securities, each security will generally be counted as the maximum number of equity securities into which it can be converted.

The takeover prohibition in Chapter 6 will also have a bearing on the number of securities being offered. The two exceptions to the takeover prohibition (discussed above) are similar to the exceptions under the Listing Rules for a rights issue and an issue of shares to an underwriter of a rights issue.

**Timing**

The timing for completion of a capital raising may vary significantly depending on the structure. A placement to sophisticated and professional investors can be completed in one or two business days, whereas a standard form rights issue will, on average, take 20 business days (in addition to the time taken to prepare a prospectus, if applicable). As discussed above, ASIC and the ASX allow for an ‘accelerated rights issue’ truncated timetable so that companies can offer securities to institutional shareholders at an earlier stage.

While share purchase plans generally have greater flexibility with respect to timing, they take, on average, 20 business days to complete. Share purchase plans are commonly conducted following an institutional placement to allow retail shareholder participation on a non-*pro rata* basis.

**Market perception**

Market perception is a relevant consideration particularly where, for example, a placement (whether to existing shareholders or otherwise) may be seen to have a dilutionary effect (and therefore may be viewed unfavourably by shareholders who cannot participate). Companies often provide justification to the market for conducting a placement instead of a *pro rata* offer, or ensure that an offer, such as a share purchase plan, is conducted in conjunction with the placement.

**Hybrid capital**

These securities can be attractive to investors because they offer downside protection (as there is no obligation to convert and investors receive a defined interest income) and provide an upside ‘equity kicker’ (as there is the possibility to convert into equity to benefit from any capital growth in the underlying shares). Convertible debt securities are also attractive to issuers who can access significant funds quickly by structuring the security as a debt instrument until the equity component is approved by shareholders, without being constrained by the issuer’s 15 per cent placement capacity. However, convertible debt securities can be an expensive way of raising capital, particularly for financially troubled (and therefore riskier) issuers.
v Tax considerations

Australia has a complex tax regime with taxes levied by both the Commonwealth and state governments, including income tax, import duty, fringe benefits tax, withholding tax, goods and services tax, stamp duty, payroll tax, land tax and resource royalties.

Income tax

The Australian company income tax rate is currently 30 per cent (for medium-sized to large entities) of taxable income. Australian companies can elect to form a tax-consolidated group with wholly owned subsidiaries to treat the group as a single entity for Australian income tax purposes. This allows intra-group transactions to be ignored for income tax purposes. Companies involved in exploration and development activities can receive an immediate deduction for certain exploration and prospecting expenditure, and deductions for activities relating to environmental protection. There are also incentives for research and development expenditure.

Tax implications for foreign investors

Tax implications for non-resident investors may be differ depending upon whether they conduct business in Australia using an Australian subsidiary or an Australian branch of a foreign company. Both are taxed at the corporate tax rate – the Australian company on its worldwide income and the branch only on its Australia-sourced income.

Double tax agreements exist between Australia and a number of other countries seeking to reduce or eliminate the double taxation of income. Taxation relief may be available under a relevant double tax agreement for a foreign resident entity if the activities do not constitute a permanent establishment in Australia.

Foreign entities deriving Australian income will need to consider tax provisions relating to repatriation of income, transfer pricing and deductions available for operations in Australia that are beyond the scope of this chapter.

III DEVELOPMENTS

As we have discussed, the most common ways of raising equity capital by mining companies in Australia are by way of placements to sophisticated and professional investors, ‘rights issues’ to existing shareholders and share purchase plans. Volatility in commodity prices has made accessing new funding and meeting the needs of existing financiers increasingly challenging. As a result, companies have been forced to pursue alternative funding options, including the issue of convertible debt securities and corporate consolidation with other companies holding excess capital.

Australian mining companies have also turned to the international bond markets as an alternative source of funding. In a transaction in 2017, an Australian mid-tier exploration company raised funds to finance the development of its greenfield project through the issue of Nordic bonds. This was significant as this type of financing option had previously been considered unobtainable for a greenfield project without existing cash flows. The success of this fundraising may result in more mid-tier exploration and development companies seeking to access bond markets to raise funds rather than pursuing more conventional equity (or hybrid equity) funding options.
In light of the challenging economic environment and in recognition of emerging growth industries (such as technology and innovation), in 2017, the ASX introduced a number of changes to the eligibility criteria for a company to list on the ASX. These included a lift in the financial threshold to list on the ASX (based on the company’s profits or assets) and the introduction of a minimum ‘free float’ requirement (i.e., securities held by non-related parties of the listing entity that can freely trade on the ASX without restrictions). These changes may affect the ability of smaller unlisted mining companies to list on the ASX.

The ASX has also proposed introducing further regulation in respect of ‘reverse takeovers’, which are transactions in which the number of shares being issued by the bidder in respect of the transaction (either as consideration in a scrip bid or issued to finance a cash bid) is equal to or greater than the number of shares on issue. Once the proposed changes take effect, shareholder approval at the bidder level will be required to undertake a reverse takeover. This reform is likely to be particularly relevant to the mining industry as ASX research has indicated that of the scrip transactions undertaken between 2012 and 2016, half of those that would fall within the new definition of a reverse takeover were in the resources sector.
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 2017 was US$32 billion, which represented a significant increase in relation to the previous year. The forecast for 2018 is slightly higher, at US$34 billion. IBRAM further reports that iron ore was the most exported mineral substance in 2017, representing approximately 68 per cent of overall mineral exports, followed by gold (10 per cent), copper (9 per cent) and niobium (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 Ferbasan), 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 2017, Votorantim made the third largest mining company initial public offering in TSX history and the largest mining initial public offering of a Latin America-focused company on the TSX. 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 ends in 2018. At the time of writing, it was still unclear who (and which political groups) will replace him from January 2019. The third reason is the lack of culture within the Brazilian market to invest in stock exchanges in the mining industry.

Carlos Vilhena is a partner and Adriano Drummond Cançado Trindade is a counsel at Pinheiro Neto Advogados.
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 in 2017 some successful listings – such as the Nexa Resources one – show 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, there were studies to create benefits so that the shareholders of listed exploration companies could deduct exploration-qualified expenditure for tax purposes. As the incentive implies a reduction of the taxes assessed by the Brazilian government, the studies are still under consideration by the Ministry of Industry, Foreign Trade and Services and the Brazilian Agency for Industrial Development, and the mechanism has not been put in place.

As a consequence, the absence of specific rules considering the particularities of the sector, coupled with high costs in terms of governance and disclosure requirements, discourage exploration companies, juniors and companies with smaller projects or operations from listing in the Brazilian market.

Foreign investment

Foreign direct investment plays an important 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 fourth most popular destination for foreign direct investment in 2017, in the amount of US$62.7 billion. In terms of the overall investment in Latin America, Brazil was the main destination for more than 40 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 was launched in 2018, for which approximately US$400 million have been earmarked. The support of Finep covers all stages and dimensions of the scientific and technological development cycle: basic research, applied research and the development and improvement of products, services and processes. Mining companies that are involved in one or more of these activities may benefit from favourable conditions for funding.

Brazilian commercial banks also provide finance for projects, but in many cases the internal requirements make it harder for projects at the exploration stage to be funded, particularly considering the economic downturn and 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 is 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 will replace the National Department of Mineral Production (DNPM) and will have 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 accident involving the Samarco dam in November 2015 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.

---

2 The Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves.
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), which was generally increased in 2017 to up to 4 per cent of the revenue arising from the sale of the mineral product (depending on the substance, 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 most dramatic change is to the rate for diamonds – an increase from 0.2 per cent to 2 per cent. The rate for gold has increased from 1 per cent to 1.5 per cent.

The government also extended the basis for calculating CFEM so as to restrict deductions 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. This means that even those producers of substances that did not have their rates increased by the new legislation may experience higher costs, to the extent that some deductions that used to be accepted in the calculation of CFEM are no longer applicable. For those companies that

---

3 Financial Compensation for the Exploitation of Mineral Resources.
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.

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

In the fifth edition of *The Mining Law Review*, we stated that ‘any changes to be proposed by [President Temer’s] government will not depart significantly from the current system (as opposed to the bill sent to Congress by Ms Rousseff’s government). So one can expect reforms to the mining sector that are more market-driven, although conversely there will probably be an increase in mining royalties’. In fact, in July 2017, the President of the Republic enacted three Provisional Measures to amend existing mining legislation. The first Provisional Measure (MP 789) altered the method to calculate the base value of CFEM – from net income to gross income – and changed applicable rates to different minerals. The second Provisional Measure (MP 790) amended around 30 provisions of the Mining Code seeking to modernise and address regulatory inconsistencies. Finally, the third Provisional Measure (MP 791) created the National Mining Agency (ANM) to replace the DNPM. Provisional measures are executive orders with immediate effect but that need to be reviewed by Congress within 120 days. Congress can approve, amend or reject each of the Provisional Measures.

The changes to CFEM enacted through MP 789, which were later converted into definitive Law 13,540/2017, did not have any effect on strengthening the mining sector. The increases to the calculation base and in royalty rates (as described above) significantly augmented the government take (particularly for some substances, such as diamonds, gold and iron ore). Moreover, the lack of detailed regulation for the definitions of ‘current market price’ or ‘reference price’, which are applicable to those miners that use a mineral substance in their industrial process to create an industrialised product, adds uncertainty and opens the possibility of legal disputes. Although mineral royalties in Brazil may still be low as compared with other large mining countries – as claimed by the government – the overall tax burden of a mining operation in Brazil results in a higher government take compared with other mining jurisdictions, on top of the legal uncertainty that has resulted from inadequate regulations.

The amendments to the Mining Code presented by MP 790 would bring some beneficial propositions to the industry, but MP 790 lapsed and lost its validity because it was not
reviewed and approved by the National Congress before the applicable deadline. However, some of the amendments that would have been made via MP 790 were contemplated in the new Regulations of the Mining Code, which were enacted in June 2018 and will come into force as soon as the ANM is operational. 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 (which were partly contemplated in the new Regulations to the Mining Code), 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.

One of these steps is the creation of the ANM to replace DNPM, as provided for in MP 791 (later converted into Law 13,575/2017). 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 will have a board made up of five members with fixed terms of office in an attempt to reduce political influence and give higher independence to the regulatory agency. The practice adopted for other regulatory bodies – whereby decisions are made jointly, sessions are public, proposed regulatory changes go through public consultations at which the agency must review and provide its opinions and suggestions, and procedures become more transparent – may bring significant gains for the industry if actually put in place. The key, however, is that 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. Creating a new agency with the same low budgets as those of the DNPM may just be an aesthetic measure. At the time of writing, the ANM is not yet operational as the five members of its board (who have been appointed by the President of the Republic) still need to be questioned and approved by the Senate.
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

1 Erik Richer La Flèche, David Massé and Jennifer Honeyman are partners at Stikeman Elliott LLP.
in Canada to the Securities and Exchange Commission in the United States. Given the 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:

- disclosure standards: rules prohibiting certain mineral disclosure and prescribing mineral disclosure standards;
- 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, are very similar to NI 43-101 and typically require little to no reconciliation, other codes are less similar and reconciliation with NI 43-101 is more complicated.

**Qualified persons**

NI 43-101 introduced the requirement that all 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:

- **a** is an accredited engineer or geoscientist;
- **b** has at least five years of experience in mineral exploration, mine development or operation or mineral project assessment;
- **c** has experience relevant to the subject matter of the mineral project and the technical report in respect thereof;
- **d** is in good standing with a self-regulatory professional organisation acceptable under NI 43-101; and
- **e** 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’.

---

2 Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves.
**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 long-form prospectus;
- 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;
- an annual information form;
- a management information circular in which the information is presented and describes a transaction in which securities are to be issued; and
- 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 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
- 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-SOE investors 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 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.
ii  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.

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’.
Tax considerations

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

- favourable deduction of Canadian exploration expenses and Canadian development expenses;
- accelerated depreciation for certain types of tangible property;
- tax credits for certain intangible property expenses;
- a 20-year operating loss carry-forward period; and
- indefinite carry forward for capital losses.

In addition, tax advantages are provided to investors in Canadian resources companies. In particular, flow-through shares, a form of equity financing, allow an issuer to issue new shares to investors at a higher price than it would ordinarily receive for similar shares. While there are a number of requirements and conditions to be satisfied, essentially the investors and the company agree that the investors will purchase flow-through shares, the company will incur 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:

- to facilitate the deduction of any interest expense associated with the bid financing against the Canadian target’s income;
- 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
- 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.
I INTRODUCTION

During the past 25 years, Mongolia has transformed into a vibrant democracy, with three times the level of gross domestic product (GDP) per capita, increasing school enrolments, and dramatic declines in maternal and child mortality. With vast agricultural and mineral resources and an increasingly educated population, the prospects for long-term development are bright. In recent years, however, the country’s economy has been on a roller coaster, facing substantial challenges caused by drops in commodity prices and weak fiscal and monetary policies.

The Mongolian economy is largely dependent on its natural resources. According to a survey by the International Monetary Fund in 2015, Mongolia has mineral deposits worth between US$1 trillion and US$3 trillion, with coal, copper, molybdenum, fluorspar concentrates and gold being the principal reserves; to date, only 25 per cent of the country has been geologically surveyed. After a sharp slowdown from 2014 to 2016, driven by a fall in commodity prices and declining foreign direct investment (FDI), the economy recovered in strongly 2017. Real GDP grew by 5.1 per cent, buoyed by strong coal exports, a recovery in FDI and improved business confidence. According to the National Statistics Office of Mongolia, GDP exceeded 27.3 trillion tugrik in 2017, of which the mining sector contributed approximately 22 per cent.

As at December 2017, total trade turnover increased by 27 per cent (5.5 billion tugrik) from the previous year, reaching 25.572 billion tugrik. Total exports increased by 26 per cent (3.116 billion tugrik) and imports by 29 per cent 2.42 billion tugrik). Minerals constituted

---

1 David C Buxbaum is the managing partner, and N Dean Boyer and Munkhbayar Batkhuu are licensed attorneys at Anderson & Anderson LLP.
5 The actual figure is 27,309,701,054,595.58 tugrik.
89 per cent of Mongolia’s total exports (with coal, copper concentrate, non-monetary gold and crude oil making up 83 per cent of the total). Exports of other minerals – iron ore, molybdenum ore, zinc ore and concentrate – constituted 6 per cent of total exports.\(^8\)

Foreign direct investment (FDI) has also been a major part of Mongolia’s economic growth. FDI averaged US$1,709.16 million between 2010 and 2018, reaching an all-time high of US$20,903.50 million in the first quarter of 2016 and a record low of US$8,444.70 million in the fourth quarter of 2010.\(^9\) Despite the record high, FDI decreased in 2016 and 2017 compared with previous years. However, in the first quarter of 2018, FDI increased by US$18,019.90 million;\(^10\) the mining sector attracted 70 per cent of all foreign investment – almost 70 per cent, according to the Bank of Mongolia.\(^11\) These statistics show the economy to be highly reliant on world commodity prices and Mongolia therefore faces the same boom and bust cycles as any resources-dependent nation.

The Mongolian capital market is finding its own unique way towards growth. Although capital markets provide the majority of long-term financing for economic development in developed countries, the situation is different in Mongolia,\(^12\) as the financial market is dominated by local banks. As at the first quarter of 2016, 95.1 per cent of financial market assets were held by the banking sector. This percentage has remained consistent for the past 25 years of the free economy.\(^13\) The other 5 per cent consists of non-bank financial institutions, insurance companies and securities companies.

The key venue for securities trading in the domestic capital market is the Mongolian Stock Exchange (MSE), with 26 years of experience in the sector. The year 2017 was an active and successful one for the MSE. Total market turnover reached 859.2 billion tugrik, the highest in its history and 57.2 per cent higher than the previous record set in 2015.\(^14\) However, that total is dominated by the sales of government bonds. In 2017, the equities market contributed 8.9 per cent to total securities turnover, of which corporate bonds constituted 1.2 per cent and government bonds 89.9 per cent.\(^15\)

The growth of the MSE index in 2017 was the highest in the world.\(^16\) During 2017, 106.1 million shares in 134 companies worth 76.4 billion tugrik were traded through 249 securities trading sessions. Of that total, 58.3 per cent (44.6 billion tugrik) was traded through block trading and 41.7 per cent (31.8 billion tugrik) was ordinary trading.\(^17\) Tool JSC issued a total of 13.4 million shares to successfully raise 1.3 billion tugrik in November 2017 on the primary market of the MSE.\(^18\) This was the only primary market transaction.

---

\(^8\) id.
\(^10\) id.
\(^15\) ibid., at 10.
\(^16\) Interview with the chief executive officer (CEO) of the Mongolian Stock Exchange, https://www.pressreader.com/mongolia/the-ub-post/20180207/281496456735152.
\(^18\) id.
Although the growth of the capital market has dramatically increased, the Mongolian primary equity market and the secondary equity market are still having trouble attracting investors. As a result, bigger business entities are more interested in issuing their securities on foreign stock exchanges, where they are able to access larger pools of capital. As at 2016, 30 Mongolian companies, mostly in the mining sector, were listed on foreign exchanges, including those in Canada, Australia, Hong Kong and the United States.19

Still, the MSE is finding its way to a brighter future. In the past 15 years, many foreign companies operating in Mongolia have traded their stocks on foreign exchanges. In that time, the domestic stock market was not closely linked with these other stock exchanges.20 In an attempt to bring the country closer to these foreign exchanges and foreign investors, the Financial Regulatory Commission of Mongolia (FRC) passed a temporary regulation for listing securities registered on foreign stock exchanges on 24 November 2017.21 This regulation streamlines the process for companies listed on certain exchanges to list their securities on the MSE. The first company to get approval from the FRC to list their four million shares on the MSE was the Erdene Resources Development Corporation, originally listed on the Toronto Stock Exchange.22 The MSE sees this as a pivotal turning point in the development of the Mongolian stock market.23

An increase in external debt has had a pronounced effect on the country’s economy. At the end of the first quarter of 2017, the total external debt reached US$24.957 million, an increase of US$1.498 million on the first quarter of 2016, according to the Bank of Mongolia.24 The figure for the fourth quarter showed a further increase, to US$27.413 million (US$2.788 million more than in the fourth quarter of 2016).25 In the last quarter of 2017, government external debt increased by US$2.448 million to US$7.317 million, and the Bank of Mongolia’s external debt increased by US$234 million to US$2.025 million.26

The challenges being faced by the Mongolian economy led the authorities to request aid from the International Monetary Fund (IMF). The Executive Board of the IMF approved a three-year arrangement under an extended fund facility, with a total amount through a Special Drawing Right of 314.505 million tugrik to support a programme of economic reform.27 The aim of this programme is to stabilise the economy, restore economic confidence and pave the way to economic recovery. A critical pillar of the programme is fiscal consolidation, to reduce the pressure on domestic financial markets, stabilise the external position relative to debt and

26 Id.
restore debt sustainability. The plan also includes cuts in non-essential expenditure, a move towards progressive taxation, pension and public financial management reforms, and steps to strengthen the social safety net.28 The government that took office in 2016 has expressed a strong commitment to strengthening macroeconomic policies and implementing structural reforms to stabilise the economy and lay the foundations for sustainable, inclusive growth in the future.29

II CAPITAL RAISING

i General overview of the legal framework

Mongolia has relatively few general laws directly related to the capital market. That said, there are several key pieces of legislation that make up the foundation of the country’s capital market regulatory framework: The Civil Code, The Company Law, The Investment Law and The Securities Market Law. Following the development of the capital market in recent years, the Parliament of Mongolia has passed more specific laws, such as The Investment Fund Law and The Asset-Backed Securities Law.

The Securities Market Law

The main legislation to regulate and establish the basic relations of the capital market is the amended Securities Market Law, passed on 24 May 2013. It replaced a law that had been in effect since 2002. The purpose of the renewed legislation was to set out the legal framework for Mongolia’s developing capital market. It has expanded the definition of securities and introduced new financial instruments, such as depositary receipts, asset-backed securities, warrants and derivative financial instruments, including option contracts and future contracts.30 To support the development of the capital market, the amended law also introduced new international possibilities for both domestic and foreign investors and issuers of securities.31 The amended Securities Market Law also introduced new financial and capital market services, including investment funds, private pension funds, insurance funds, investment banking and custody banking services.32

The Law regulates the main procedures of capital raising through the issuance of securities. The issuer can be the government, governors of provinces or the capital city (Ulaanbaatar), and private companies.33 Securities may be issued for sale by way of public offering or closed subscription.34 A public offering of securities on the primary market should be targeted at a minimum of 50 investors. If the initial prospectus of the securities provides that the securities shall be offered by way of closed subscription, the securities must be offered through closed subscription.35

---

28 id.
30 Securities Market Law, Articles 5.1, 4.1.7.
31 id. at Articles 17, 18.
33 Securities Market Law, Article 7.1.
34 id. at Article 6.1.
35 id. at Articles 11.1, 11.2.
The issuer must submit its request and a securities prospectus to the FRC and register
the securities before offering them to investors.\textsuperscript{36} The prospectus must include information
regarding the securities issuer, its shareholders, management, organisational structure and
governing persons, the assets, debts, financial condition, present and future outlook, and
risks relating to the securities issuer, the securities being issued, the rights evidenced by such
securities, the procedures for trading the securities and independent opinions.\textsuperscript{37}

Securities issued by Mongolian companies can be traded in foreign markets and \textit{vice versa}.\textsuperscript{38} Article 18 of the amended Securities Market Law specifically provides a legal entity
‘registered in a foreign jurisdiction’\textsuperscript{39} with the ability to ‘register with the MSE and trade
its securities’.\textsuperscript{40} The amended Law expressly provides the opportunity for dual or secondary
listings by foreign entities, though permission must be obtained from the FRC prior to
registration with the stock exchange.\textsuperscript{41}

\textbf{The Investment Law}

While developments in Mongolia’s securities market may be significant to raising capital in
the mining sector, the passing of the Investment Law on 3 October 2013 and amendments
to the Minerals Law on 1 July 2014, 9 April 2015, 14 May 2015 and 21 July 2016 have had
a pivotal role in encouraging increased foreign investment into the country. The Investment
Law’s stated purpose, provided in Article 1.1, is ‘to protect the legal rights and interests
of investors within the territory of Mongolia . . . to promote investment, to stabilise
the tax environment, and to determine the powers of government organisations and the rights
and obligations of investors’.\textsuperscript{42} Enacted in October 2013, the Investment Law replaced both
the Law on the Regulation of Foreign Investment in Entities Operating in Strategic Sectors
and the Foreign Investment Law. With the inclusion of several articles intended to level the
playing field between foreign and domestic investors, the Investment Law also streamlined
the registration process for foreign-invested entities and relaxed the restrictions on investment
by foreign state-owned entities.

A permit, issued by the Ministry of Finance, is required for investments of 33 per cent
or more of a company’s shares by a foreign state-owned entity in the mining, banking and
finance, or media and communication sectors.\textsuperscript{43} The law defines foreign state-owned entities
as those entities with 50 per cent or more of their total issued shares ‘owned, directly or
indirectly, by a foreign state’.\textsuperscript{44} These restrictions are intended to limit the entry, the influence
and dominance of foreign state-owned entities in national strategic sectors. In addition to
restrictions placed on foreign state-owned entities, the Investment Law effectively increased
the minimum share capital requirement for foreign investors. While the former Foreign
Investment Law required a minimum capital investment of US$100,000 for foreign-invested
entities, the new Investment Law stipulates that capital contributions must be US$100,000 per foreign investor, which is not required for Mongolian investors. Foreign-invested entities already incorporated in Mongolia were grandfathered in under the previous capital contribution mandates and have not been required to meet the new per-investor minimum thresholds.

In partial contrast to the Investment Law’s restrictions on investment outlined above, the law has also paved the way for a streamlined company registration process. Foreign-invested entities are not required to hold both a company certificate and a foreign-invested company certificate. All company registration renewals and establishment processes are carried out solely through the Legal Entity State Registration Office, a sub-office under the country’s overarching Intellectual Property and State Registration Office. In addition, the Investment Law, Chapters 5 and 6, provides investors with the ability to secure tax stabilisation certificates or investment agreements (or both). Investment agreements may be established between the government and investors who ‘will make an investment of more than MNT 500 billion . . . for the purpose of stabilising its operational environment’. With regard to stabilisation certificates, the Investment Law includes several criteria that will be used to determine whether an entity may be issued with a certificate. Article 14 provides that the following types of taxes may be stabilised under the law: corporate income tax, customs duties, value added tax and mineral royalties. The law also has non-tax promotion policies for investors, such as extended terms for allocating land to investors and the issuance of multiple-entry visas for investors travelling to Mongolia.

The Invest Mongolia Agency, which is in charge of issuing stabilisation certificates, was restructured as the National Development Agency (NDA) as of 14 May 2017. The NDA is responsible for issuing the above-mentioned certificates but has not yet implemented this new practice.

The new government of Mongolia, established by virtue of the election held on 28 June 2016, established a Council on 3 August 2016 to protect the interests of investors. The Council is set up as part of the Cabinet Secretariat of the government and reports directly to the Prime Minister. The primary functions of the Council are to protect the interests of investors, to collaborate with them in a legitimate way, to mitigate possible risks and to effectively address in-country dispute cases with investors. The Council will also address dispute issues raised by investors in an efficient and constructive way. The Council has been in operation since 28 December 2016.

The government also adopted a new regulation with respect to dispute resolution, under which the Council must review and comment on every single contract that will be

45 Foreign Investment Law, Article 11.1 (repealed 2013) (Mong.).
46 Investment Law, Article 3.1.5. (2013) (Mong.).
47 id. at Article 15 (2013) (Mong.).
48 id. at Article 20 (2013) (Mong.).
49 id. at Article 20.1.
50 id. at Articles 14.1.1 to 14.1.4.
51 id. at Article 12.1.
entered into between foreign investors and stated-owned companies or quasi-state-owned companies. This regulation may help to prevent or resolve potential disputes between parties before they are forced to pursue overly complicated judicial proceedings.

ii Market overview

According to the Bank of Mongolia’s latest report on foreign investment, of 31 December 2017, total FDI was equal to US$18 billion. The majority of FDI was by nations such as the Netherlands, China, Luxembourg, the British Virgin Islands, Singapore, Canada, Korea and the United States. In 2016, the largest investor by country listed was China, which constituted 26.89 per cent of all FDI by country. Canada followed closely with 23.64 per cent. In 2017, however, Canada narrowly outpaced China and constituted 25.58 per cent of all FDI, with China accounting for 25.56 per cent. The Bank of Mongolia reported that as at the third quarter of 2017, FDI was US$702 million, of which US$285 million came from Canada and US$155 million from Luxembourg; 79 per cent of all FDI was made in the mining sector.

According to the Bank of Mongolia, as of the fourth quarter of 2017, inflows of FDI were US$792 million. Of that sum, investment in the mining sector amounted to US$552.76 million, a significant increased (of US$228.7 million) compared to the same quarter of 2016. During this period, the countries by investment volume listed were Canada (50 per cent), the United States (9 per cent), the Netherlands (8 per cent) and China (5 per cent), all of which have been major players for many years. With respect to the mining sector, it has been dominated by three main actors – Tavan Tolgoi (coal producer), Oyu Tolgoi (gold and copper) and Erdenet (copper and molybdenum).

iii Structural considerations

The amended Securities Market Law contains a number of considerations for structuring a capital-raising transaction, in addition to those described above. Generally, the Law now incorporates important requirements relating to increased transparency and ease of capitalisation. An application to register securities for approval for a public offering on the MSE must contain an application form, a detailed securities prospectus, documentation that evidences ‘payment of regulatory service fees’ and other items determined by the FRC’s implementing regulations. A securities prospectus should contain specific information required by the law. In addition, Article 10.6 requires that all prospectuses be reviewed

54 Government Resolution No. 160, dated 7 June 2017.
60 Securities Market Law, Article 9.5 (revised 2013) (Mong.).
for accuracy by an authorised law firm or legal entity. The appointed firm or entity will
thereafter issue an opinion regarding the veracity and accuracy of the information included,
which will form a part of the prospectus for later review by potential buyers.

During an initial public offering of the shares of an open joint-stock company, a
securities issuer will be required to engage a legal entity to carry out underwriting activities.
In addition, any prospective buyers of securities will be entitled to view the issuer’s security
prospectus free of charge. The amended Securities Market Law also contains reporting
requirements for securities sold on the MSE, which should show evidence that the issuer is in
compliance with all legal and regulatory guidelines.

As indicated above, many of the procedures to be implemented under the amended
Securities Market Law are the responsibility of the FRC, which is tasked with devising a
plethora of regulatory activities, which include:

\( a \) approving procedures related to issuing securities via a public offer;
\( b \) application requirements for the registration of securities;
\( c \) establishing regulations related to issuing and registering depositary receipts;
\( d \) establishing regulations related to registering company debt instruments; and
\( e \) issuing regulations pertaining to the purchasing and sale of shares in a listed company.

These are just a fraction of the regulatory obligations with which the FRC has been tasked.
It has taken time for the FRC to fully implement the Securities Market Law; however, the
structural foundation has been laid and, as stated previously, the amendments to the Law
mark a decisive improvement to Mongolia’s overall capital market framework.

With an improved legal framework in place, the MSE has also diligently collaborated
with regulatory authorities and foreign development partners. For instance, the Project for
Capacity Building of Capital Market in Mongolia has been implemented by the Japanese
International Cooperation Agency in cooperation with the MSE. The aim of the Project
has been to enhance the credibility of the Mongolian capital market through several
improvements to the legal framework, the capacity of market participants, and expanding
the routes for Mongolian companies to raise capital from domestic and foreign markets,
which was completed in December 2017. These continuous efforts to improve the capital
market will undoubtedly prove beneficial to the country and attract more foreign investors
to the mining sector.

iv Tax considerations

The Mongolian tax regime and tax rates are highly favourable compared to other developing
countries. The government has been keen to improve tax regulations in order to make the
country more attractive to foreign investors, while being mindful not to discriminate against

\( 61 \) id. at Article 10.6.
\( 62 \) id. at Articles 10.6, 10.7.
\( 63 \) id. at Article 11.3.
\( 64 \) id. at Article 11.4.
\( 65 \) See, generally, Securities Market Law, Article 12 (revised 2013) (Mong.).
news/4277.
c8h0vm000007dxgim-arrt/jica_en.pdf.

© 2018 Law Business Research Ltd
local taxpayers. The general income tax rate for corporate activities has been constant at 25 per cent since 2012.\footnote{Trading Economics, https://tradingeconomics.com/mongolia/corporate-tax-rate.} If a corporate entity’s taxable income for a year is 3 billion tugrik or less, the entity is taxed at a rate of only 10 per cent.\footnote{Law on Corporate Income Tax, Article 17.1.} Interest income and income derived from dividends and royalties is also taxed at the 10 per cent rate.

With the exception of the tax consideration included in the Investment Law, there is no unique tax structure that applies specifically to the mining industry. Corporate mining entities, whether domestic or foreign-invested, are taxed in accordance with the provisions of the Law on Economic Entity Income Tax. This law applies to any economic entities formed under the laws of Mongolia, their subsidiaries, representative offices,\footnote{id. at Article 3.1.1.} foreign economic entities with headquarters located in Mongolia,\footnote{id. at Article 3.1.2.} and foreign economic entities or their subsidiaries earning income in Mongolia.\footnote{id. at Article 3.1.3.} Gross taxable income deductions, many of which may be utilised by mining entities, are found in Article 12 of the Law on Economic Entity Income Tax.\footnote{id. at Article 12.} The deductions are numerous and include a variety of expenses, including social and health insurance premiums,\footnote{id. at Article 12.1.3.} raw materials, primary and auxiliary materials,\footnote{id. at Article 12.1.1.} employee bonuses, incentives and allowances for housing and transportation.\footnote{id. at Article 12.1.4.} Corporate entities may also deduct for maintenance expenses, lease payments, loan interest, customs duties, transport and labour safety expenses, and more.\footnote{id. at Articles 12.1.6, 12.1.7, 12.1.10, 12.1.14, 12.1.21, 12.1.23.}

Other significant taxes that may apply to legal entities, including foreign-invested entities, are value added tax and customs duties. Any legal entity that is engaged in imports or exports of goods, the sale or manufacturing of any goods, performance of work or rendering of services in the territory of Mongolia are liable for value added tax.\footnote{Law on Value Added Tax, Article 5.1.} The rate payable is 10 per cent of the total sales amount of the goods, jobs or services that are subject to value added tax.\footnote{id. at Article 11.1.} Most imported goods are subject to a 5 per cent import duty.\footnote{Mongolian Customs, http://customs.gov.mn/2017-10-09-03-00-30/trf.}

**Tax exemption and incentives**

With the passing of the Investment Law, several new tax incentives became available to investors. Chapter 4 of the Law, entitled ‘Promotion of Investment’, contains a number of incentives, which include the possibility for:

- exemption from taxes;
- provision of tax rebates;
- estimation of depreciation costs that could then be excluded from taxable income;
- having losses excluded from taxable income; and
- exclusion of employee training costs from taxable income.\footnote{Investment Law, Articles 11.1.1-11.1.5 (2013) (Mong.).}
The general requirements for obtaining a stabilisation certificate are directly connected to the amount of the investment, with a minimum requirement of 10 billion tugrik. There is, however, an exception for businesses in the mining and heavy industry sectors. If an investor in these sectors wants to obtain a stabilisation certificate, the minimum investment value must be greater than 30 billion tugrik. In addition, the investment project must show that an environmental impact assessment has been conducted, if required. Investors must also demonstrate that they are using advanced technology and that a 'sustainable workplace' has been created.

A stabilisation certificate allows investors to lock in a favourable tax rate for a given period of time. The duration of a stabilisation certificate will be determined by the total amount invested and the location in which an investment project is to be undertaken.

**Tax treaties**

Mongolia has entered into bilateral tax treaties with 25 countries, which limits the tax rate at certain levels and may give taxpayers an option to avoid double taxation in Mongolia and their respective countries. The list includes many major contributors to the global economy, such as China, France, Germany, Korea, Russia, Singapore and the United Kingdom.

### DEVELOPMENTS

As the Mongolian economy is heavily dependent on natural resources, it is highly vulnerable to external factors such as falling global commodity prices or currency depreciation. After enjoying significant economic growth in 2011, Mongolia faced serious deficits owing to the dramatic fall in commodity prices of coal and copper in 2012. The country is still struggling to fully recover from this economic downturn.

To tackle the challenges facing the country's economy, the government has followed a programme proposed by the International Monetary Fund (IMF). Mongolian authorities met all quantitative performance criteria as required by the deadline of the end of March 2018.

Regarding structural reforms, the government has recently submitted two tax administration laws originally due in February 2017. In relation to the IMF programme, amendments to the Bank of Mongolia Law were passed in January 2018. Further, the government plans to pass a Recapitalisation Law, and the approval and publication of a non-performing loan resolution strategy is in progress but not yet complete.

As a result of the IMF programme and the positive projection for the global commodity economy, the Mongolian economy got back on track faster than expected. Fiscal performance continues to be robust, with a 2.1 per cent of GDP primary surplus in the first quarter.

---

82 *id. at Articles 16.2 to 16.3.*
83 *id. at Article 16.1.2.*
84 *id. at Article 16.1.4.*
85 *id. at Article 16.1.3.*
86 *id. at Articles 14.1.1 to 14.1.4.*
87 *id. at Articles 16.2 to 16.3.*
89 [International Monetary Fund, Executive Summary, 8 June 2018.](http://en.mta.mn/c/view/12118.)
of 2018. However, after the strong capital inflows of 2017, the balance of payments has moderated in recent months owing to an acceleration in imports, a decline in donor flows, temporary border bottlenecks for coal exports and bond repayments.

Mongolia is also trying to achieve an investment-friendly environment and is constantly aiming to improve the applicable laws, rules and regulations. The Ministry of Finance and the tax authorities are planning to amend the old corporate income law as part of a recent push for tax reform. Further, the government has adopted a new stage in its legislative process, for holding public hearing sessions and receiving comments from stakeholders. The Ministry of Mining and Heavy Industry is also implementing the same methods and inviting the private sector to participate in the process of drafting the new Mining Law. Even if the government is reluctant to actually incorporate the comments and suggestions from the private sector, their inclusion in the conversation is an important step. These developments show that the government recognises the importance of a stable and engaging legal regime for crucial business sectors and investors.

---

INTRODUCTION

London is a leading financial market for international mining companies seeking to access the equity capital markets. London Stock Exchange's Main Market is the listing venue for many of the world's largest mining groups by market capitalisation, including Anglo American, BHP Billiton, Glencore and Rio Tinto. 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 2018, there were 39 mining companies admitted to trading on the Main Market and 117 mining companies admitted to trading on the AIM market.2

New issues

In the 12-month period from 30 June 2017 to 30 June 2018, two new mining companies were admitted to the Main Market of the London Stock Exchange – Shefa Yamim (ATM) Ltd and PJSC Polyus. Shefa Yamim (ATM) Ltd is a minerals company focused on exploration for precious stones in northern Israel. The market capitalisation of the company was approximately £15.3 million at the time of its initial public offering in December 2017. PJSC Polyus was readmitted to the Main Market having delisted from the London Stock Exchange in 2015. Polyus is the largest gold producer in Russia and one of the top 10 gold miners globally. The total fund raised on its readmission was £433 million.

Six new mining companies were admitted to trading on AIM during the same 12-month period – Altus Strategies Plc, Cora Gold Ltd, Erris Resources Plc, Cradle Arc Plc, Kore Potash Plc and Crusader Resources Ltd.

Altus Strategies Plc is an Africa-focused company with a number of precious and base metal exploration assets. On admission in August 2017, Altus had a market capitalisation of £10.8 million.

Cora Gold Ltd is a West Africa-focused gold exploration company. It raised £3.45 million through a placing and subscription and had a market capitalisation of £9.07 million on admission in October 2017.

Erris Resources Plc is a Europe-focused mineral exploration company with a zinc project in Ireland and a gold project in Sweden. It raised £4 million through a placing of new shares and had a market capitalisation of £7.8 million on admission in December 2017.

Kate Ball-Dodd and Connor Cahalane are partners at Mayer Brown International LLP.

Cradle Arc Plc is an Africa-focused base and precious metals exploration and production company. It had a market capitalisation of approximately £20.1 million on its admission to AIM in January 2018.

Kore Potash Plc is a potash exploration and development company. Its flagship asset is the Kola Project in the Democratic Republic of the Congo. Kore had a market capitalisation of £90.2 million on its admission to the AIM market in March 2018 and at the same time joined the main board of the Johannesburg Stock Exchange. The company is also admitted on the Australian Securities Exchange.

Crusader Resources Ltd is an independent gold explorer and developer. The company had a market capitalisation of approximately £13.8 million on admission to AIM in April 2018. The company is also listed on the Australian Securities Exchange.

ii Secondary offerings

The largest Main Market secondary offering by a mining company in the period from 30 June 2017 to 30 June 2018 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 Central Asia Metals Plc, which owns the Kounrad SX-EW copper project in central Kazakhstan and the Sasa zinc-lead mine in Macedonia. The company also owns 80 per cent of the Shuak copper exploration property in northern Kazakhstan. The total proceeds of the placing was approximately £113 million.

II CAPITAL RAISING

i General overview of the legal framework

Under the UK listing regime, different admission criteria and listing rules will apply depending on whether a company is seeking to have its shares (or other securities) admitted to a regulated market governed by the EU Prospectus Directive,3 such as the Main Market, or to AIM, which has a more flexible regulatory structure.

Official List

In order to be admitted to the Main Market, a company must first apply to the UK Listing Authority (UKLA), a division of the UK’s Financial Conduct Authority (FCA), to join the Official List.

Mineral companies

For the purposes of the Listing Rules (LR), which set out the admission requirements for the Official List, a mineral company is a company with material mineral projects (not just those whose principal activity is the extraction of mineral resources). The materiality of projects is assessed having regard to all the company’s mineral projects relative to the company and its group as a whole.

Mineral projects include exploration, development, planning or production activities (including royalty interests) in respect of minerals, including:

- metallic ore, including processed ores such as concentrates and tailings;
- industrial minerals (otherwise known as non-metallic minerals), including stone such as construction aggregates, fertilisers, abrasives and insulators;
- gemstones;
- 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
- solid fuels, including coal and peat.

**Admission requirements**

The Official List is divided into two segments: standard listings and premium listings. A standard listing is one that satisfies the minimum requirements laid down by the EU Prospectus Directive. A premium listing denotes a listing that meets more stringent criteria that are not required by the EU Prospectus Directive but 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.\(^4\) These include a requirement that the company is duly incorporated (either within the United Kingdom 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).\(^5\) If the company is making an offer of new securities, any necessary constitutional, statutory or other consents required must be obtained prior to listing.\(^6\) The expected market capitalisation of the securities to be listed must be at least £700,000 in the case of shares and £200,000 in the case of debt securities. While the UKLA has a discretion to admit a company with a lower market capitalisation if it is satisfied there will be an adequate market, from a practical perspective it is likely that the market capitalisation would need to be significantly higher for a listing to be economical.\(^7\) While there is no requirement for a company seeking a standard listing to confirm to the UKLA that it has sufficient working capital to meet the requirements of the business for the next 12 months, if the company is also producing a prospectus (which is likely to be the case – see below), it will be required to include a working capital statement in the prospectus confirming whether the business has sufficient working capital for that period.

\(^4\) 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.
Premium listing

If a mineral company is seeking an admission of its shares to the premium segment of the Official List, in addition to the minimum requirements applicable to all listings set out above, the company must confirm to the UKLA that it has sufficient working capital available to meet the requirements of the business for the next 12 months. At least 25 per cent of the class of the company’s shares to be listed in the premium segment must be in the hands of the public in one or more EEA countries at the time of admission. 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:

a transactions and arrangements with the controlling shareholder (or any of its associates, or both) will be conducted at arm’s length and on normal commercial terms;

b neither the controlling shareholder nor any of its associates will take any action that would have the effect of preventing the new applicant or listed company from complying with its obligations under the LR; and

c neither the controlling shareholder nor any of its associates will propose or procure the proposal of a shareholder resolution that is intended or appears to be intended to circumvent the proper application of the LR.

---

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.
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 United Kingdom 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 UKLA, which will assess whether the document complies with the disclosure requirements set out in the Prospectus Rules (PR). A prospectus must not be published unless it is approved by the UKLA.
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{18}

Specific eligibility requirements for mineral companies

In addition to the independent business requirements set out above, if a mineral company seeking admission to the Official List (to the standard or premium segment) does not hold a controlling interest in a majority by value of the properties, fields, mines or other assets in which it has invested, the company must be able to demonstrate to the UKLA that it has a reasonable spread of direct interests in mineral resources and has rights to participate actively in their extraction, whether by voting or through other rights that give it influence in decisions over the timing and method of extraction of those resources.\textsuperscript{19}

Specific content prospectus requirements for mineral companies

In March 2013, the European Securities and Markets Authority (ESMA) published an updated edition of its recommendations for the consistent implementation of the EU Prospectus Directive, with revised recommendations as to the content requirements for prospectuses published by mineral companies.\textsuperscript{20} When reviewing a prospectus, the UKLA will take into account these recommendations, which in effect supplement the requirements of the LR and the PR.

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;
  \item[d] 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
  \item[e] an explanation of any exceptional factors that have influenced the foregoing items.
\end{itemize}

\textsuperscript{18} Prospectus Rules (PR) 5.5.

\textsuperscript{19} LR 6.1.10.

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 PR. 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 are less stringent than those for the premium segment.
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.21

**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 EU Prospectus Directive, AIM is governed by a more flexible regulatory regime than the Main Market.

**Role of the nomad**

The London Stock Exchange oversees the regulation of AIM and compliance with the AIM Rules. Each company seeking admission to AIM must appoint a corporate finance adviser that has been approved by the London Stock Exchange to act as a nominated adviser or ‘nomad’. The company’s nomad is responsible for assessing whether the company is an appropriate applicant for AIM, and for advising and guiding the company on its responsibilities under the AIM Rules.

**Admission requirements**

Unlike the Official List, there are generally no minimum market capitalisation requirements for a company seeking admission to AIM. However, investment companies must raise a minimum of £6 million in cash through an equity fundraising to be eligible for admission to AIM.22

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.23 To be eligible for fast-track admission, a company must have had its securities traded on an AIM designated market24 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 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.

---

22 Rule 8, AIM Rules for Companies. For this purpose an ‘investing company’ is any company that has as its primary business or objective the investing of its funds in securities businesses or assets of any description.
23 However, as with any company seeking admission to AIM, a fast-track applicant may be required to produce a prospectus under the EU Prospectus Directive where, for example, an offer of securities is made to the public and no relevant exemption is applicable.
24 These include the top-tier markets of the Australian Securities Exchange, Deutsche Börse Group, NYSE Euronext, Johannesburg Stock Exchange, NASDAQ, NYSE, NASDAQ OMX Stockholm, Swiss Exchange, TMX Group and the UKLA Official List.
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.25

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 UKLA, the process and timetable for admission to AIM can often be shorter and more flexible than the process for admission to the Official List.

Prospectus requirement for AIM companies
Although AIM is not a regulated market for the purposes of the EU Prospectus Directive, if a company seeking admission to AIM is also making an offer of its securities to the public in the United Kingdom, the admission document may also need to be approved as a prospectus by the UKLA 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).26

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.

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

25 Schedule 2(k), AIM Rules for Companies.
26 AIM Guidance Note for Mining, Oil and Gas Companies (June 2009).
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 United Kingdom or carrying on a trade through a permanent establishment in the United Kingdom).

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. The UK introduced new rules for tax losses arising after 1 April 2017. 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 from 1 April 2017, subject to an allowance of £5 million per group. 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.

The usual capital allowances regime for long-life assets and integral features (8 per cent writing down allowance per annum) and other plant and machinery (18 per cent writing down allowance per annum) applies to mining companies. In addition, persons engaged in mining activities can benefit from the mineral extraction allowance (at a rate of 25 per cent or 10 per cent on a reducing balance basis), which is a form of capital allowance available to those who carry on a mineral extraction trade (a trade consisting of, or including, the working of a source of mineral deposits) and incur qualifying expenditure. Qualifying expenditure for

---

27 Specific tax rules for the oil and gas sector are not addressed here. This section focuses solely on mining companies involved in exploration for and extraction of minerals other than oil and gas.
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 United Kingdom 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 £88.95 per tonne or the lower rate of £52.80 per tonne,\(^{28}\) 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.

## III DEVELOPMENTS

### i UK leaving the European Union

Although the main rules governing public offers of securities and applications for admission to trading on regulated markets in the United Kingdom (including the Main Market) are derived from EU law, principally the EU Prospectus Directive, this Directive itself closely follows the UK rules that were in place prior to the introduction of the Prospectus Directive in 2003. While leaving the European Union might lead to an overhaul of the relevant UK rule books 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. 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 United Kingdom 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).

---

\(^{28}\) These rates are subject to annual increases in line with the retail price index, rounded to the nearest five pence.
One of the intended benefits of a common European framework for the approval of prospectuses is the issuers’ ability to use a prospectus approved by a competent authority in one Member State to market securities in another Member State through the Prospectus Directive’s ‘passport’ regime. Leaving the 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 United Kingdom need to be passported out as they are used to market securities only to qualified investors in other EU Member States.

**Market abuse regulation**

At the EU level, concerns of market distortion arising through regulatory arbitrage have led to the introduction of new harmonising measures in the form of an EU Regulation on Market Abuse (MAR), which has a direct effect on all EU Member States, 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 rule book 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:

- prohibition on insider dealing;
- restrictions on the unlawful disclosure of inside information;
- safe harbour rules relating to market soundings procedures to be followed when ‘wall crossing’ investors for transactions;
- restrictions relating to market manipulation;
- 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;
- a requirement to maintain insider lists with details of persons who have access to inside information; and
- 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.
ABOUT THE AUTHORS

DIOGO PRADO ALFAIATE

Vieira de Almeida

Diogo Prado Alfaiate joined Vieira de Almeida in 2016. He is an associate in the oil and gas practice where he has been involved in several transactions in Portugal and abroad, namely in the oil and gas, waste management and energy sectors.

He has advised several clients on regulation procedures and public procurement in these sectors.

Diogo Alfaiate speaks Portuguese, English and French. He is admitted to the Portuguese Bar Association.

KATE BALL-DODD

Mayer Brown International LLP

Kate Ball-Dodd is a partner in the corporate department of Mayer Brown International LLP. She has a wide-ranging corporate practice that encompasses corporate finance, mergers and acquisitions (including public takeovers), equity fund raisings, joint ventures and corporate governance. She advises a number of quoted companies and financial intermediaries on the UKLA Listing Rules and Disclosure Guidance and Transparency Rules, the Prospectus Rules, the AIM Rules, the Takeover Code and general company law.

Ms Ball-Dodd speaks regularly at external conferences on corporate governance and takeovers.

MUNKHBAYAR BATKHUU

Anderson & Anderson

Munkhbayar Batkhuu is an attorney licensed to practise law in Mongolia. He has vast experience in the corporate and financial law of Mongolia and related litigation. Mr Batkhuu was in-house lawyer for a major commercial bank in Mongolia for five years and accumulated practical knowledge of the country’s banking and financial systems.
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. 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 through their different stages, from the incorporation of the company to the exploration, assessment and 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. He has also 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.

N DEAN BOYER  
*Anderson & Anderson*

N Dean Boyer III is an attorney licensed to practise law in the state of Louisiana, United States. His legal practice focuses on financing law, international trade and financial and commercial transactions, environmental law, and public and private international law. Mr Boyer has expertise in a variety of issues relating to international and domestic financial and commercial transactions.

Mr Boyer holds a JD from Tulane University Law School, New Orleans, in the United States and a bachelor of history degree with honours from the University of California, Santa Cruz.

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.
DAVID C BUXBAUM  
*Anderson & Anderson*

David C Buxbaum was the first American lawyer invited to China to represent American business interests in 1972, after President Nixon’s historic visit. He founded the firm’s first overseas office in Guangzhou (Canton). Subsequently, the firm opened offices in Mongolia, and elsewhere in China and Asia. Mr Buxbaum is a well-regarded expert on private international Chinese, Mongolian and Asian law who, in addition to being an experienced and highly respected practitioner, has published extensively in the field. He is presently very active in M&A, securities and commodities projects and cases. In addition to international transactional matters, Mr Buxbaum is professionally active in litigation, particularly regarding international business disputes, as well as intellectual property and commodities and securities matters. He represented the successful respondents before the United States Supreme Court in the landmark case of *Butz v. Economou* [438 U.S. 478 (1978)] and successfully handled leading cases in China, including Microsoft, Autodesk and Wordperfect v. Juren, Beijing Intermediate Court, 1996. He has been involved in leading commercial arbitration cases, and civil and criminal intellectual property cases in China, Hong Kong, London and New York (2014–2016).

CONNOR CAHALANE  
*Mayer Brown International LLP*

Connor Cahalane is a partner in the corporate and securities group of Mayer Brown International LLP. He advises on international and UK corporate and commercial transactions with a particular focus on public and private mergers and acquisitions and equity capital markets transactions for mining companies. He also advises on general company law and corporate governance matters.

RONG CAO  
*Tian Yuan Law Firm*

Rong Cao is an associate in Tian Yuan’s M&A practice. She received her LLB from Peking University Faculty of Law and her LLM from Hong Kong Chinese University.

Ms Cao practises mainly in the areas of foreign direct investment, outbound M&A and other corporate matters. Prior to joining the firm, Ms Cao worked with the capital market department in the Hong Kong office of Sidley Austin, where she was responsible for initial public offerings and related corporate matters. Ms Cao is admitted to practise in China.

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 of PRC. 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 suitable contractual framework and legal arrangements, project finance and bonding, he also provides legal advice on claims and dispute resolutions.

AIMERY DE SCHOUTHEETE

Liedekerke Wolters Waelbroeck Kirkpatrick SCRL

Aimery de Schoutheete has extensive experience in drafting and negotiating commercial contracts and in handling litigation before the Belgian courts, but also in other jurisdictions and in arbitration proceedings (ICC, Swiss Chambers and CEPANI). He has particular expertise in the fields of distribution, mining, international sale of goods and commodities, manufacturing, chemicals, agribusiness as well as Congolese law. He is currently the senior partner of the firm and also heads Liedekerke’s Africa desk.

ALBAN DORIN

Mayer Brown

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 17 OHADA Member States, in particular Burkina Faso.

He also represents arranging banks, investment funds and sponsors in areas of structured finance such as trade receivables securitisations, asset-based lending and aircraft finance transactions.

Alban is a member of the Paris Bar and a graduate of HEC Paris and Sciences Po Paris.

EDWINE ENDUNDO

Liedekerke Wolters Waelbroeck Kirkpatrick SCRL

Edwine Endundo is an associate and part of the corporate and finance practice group of Liedekerke.

Since the end of 2016, Edwine has been a member of Liedekerke’s Africa desk and is based in Kinshasa. She advises international and national clients in relation to multi-jurisdictional and cross-border transactions. She has particular expertise in M&A, corporate and mining law.
Daniel Fajardo is an associate in Holland & Knight’s Bogotá office. He practises in the area of corporate, oil and gas and mining law. Mr Fajardo primarily represents oil and gas and mining companies, and other types of corporations. He advises clients in contracting, due diligence, and mergers and acquisitions matters, and has experience with both litigation and arbitration. Mr Fajardo graduated from Universidad del Rosario and holds an LLM in oil and gas law and policy from Dundee University.

Rubén Federico García graduated from the Escuela Superior de Comercio y Administración del Instituto Politécnico Nacional in 1986. With more than 36 years of practice, his experience is focused on corporate tax services, which include advisory and tax compliance. This experience in corporate tax services has been achieved through years of working in the tax department of accounting firms.

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.

João Afonso Fialho joined Vieira de Almeida in 2015 and is the head of the firm’s oil and gas and mining practice group. In the past 20 years, João has been involved in all sorts of oil and gas and mining projects and transactions in various jurisdictions, such as Timor-Leste, Angola, Portugal, Mozambique, Congo, Democratic Republic of the Congo, Guinea Bissau and São Tomé and Príncipe. His practice is mainly focused on the energy (oil and gas upstream and downstream and power projects) and mining industries.

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).
EMMA FRANCE
_Herbert Smith Freehills Paris LLP_

Emma France is a French-qualified lawyer who works within the energy and infrastructure practice at international law firm Herbert Smith Freehills, based in the firm’s Paris office. Her practice focuses primarily on the provision of M&A and general corporate and commercial advice (joint ventures, shareholder arrangements, restructurings, etc.) to international clients in the context of their projects and ongoing operations in the energy and natural resource sectors in francophone Africa (north and sub-Saharan) and France.

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.

THIBAUT HOLLANDERS
_Liedekerke Wolters Waelbroeck Kirkpatrick SCRL_

Thibaut Hollanders is a partner and part of the corporate and finance practice group of Liedekerke. Since January 2015, Thibaut has been the head of activities of Liedekerke’s DRC subsidiary, Liedekerke Africa SASU, based in Kinshasa. He advises international and national clients in relation to multi-jurisdictional and cross-border transactions in the areas of M&A (including private equity) and corporate (re)structuring (outside insolvency), with a particular focus on mining (including extensive experience with francophone Africa).

JENNIFER HONEYMAN
_Stikeman Elliott LLP_

Jennifer Honeyman is a partner in the Vancouver office of Stikeman Elliott. She specialises in mergers and acquisitions (both public and private), securities and corporate finance and is a member of the firm’s global mining group. She advises both public and private companies on a wide range of transactions and corporate matters related to mergers and acquisitions, equity capital markets, joint ventures and general corporate matters. She has extensive experience in mining, with a focus on cross-border transactions. Prior to joining Stikeman Elliott in 2008, Ms Honeyman spent seven years practising in the United Kingdom, six of them at a magic circle firm in London. She has been a member of the British Columbia Bar since 1999 and is admitted to the Roll of Solicitors (England and Wales) (non-practising).

KAROL KAHALLEY
_Holland & Hart LLP_

Karol Kahalley has been a mining and Indian law attorney with the firm of Holland & Hart, LLP in Denver, Colorado for over 20 years. As a leading expert on US mining law, Ms Kahalley has successfully represented clients in acquiring mineral properties and developing mining operations throughout the United States, including on tribal lands. Her work includes hard rock minerals, oil and gas, oil shale, potash, uranium, coal, rare earth minerals, aggregates, and geothermal resources. She is a recognised expert on the creation and interpretation of mining royalties.

© 2018 Law Business Research Ltd
Ms Kahalley has been a lecturer and has published numerous articles for the Rocky Mountain Mineral Law Foundation. She is an adjunct professor at the University of Denver College of Law in international mining law and policy.

**MOUHAMED KEBE**  
*Geni & Kebe*

Mouhamed Kebe is the managing partner of Geni & Kebe, a full-service law firm based in Senegal with affiliate offices in 15 African countries. It is the only law firm with an office in the first mineral region of Senegal (Tambacounda), to assist mining clients located there.

Mr Kebe’s practice focuses on corporate and investment law, with a particular interest in the mining sector. He has an in-depth and practical knowledge of the law in Senegal and throughout the region, and has advised on many landmark mining transactions. He is top-ranked in *Chambers Global*, named in *Who's Who Legal: Mining* and is profiled as a Leading Lawyer in *IFLR1000* for his energy and infrastructure work.

Mr Kebe holds a master of laws with merit from the University of Essex, a master and bachelor of laws from the University of Dakar Anita Cheikh Diop and a certificate of international commercial and investment arbitration from the University of London.

Mr Kebe has been seconded to major law firms in Paris and London. He speaks English, French, Wolof and Arabic, and is a member of the Senegalese Bar Association, International Bar Association and the Law Society of England and Wales (international division).

**GEOFF KERRIGAN**  
*Herbert Smith Freehills*

Geoff Kerrigan is a senior associate in Herbert Smith Freehills’ corporate group and has broad experience in mining and resources transactions, including domestic and international acquisitions and divestments, joint ventures and offtake agreements. He is also experienced in advising on a varied range of project and development agreements, including construction and procurement contracts, state agreements, port access and transportation agreements, infrastructure use agreements and commodity marketing agreements.

**JAY LEARY**  
*Herbert Smith Freehills*

Jay Leary is a partner and the global co-head of mining at Herbert Smith Freehills. Jay’s energy and resources experience includes acquisitions and sales (private M&A), joint ventures, project development (including EPC and EPCM agreements and procurement contracts), operation and maintenance (including O&M agreements, contract mining agreements and gas transportation agreements), commodity sales agreements and agency agreements. His port and rail experience includes acquisitions and sales (private M&A), access regimes, state agreements, rail and port agreements, infrastructure leases, rail and port development and expansion, rail connection agreements, rail user funding arrangements, rail haulage agreements, supply chain coordination arrangements, port authority rules, marine and channel arrangements.

Jay is considered one of the leading resources and infrastructure lawyers. Several industry bodies have profiled 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 2018.
DAVID MASSÉ

Stikeman Elliott LLP

David Massé is a partner in the Montreal office of Stikeman Elliott and a member of the corporate and global mining groups. He specialises in mergers and acquisitions, securities and corporate finance, and acts for mining companies and underwriters in connection with mergers and acquisitions, corporate finance, joint ventures and mining development projects. He has been counsel to sellers, purchasers and financial advisers in various mergers, acquisitions, divestitures, spin-offs and reorganisations. He also frequently acts as counsel to issuers and underwriters in public and private domestic and international offerings, and advises TSX-listed issuers on regulatory compliance matters, corporate governance and continuous disclosure obligations.

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.

BERTRAND MONTEMBAULT

Herbert Smith Freehills

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.

ERICA K NANNINI

Holland & Hart LLP

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 geothermal resources.

KRISTIN A NICHOLS

Holland & Hart LLP

Kristin Nichols is an associate in the energy, environment and natural resources practice group of Holland & Hart, LLP in Denver, Colorado. Ms Nichols advises clients on a wide variety of natural resource issues, including energy development on federal, state and tribal
lands, regulatory compliance and public land use litigation. She represents natural resource clients in appeals to federal district court and federal administrative boards, including the Interior Board of Land Appeals.

MARCELO OLIVARES
Quinzio & Anríquez Novoa Abogados
A partner at Quinzio & Anríquez Novoa Abogados (formerly Quinzio & Cía Abogados), Marcelo Olivares specialises in consultancy in the areas of natural resources (mining, water and environment), engineering and construction agreements, labour, tax and public works concession matters. Since 1997, he has taught mining law at the Law School of the University of Chile. He is also a mining law professor in both the industrial civil engineering (MBA in mining industry) and mining civil engineering departments of the Faculty of Physical and Mathematical Sciences of the University of Chile.

Mr Olivares obtained a master’s degree in tax law at the Law School of the University of Chile. In 2009, he obtained a master of laws degree (LLM) in natural resources and environmental law and policy from the Sturm College of Law at the University of Denver, specialising in mining and energy. He was a participant in the 2008 Program of Instruction for Lawyers at Harvard Law School.

SIMON REAR
Squire Patton Boggs
Simon Rear is a partner in the corporate practice group of Squire Patton Boggs in Perth. He has broad experience in private and public mergers and acquisitions, equity capital markets and general corporate advisory work in both Australia and the United Kingdom. He has advised in connection with takeovers, schemes of arrangement and private mergers and acquisitions transactions. He has also advised on a number of fundraisings, including initial public offerings, rights issues and placements acting for both issuers and underwriters.

ERIK RICHER LA FLÈCHE
Stikeman Elliott LLP
Erik Richer La Flèche is a partner in the Montreal office of Stikeman Elliott and specialises in commercial transactions in Canada and abroad, including natural resource projects. He has led large projects in more than 35 countries. From 1981 to 1984, he was seconded to Anderson Mōri Tomostune (Tokyo).

CHRIS ROSARIO

*Squire Patton Boggs*

Chris Rosario is a senior associate in the corporate practice group of Squire Patton Boggs. He has corporate experience in advising listed and unlisted corporations on domestic and cross-border schemes of arrangement, regulated takeovers, corporate restructures and reorganisations and private mergers and acquisitions transactions. He also has significant experience in advising on equity fundraisings, including rights issues (traditional and accelerated), placings and share purchase plans.

ALEXANDRE OHEB SION

*Sion Advogados*

Alexandre Oheb Sion is a founding partner of Sion Advogados. He is a postdoctoral candidate at Universidad de Salamanca, Spain, and a PhD candidate at Universidade Autónoma de Lisboa, Portugal (credits completed). He has an LLM in international commercial law (University of California, USA), postgraduate degrees in constitutional law and in civil law and civil procedure law from FGV, Brazil, and bachelor degrees in law and in business administration. Alexandre Sion was a legal counsel (2001–2011) at Vale, MMX and Anglo American. At MMX, he served as legal officer and at Anglo American, he served as Chief Counsel of Regulatory Affairs to the Anglo American group in Brazil.

Alexandre Sion is national vice president of the Brazilian Union of Environmental Law (UBAA), a consultant at the National Commission of Environmental Law of Brazilian Bar Association (OAB) and president of the Commission of Infrastructure of the Brazilian Bar Association in the state of Minas Gerais. He is a member of the commissions mining law, environmental law, arbitration and mediation, energy, construction law and corporate law sections of OAB/MG. He is a member of the Commission of Infrastructure, Logistics and Sustainable Development of OAB/SP and a member of the Commission of Anti-Corruption and Compliance of OAB/RJ.

He is a law school professor, an active lecturer and author of a variety of legal articles. Also, he has been selected as one of the most renowned lawyers by the most relevant national and international guides.

THOMAS MIHAYO SIPEMBA

*East African Law Chambers*

Thomas Mihayo Sipemba is a partner and heads the energy and natural resources practice in East African Law Chambers. Thomas is one of the leading mining lawyers in Tanzania, having gained his experience as an in-house counsel for the country’s largest mining company. He later joined one of the largest commercial law firms in Tanzania as a senior associate, rising to partner level before joining East African Law Chambers. He specialises in corporate and commercial law, mining law, natural resources law and environmental law. Thomas has advised in high-value and complex transactions in the market and is a recommended lawyer by one of the leading legal directories.

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.
PIETER WILLEM SMIT
Falcon & Hume Inc

Pieter Willem Smit was admitted as an attorney in 2009, having served articles at Webber Wentzel. Pieter practised as an associate at Webber Wentzel from 2009 to 2012, and as a senior associate at Webber Wentzel from 2012 until April 2014, advising blue-chip clients on high-profile commercial and litigious matters with a focus on the mining industry. Pieter was appointed as a director at Falcon & Hume Inc in May 2014. Pieter holds a BA (law) degree and an LLB degree from the University of Stellenbosch. Pieter’s main practice areas include mining, minerals and natural resources, regulatory laws, administrative law, commercial litigation and business rescue.

LUIZA MELLO SOUZA
Sion Advogados

Luiza Mello Souza is an associate attorney at Sion Advogados. She has a postgraduate degree in environmental and mining law from PUC, Brazil, and is a postgraduate candidate in mining law at CEDIN, Brazil. Luiza regularly represents clients in regulatory issues related to mining and environmental law, especially concerning large capital projects (e.g., mining, energy, infrastructure, forestry and steel industries).

She has also authored legal articles concerning mining law, environmental law and public law.

ADRIANO DRUMMOND CANÇADO TRINDADE
Pinheiro Neto Advogados

Adriano Drummond Cançado Trindade is a counsel at Brazilian law firm Pinheiro Neto Advogados, where he has devoted his time to providing advice to exploration and mining companies and investors in matters involving mining projects. He holds an LLB from the Law School of the University of Brasília and an LLM (distinction) from the Centre for Energy, Petroleum, Mineral Law and Policy at the University of Dundee. Mr Trindade is also a professor of resources law at the University of Brasília Law School, where he also heads the mining section of the natural resources law research group, and is a PhD candidate. He has been continually listed as a top mining lawyer by various international legal guides.

MICHAEL VAN DER ENDE
Squire Patton Boggs

Michael Van Der Ende is an associate in the corporate practice group of Squire Patton Boggs in Perth. He advises clients on a range of corporate transactions, including both private and public mergers and acquisitions, equity capital markets and general corporate advisory matters. He has broad experience in advising global clients on domestic and cross-border mergers and acquisitions and equity fundraisings, including rights issues, placings and share purchase plans.
ALBERTO M VÁZQUEZ

VHG Servicios Legales SC

Alberto M Vázquez is a graduate of Universidad La Salle, where he obtained his law degree in 1996 with a thesis entitled ‘Expropriation as a Right Derived from Mining Concessions’.

With more than 20 years of experience, his practice is focused on corporate law, mining, migration, foreign investments and community relationships.

Mr Vázquez is involved in the establishment of Mexican companies and the corporate management of mercantile companies, as well as drafting agreements in general and representing important corporate foreign groups with business in Mexico.

In relation to mining issues, he has carried out important negotiations to access superficial lands where concessions are located; in addition, he has vast experience in drafting and negotiating contracts that involve mining concession rights, 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.

He is an active partner of the Mexican Mining, Metallurgy and Geology Engineer Association AC, and is a member of work groups organised by the Mexican Chamber of Mining (CAMIMEX) and the General Direction of Mining Promotion in the Ministry of the Economy.

He has been invited as a speaker to local and international seminars related to mining law issues, and has written several articles for magazines specialising in mining and environmental law.

Mr Vázquez has also been recognised by Who’s Who Legal as one of the world’s leading practitioners in the mining sector. He was also nominated by Who’s Who of Professionals for ‘Advisor of the Year’ for 2012–13.

ÂNGELA VIANA

Vieira de Almeida

Ângela Viana joined VdA in 2015. She is senior associate in the oil and gas practice, where she has been involved in several cross-border transactions, with a particular focus on energy, mining, investment, corporate and commercial law. She has been particularly active in providing assistance to several mining projects in Angola, Portugal and Timor-Leste, notably in the negotiation or renegotiation of mining investment contracts, structuring and restructing of joint ventures, farm-ins and farm-outs, assisting some of the world leaders in the mining sector.

She is a member of the Portuguese Bar Association and the Angola Bar Association.

CARLOS VILHENIA

Pinheiro Neto Advogados

Carlos Vilhena is a partner at Brazilian law firm Pinheiro Neto Advogados. He is in charge of the firm’s mining practice and government relations. Mr Vilhena has an LLB from the Law School of the University of Brasilia and an LLM from the Centre for Energy, Petroleum, Mineral Law and Policy at the University of Dundee. He is a member of the energy, environment, natural resources and infrastructure law section at the International Bar
Association. In his mining practice, he has advised exploration and mining companies and investors on a wide variety of mining-related issues. He has been continually listed as a top mining lawyer by various international legal guides.

**XIONG YIN**

*Tian Yuan Law Firm*

Xiong Yin is a senior partner at Tian Yuan Law Firm in Beijing. Before returning to China, Xiong Yin practised law for more than five years (1994–1999) at the Chicago Office of Baker & McKenzie. He is admitted in China, and in the United States as a member of the State Bar of Illinois.

Xiong Yin has practised in the areas of corporate law and international investment including foreign domestic investment, domestic and overseas investment, mergers and acquisitions, reverse takeovers and overseas listings, corporate financing, restructuring, venture exploration and mining, clean energy and natural resources, technology licensing and transfers, education and commercial arbitration.

Xiong Yin was awarded an LLM degree from Harvard Law School in 1994. When working full-time at the Chicago office of Baker & McKenzie, he studied at the Illinois Institute of Technology Chicago-Kent College of Law and received a JD degree in 1998. Xiong Yin received a bachelor of law degree in 1984 and a master of law degree in 1987 from Beijing University. He was a PhD candidate in international law at Beijing University before going the United States in 1989 to do research and to study at the University of Maryland and at Harvard Law School.

**JOSE VICENTE ZAPATA**

*Holland & Knight*

An equity partner at Holland & Knight in Bogotá, Jose Vicente Zapata has been recognised as one of the lawyers with the highest level of expertise in oil and gas, mining and environmental matters in Colombia. Similarly, he is one of the most recognised lawyers for projects and negotiations in the mining and oil and gas sectors, both upstream and downstream, throughout Latin America. With more than 20 years’ experience in natural resources, he has been an officer and legal representative of various oil and gas, mining and environmental corporations, and has served as president of Columbus Energy Sucursal Colombia, a leading venture company successfully set up in Colombia with 11 blocks in the Llanos and Putumayo basins covering nearly 1 million acres of gross acreage. Mr Zapata has also been legal counsel in the structuring of foreign investment transactions, mergers and acquisitions, and reorganisations of corporations in Colombia.

Mr Zapata has been a member of boards of directors for multinational corporations in the automotive, energy, telecommunications, industrial and food sectors. He is a professor at the Javeriana, Rosario and Externado de Colombia universities for environmental, oil and gas, corporate responsibility, environmental liability and sustainable development. Mr Zapata graduated from Universidad Javeriana and holds an LLM from McGill University.
YANLI ZHANG

*Tian Yuan Law Firm*

Yanli Zhang is an associate at Tian Yuan Law Firm. She received her LLB from North China Coal Medical University and her LLM from China University of Political Science and Law. Prior to joining the firm, Yanli worked as the legal counsel for the project company of China National Petroleum Corporation in West Africa. Yanli is qualified by the National Bar Association of China.

Yanli’s practice mainly focuses on energy and natural resources, cross-border acquisitions and financing transactions. She has provided legal support for a series of projects, including reviewing and drafting transaction documents, and participating in due diligence.
CONTRIBUTING LAW FIRMS’ CONTACT DETAILS

ANDERSON & ANDERSON
Suite 3901
39th Floor, Profit Plaza
76 Huangpu Avenue West
Tianhe District
Guangzhou 510623
China
Tel: +86 20 3839 2008
Fax: +86 20 3839 2009
anderson.guangzhou@anallp.com

Suite 1008
10th Floor, Grand Plaza
Enkhtaivan Ave-46
Bayangol District
Ulaanbaatar 16052
Mongolia
Tel: +976 7011 9339
Fax: +976 7011 9669
anderson.mongolia@anallp.com
anallp.com

FALCON & HUME INC
2nd Floor, 8 Melville Road
Illovo
Sandton, 2196
South Africa
Tel: +27 10 594 5000
pieter@fhinc.co.za
www.fhinc.co.za

GENI & KEBE
47, Boulevard de la République
Immeuble Sorano
Dakar 15023
Senegal
Tel: +221 33 821 1916 / 822 4636
Fax: +221 33 842 62 75
mhkebe@gsklaw.sn
www.gsklaw.sn

EAST AFRICAN LAW CHAMBERS
Plot No. 18, Rukwa Street
Masaki
Dar Es Salaam
Tanzania
Tel: +255 22 260 0854 / 0857
Fax: +255 22 260 0868
t.sipemba@ealc.co.tz
www.ealawchambers.com
HERBERT SMITH FREEHILLS
QV.1 Building
250 St Georges Terrace
Perth
WA 6000
Australia
Tel: +61 8 9211 7777
Fax: +61 8 9211 7878
jay.leary@hsf.com
geoff.kerrigan@hsf.com

Herbert Smith Freehills Paris LLP
66, avenue Marceau
75008 Paris
France
Tel: +33 1 53 57 70 70
Fax: +33 1 53 57 70 80
emma.france@hsf.com

Herbert Smith Freehills South Africa LLP
Rosebank Towers – 4th Floor
15 Biermann Avenue
Rosebank
Johannesburg 2196
South Africa
Tel: +27 10 500 2600
Fax: +27 11 327 6230
stephane.brabant@hsf.com
bertrand.montembault@hsf.com
www.herbertsmithfreehills.com

HOLLAND & HART LLP
Denver Tech Center
6380 South Fiddlers Green Circle
Suite 500
Greenwood Village
Colorado 80111
United States
Tel: +1 303 290 1600
Fax: +1 303 290 1606
kkahalley@hollandhart.com
kanichols@hollandhart.com

5441 Kietzke Lane
Suite 200
Reno
Nevada 89511
United States
Tel: +1 775 327 3000
eknannini@hollandhart.com
www.hollandhart.com

HOLLAND & KNIGHT
Carrera 7 # 71-21
Torre A, Piso 8
Bogotá
Colombia
Tel: +57 1 745 5720
Fax: +57 1 541 5417
jose.zapata@hklaw.com
daniel.fajardo@hklaw.com
www.hklaw.com

LEXIM ABOGADOS
Avenida República del Salvador
N35-146 y Suecia
Edificio Prisma Norte, Piso 11
Quito 170135
Ecuador
Tel: +593 2 244 3866
Fax: +593 2 244 3866
rborja@leximabogados.com
www.leximabogados.com
<table>
<thead>
<tr>
<th>Law Firm Name</th>
<th>Address</th>
<th>Contact Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>LIEDEKERKE WOLTERS WAELE BROECK KIRKPATRICK SCRL</td>
<td>Boulevard de l’Empereur 3 Keizerslaan B-1000 Brussels Belgium</td>
<td>Tel: +32 2 551 15 15 Fax: +32 2 551 14 14 <a href="mailto:a.deschoutheete@liedekerke.com">a.deschoutheete@liedekerke.com</a></td>
</tr>
<tr>
<td>Liedekerke Africa SASU</td>
<td>Immeuble TILAPIA, 3ème étage Avenue Batetela No. 70 Kinshasa Democratic Republic of the Congo</td>
<td>Tel: +243 854 854 854 / 84 84 39 330 <a href="mailto:t.hollanders@liedekerkeafrica.com">t.hollanders@liedekerkeafrica.com</a> <a href="mailto:e.endundo@liedekerke.com">e.endundo@liedekerke.com</a></td>
</tr>
<tr>
<td>PINHEIRO NETO AVOGADOS</td>
<td>SAFS, Quadra 2, Bloco B Ed Via Office, 3º andar 70070-600 Brasília DF Brazil</td>
<td>Tel: +55 61 3312 9400 Fax: +55 61 3312 9444 <a href="mailto:cvilhena@pn.com.br">cvilhena@pn.com.br</a> <a href="mailto:atrindade@pn.com.br">atrindade@pn.com.br</a> <a href="http://www.pinheironeto.com.br">www.pinheironeto.com.br</a></td>
</tr>
<tr>
<td>QUINZIO &amp; ANRÍQUEZ NOVOA ABOGADOS</td>
<td>Av. Apoquindo 4775 Oficinas 1001–1002 Las Condes Santiago Chile</td>
<td>Tel: +56 2 3273 9300 <a href="mailto:molivares@q-an.cl">molivares@q-an.cl</a> <a href="http://www.quinzio.cl">www.quinzio.cl</a></td>
</tr>
<tr>
<td>RSM BOGARÍN Y CÍA SC</td>
<td>Edificio Torre Platinum Periférico Sur No. 4293 4to. Piso Col. Jardines en la Montaña 14210 Tlalpan, Mexico City Mexico</td>
<td>Tel: +52 55 5028 1900 <a href="mailto:ruben.federico@rsmmx.mx">ruben.federico@rsmmx.mx</a> <a href="https://www.rsm.global">https://www.rsm.global</a></td>
</tr>
<tr>
<td>SION AVOGADOS</td>
<td>Avenida Getúlio Vargas, 258 12º andar Savassi Belo Horizonte Minas Gerais 30.112-020 Brazil</td>
<td>Tel: +55 31 3582 9710 Fax: +55 31 3582 9710 <a href="mailto:alexandre.sion@sionadvogados.com.br">alexandre.sion@sionadvogados.com.br</a> <a href="mailto:luiza.souza@sionadvogados.com.br">luiza.souza@sionadvogados.com.br</a> <a href="http://www.sionadvogados.com.br">www.sionadvogados.com.br</a></td>
</tr>
</tbody>
</table>
SQUIRE PATTON BOGGS
Level 21, 300 Murray Street
Perth WA 6000
Australia
Tel: +61 8 9429 7444
Fax: +61 8 9429 7666
simon.rear@squirepb.com
chris.rosario@squirepb.com
michael.vanderende@squirepb.com
www.squirepattonboggs.com

STIKEMAN ELLIOTT LLP
1155 René-Lévesque Blvd West
40th Floor
Montreal
Quebec H3B 3V2
Canada
Tel: +1 514 397 3000
Fax: +1 514 397 3222
ericherlafleche@stikeman.com
dmasse@stikeman.com

Suite 1700
666 Burrard Street
Vancouver
British Columbia V6C 2X8
Canada
Tel: +1 604 631 1300
Fax: +1 604 681 1825
j蜂蜜man@stikeman.com
www.stikeman.com

TIAN YUAN LAW FIRM
10/F, China Pacific Insurance Plaza
Tower B
28 Fengsheng Lane
Xicheng District
Beijing 100032
China
Tel: +86 10 5776 3888
Fax: +86 10 5776 3777
xiongyin@tylaw.com.cn
chajjie@tylaw.com.cn
zhangyl@tylaw.com.cn
caorong@tylaw.com.cn

VHG SERVICIOS LEGALES SC
Paseo de las Palmas, # 755–902
Col. Lomas de Chapultepec
Distrito Federal
11000 Mexico City
Mexico
Tel: +52 55 5540 3020
Fax: +52 55 5540 3435
avazquez@vhglegal.com
www.vhglegal.com

VIEIRA DE ALMEIDA
Rua Dom Luís I, 28
1200-151 Lisbon
Portugal
Tel: +351 21 311 3400
jaf@vda.pt
axv@vda.pt
dpa@vda.pt
www.vda.pt