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New Policies, New Priorities: A Review of Mining and Minerals Policy and Legislative Changes by Governments

Mayer Brown International LLP

Tom Eldridge



The Continued Challenge

For this chapter we have considered some of the more recent changes to certain countries' mining laws and policies. South Africa, Argentina, Indonesia, Tanzania and Senegal, amongst many others, have all made material changes to their laws. Saudi Arabia, Nigeria, Uganda and Oman have all made statements and commitments as a base for policy formulation of new laws in the sector.

We have looked at these developments in the context of what is an ongoing debate surrounding national mining laws and policies: how does a country's government best legislate for its minerals sector to ensure all those involved in the value chain – from those living on the land beneath which the minerals reside to the buyers and sellers of finished products – benefit fairly along the way? We do not attempt to answer the question. But we have highlighted some of the key themes central to this ongoing balancing act facing governments and sought to explain why it is so difficult.

Changing Laws and Policies

Mining and minerals policy and legislation is always changing.

Today's governments will often have different policies to their predecessors as to the way in which they think their countries' mineral assets should be dealt with. Policies are shaped by political thought, values and priorities. As policies are formulated, new laws are enacted and existing laws amended and replaced.

Policies and laws need to be capable of setting parameters and guidelines for the present. Likewise, they must be durable and capable of responding and adapting to new circumstances in the future. In some cases, they also need to be strong and brave enough to rebase, and even correct problems of the past. It is any government's role to propose new laws and review existing ones. And in doing so, it is a government's duty to ensure that the country's legislative framework and policies are fit for purpose in a modern, ever-changing world.

Specific Challenges for Mining Legislation and Policy

Yet none of this is specific to the mining sector. But lawmakers and policy-setters in the mining and natural resources sectors always seem to face more scrutiny, more challenges and more criticism than those operating in other industry sectors. There are many reasons why new or amended laws in the mining sector generate more debate, opinion and analysis than others.

The very physical nature of mineral and natural resource assets means any discussion around ownership of, and dealings in them, in any form, is never without heightened national interest, even emotion.

In addition, the cyclical nature of the industry, and its effects on financial returns against large, capital investments that amortise over long periods of time, needs a legislative and financial framework to support industry participants during these times.

And a third material characteristic adding to the sensitivity surrounding mining law and policy is the complexity of the industry itself. The way in which value is derived at different stages of the minerals-to-metals cycle (and not always spread evenly throughout) presents considerable challenges.

The value (and associated returns) generated at the mid and downstream end of the industry cycle – in the smelters and refineries, in the warehouses, export terminals and trading floors and, finally, in the finished products themselves and the industries they are sold into – can be far greater than the value generated within the upstream exploration and mining activities at the very start of that cycle. In many cases, a disproportionate amount of the mid and downstream value is generated far away from the countries within which the exploration and mining value is created.

Thus, on the one side of the issue is the need for any government to ensure that its laws permit a country, its economy and its people to receive equitable benefit from the resources within its borders and beneath its grounds at all stages of the industry cycle.

And on the other side of the issue is the need for any government to ensure that its laws are capable of both attracting and sustaining the necessary investment, capital and technology required to commercialise its country's minerals to allow the industry cycle to run its full course – from mineral identification and extraction right through to sales of finished products. In compounding the complexity of these issues, that investment, capital and technology is not always located in the same countries as the actual mineral reserves and resource. In many cases, it resides far away from the minerals, the land and the people and governments who collectively own them.

Hence the continual balancing act for a government in seeking to formulate laws and policies capable of satisfying both sides.

Different Approaches

Recent legislative changes in countries with established mining laws, such as South Africa, Argentina, Indonesia, Tanzania and Senegal, and policy changes in countries with a relatively new focus

on mining, such as Saudi Arabia, Nigeria, Uganda and Oman, are all examples of how countries set their priorities and seek to implement them.

Not all countries are the same of course. Whilst the global industry collectively emerges from what has arguably been one of the most depressed commodity cycles in recent times, countries continue to take different approaches to the development of their mining sectors and these approaches are driven by different priorities.

In the past, and as a direct response to falling metal prices, certain countries have sought to increase royalty rates and other forms of taxation in an attempt to extract as much value from a downward cycle.

Local ownership issues and local beneficiation remain key themes within recent changing legislation. As previously stated, the physical nature of minerals and mining assets often makes ownership of them, and the laws that determine ownership, highly charged considerations. Governments have often sought to increase state ownership in mineral assets as a way of obtaining value from the asset itself, instead of relying solely on income in the form of royalties and taxation assessed on production. Ownership interests come in many forms, including free-carries, earn-ins, special share allocations and other derivatives of these.

The real issue around ownership is not necessarily the form and nature of that ownership, but more around the level and percentage of ownership. How much ownership represents a fair allocation in the balancing act we have described before which becomes a government priority framing policy and laws. In addition to direct ownership requirements for government, other forms of ownership control have been developed. These include government consent rights for transfers of mining licences and interests in mining operations and assets. The requirement for ownership vehicles to be locally incorporated entities is also common.

Likewise with questions and considerations around local beneficiation. This takes the form in a number of different ways. At perhaps its most primary is the requirement, written into law, that local people are employed to work at the mines and production facilities. Further, there is an ongoing emphasis on mining operations sourcing supplies locally. And as we have already highlighted, the contention that value really accrues at the downstream end of the cycle means that some governments formulate policies and laws to ensure that benefit accrues to it at these later stages. The requirement to refine and process minerals “in-country” is an example of this, coupled with increased taxation for sales of unrefined minerals to export markets.

Local ownership priorities forming new law and policies have been notable in South Africa and Tanzania.

South Africa

In South Africa, the Mineral and Petroleum Resources Development Amendment Bill 15D 2013 (the “Amendment Bill”) proposed amendments to South Africa’s legal framework for the mining industry. The bill was initially refused Prime Ministerial assent and was enacted following parliamentary revisions in November 2016. The Amendment Bill has implemented a number of changes to the two primary pieces of mining legislation in South Africa: the Mineral and Petroleum Resources Development Act 28 of 2002; and the Empowerment Charter for the South African Mining and Minerals Industry 2010. The Amendment Bill stipulated that the transfer of a prospecting or mining right now requires ministerial approval. Additionally the Minister of Mineral Resources is now entitled to declare specified minerals as ‘designated minerals’. The export of ‘designated minerals’ is prohibited without the prior written consent

of the Minister. Commentators say that this could be considered a veto right held by the Minister, and that it is this, along with a fee that can be levied on the production of designated minerals to local beneficiaries, is to be used to encourage local beneficiation in the South African mining industry. Additionally the Empowerment Charter was amended by the Economic Empowerment Charter for the South African Mining and Minerals Industry 2017. However, in July 2017, following pushback from the South African Mining Industry, these amendments were suspended. The new charter proposed requiring mining companies to permanently increase stakes held by black shareholders to 30% or more within a year. Currently, the application of the charter is in the hands of the South African courts and facing an uncertain future.

Tanzania

In Tanzania, efforts have been made in recent years by the Tanzanian government to increase the local benefits provided by the Mining Industry. Notable recent changes to Tanzanian mining legislation include: (a) the Natural Wealth and Resources (Permanent Sovereignty) Act 2017 providing that a foreign investor must now afford the Tanzanian government an ‘equitable stake’ in its business and the Tanzanian government is entitled to a minimum free-carried interest of 16% in any mining venture pursued in Tanzania; and (b) the Written Laws Act 2017 establishing a Mining Commission charged with regulating the mining industry. Additionally, new local beneficiation requirements were introduced and foreign investors are now required to give preference to Tanzanian suppliers throughout the mining industry.

Further illustrations are relevant in this discussion.

Argentina

The Argentine Mining Code (Argentina’s principle piece of Mining legislation) was amended in June 2017 with the implementation of the New Federal Mining Agreement. This formalised local beneficiation by promoting the use of local labour and local supplies. Some estimates believe that it will create over 125,000 new jobs for Argentinians in the mining sector. It also sought to provide a more predictable tax regime for foreign investors. The commercialisation of mineral substances is now subject to a provincial tax not exceeding 1.5% of the gross annual revenue of a mining project. Additionally the rate at which royalties are levied has been capped; royalties following the enactment of the Agreement cannot surpass 3%.

Senegal

Senegal enacted a new mining code, ‘The Mining Code No 27/2016’, in October 2016. The new code aimed to increase transparency throughout the Senegalese mining industry whilst also promoting local beneficiation and altering the existing taxation and royalties regime. The former code will continue to govern existing mining titles, while the new code only applies to those acquired after 8 November 2016. Applicants can now apply for either a small mine permit (for a mining project not exceeding 500 hectares) or a mining permit (for all other mining projects). This simplified position is designed to avoid some of the confusion associated with the former code. Previously, Senegalese companies could not be wholly owned by foreign investors. Whilst the new code removes this restriction, it is worth noting that to engage in mining activities in Senegal, a mining title still must be obtained/held by a company registered in Senegal. Companies engaged in mining activities in Senegal are

now required to contribute annually to a local development fund, levied at 0.5% of turnover less annual taxes. The rules governing payment of taxation and royalties have also been changed; an annual surface royalty is now levied on all mining projects, its value being dependent upon the amount of land being used for the mining operation.

Indonesia

The Indonesian government's well-documented attempts to increase local beneficiation from the mining industry commenced back in 2009 with the passing of a new mining law (Law No.4 of 2009). This law required local minerals to be processed domestically, thus incentivising local miners to build the requisite processing infrastructure locally. Subsequently in 2014, the export of unprocessed minerals was banned by a new regulation.

This ban was relaxed slightly in January 2017 by new legislation enabling local miners to export unprocessed minerals providing certain criteria are met. However, even if these criteria are met, permission to export unprocessed minerals will only be granted to an applicant who has made efforts to develop a local smelter. The Ministry of Energy and Mineral Resources can revoke any permission granted if they feel there is insufficient progress continuing towards the construction of a local smelter.

The new law passed in January also strengthened the requirement for local ownership under Indonesian law. Previously, companies who were IUP (*Izin Usaha Pertambangan*) or IUPK (*Izin Usaha Pertambangan Khusus Operasi Produksi*) holders were required to have no more than 49% of their shares in foreign ownership after 10 years. The new law amended this so that all foreign investors are now required to relinquish any majority stake they hold in Indonesian mining ventures by the end of the tenth year of the project.

New Frontiers

But it is not just recent metal prices that are influencing policy decisions. The recent sustained period of low oil prices has forced a number of countries to relook at their minerals policies. An over-dependency on oil and petrodollars, and an export economy focused on the same, has led countries such as Saudi Arabia, Oman and Nigeria to put in motion plans to increase investment in their mineral sectors.

Saudi Arabia

When the world's most prominent oil-producing nation made formal announcements last year (backed-up with far-reaching economic reforms) of its need and desire to diversify away from oil the mining world really took note as to the potential for investment in the kingdom's mineral wealth.

Nigeria

Whilst no recent amendments have been made to Nigerian mining law, the principal pieces of mining legislation in Nigeria are the Mining Act 2007 and the Minerals and Mining Regulations 2011 – the Minister of Mines and Steel Development recently spoke of his department's intention to fix some "loopholes" in the Mining Act 2007. A review of the Mining Act 2007 is ongoing, although no indication has as of yet been given as to when amendments can be

expected to Nigeria's mining legislation. That said, the government has embarked on a major marketing and promotion exercise, hosting a number of investment forums for its mining sector. And in the second half of 2016, a USD 500 million mining investment fund was established and since its inception, the Ministry of Mines and Steel Development has secured USD 150 million of funding from the World Bank for the sector.

Oman

Oman's mining industry is governed predominantly by two principal pieces of legislation: Royal Decree No.27 of 2003; and Implementing Regulation No.77 of 2010. No recent amendments have been made to Oman's mining code; however, the newly-formed body that regulates mining, the Public Authority for Mining, has stated that amendments will be made in 2017. Commentators suggest that the proposed amendments will focus on making the process easier for foreign investors to obtain mining licences.

Uganda

The Mineral Policy 2001 and the Mining Act 2003 are the primary sources of mining legislation in Uganda. Although no recent amendments have been made to either of these, the Ugandan Ministry of Energy and Minerals recently began a review of the legal framework that governs mining in Uganda.

A report produced by the Ministry of Energy and Minerals entitled 'Mining and Mineral Policy for Uganda 2016' outlined some of the main challenges currently facing the Ugandan mining industry. These include an inadequate legal and regulatory framework, limited national and community participation in mining projects, a lack of a long-term strategy and the need for provisions enabling state intervention.

Conclusion

A number of these countries' existing non-fossil fuel mineral laws and policies are far less advanced than other nations. The task will be for these countries to develop a legislative framework to support the required investment levels. And so again we come to the great government balancing act – where governments need to ensure local value and participation throughout the mineral cycle (including in the much needed areas of data collation for reserves and resources, geological and geotechnical surveys and studies, mapping and reconnaissance programmes and early stage exploration activities) with investors looking at all times for certainty of tenure and title around their assets and investments, stability and transparency as to how they can conduct their operations in order to make acceptable returns on investments at all stages.

The themes and issues discussed in this chapter show that there is no real consensus amongst mineral-rich nations (both established ones and those expressing aspirations to become so) as to how best to formulate a policy and legal framework capable of achieving the necessary balance.

That said, the industry will watch closely in particular the developments in the likes of Saudi Arabia, Oman, Nigeria and Uganda. These countries, whilst not exactly starting from scratch with a blank canvas on which to prepare its mining legislation, will need foreign investment and will need to create an investment environment capable of attracting and maintaining it. And in doing so they will need to address the balancing act that forever frames the industry.

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Mayer Brown's global mining group works throughout the world, advising clients on a wide variety of transactions including project finance, environmental, corporate, construction, insurance and commodities matters. Our lawyers have extensive experience of the day-to-day legal, financial and operational issues faced by mineral producers and those who provide finance to the industry sector. This enables us to get straight to the heart of what our clients need and for the assistance we provide to be given with a full appreciation of real and practical industry concerns. No matter how complex the deal or remote the operation, our mining team is likely to have worked on a similar assignment before and will therefore be familiar with the issues that have to be resolved.

Angola

VdA Vieira de Almeida

João Afonso Fialho



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1 Relevant Authorities and Legislation

1.1 What regulates mining law?

The Mining Code, approved by Law 31/11, of 23 September 2011 (“**Mining Code**”), is the cornerstone of the legal regime of the mining industry. This statute regulates the activities of exploration, evaluation, reconnaissance, mining and marketing of mineral resources in general. In addition to the above statute, other relevant statutory and regulatory acts need to be considered, including: (i) Presidential Decree 231/16, of 8 December 2016, which classifies rare metals and rare earth elements as strategic minerals; (ii) Presidential Decree 163/16, of 29 August 2016, which approves the policy for the marketing of rough diamonds; (iii) Presidential Decree 158/16, of 10 August 2016, which approves the mineral administrative infringements regime; (iv) Order 255/14 of 28 January 2014 of the Ministry of Geology and Mines, on monitoring of posting of bonds and payments of surface fee and royalties under the Mining Code; (v) Presidential Decree 2/14 of 2 January 2014, on the Market Regulation Agency for Gold, whose main purpose is to organise, regulate and supervise the gold market; and (vi) Order 2/03 of 28 February 2003 of the National Bank of Angola, which establishes the foreign exchange regime for holders of mineral rights.

1.2 Which Government body/ies administer the mining industry?

The main regulatory bodies are the Head of the Government (“**HOG**”), the Ministry of Geology and Mines (“**MGM**”), the Ministry of Finance and the Angolan Central Bank (“**BNA**”).

Empresa Nacional de Diamantes de Angola – Endiama E.P. (“**Endiama**” – which is deemed as the national concessionaire for diamonds, rare metals and rare earth elements) and *Empresa Nacional de Ferro de Angola* – Ferrangol – E.P. (“**Ferrangol**” – which is the national concessionaire for iron, gold and other miscellaneous minerals) have certain regulatory and supervisory powers. It is also worth mentioning the Market Regulatory Agency for Gold (approved by Presidential Decree 2/14, of 2 January 2014), but this is still waiting for effective implementation, which has as a main purpose to organise, regulate and supervise the gold market.

1.3 Describe any other sources of law affecting the mining industry.

There are many other miscellaneous statutes applicable to the

mining industry, such as the private investment law (Law 14/15 of 11 August 2011), 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), among others.

2 Mechanics of Acquisition of Rights

2.1 What rights are required to conduct reconnaissance?

There is no specific title to carry out isolated reconnaissance activities (please see our comments in question 2.2 below).

However, under the Mining Code, private entities may carry out geological mineral investigations and produce geological information under a public-private partnership structure and under the methodological supervision of the Public Geological-Mineral Services, provided that (i) such public-private partnership is duly justified (since, as a rule, the Government is the entity responsible for this activity), and (ii) a proper authorisation is obtained from the MGM.

2.2 What rights are required to conduct exploration?

As a rule, to carry out exploration activities, the investor is required to negotiate and enter into with the MGM and/or a national concessionaire entity for a given mineral a mineral investment contract (“**MIC**”). However, for exploration and mining of mineral resources used in civil construction and public works, a mineral permit suffices. In respect of artisanal activities, only a mineral ticket is required.

Focusing now on industrial mining, the Mining Code adopted a single-contract model (the MIC) under which mineral rights are granted, from the outset, for the whole mineral process (exploration, evaluation, reconnaissance, mining and marketing). The Mining Code divides the mineral activities into three phases (reconnaissance and exploration stage, appraisal stage and mining stage), although explicitly stating that the rules, rights and obligations covering the three phases are to be set forth in the relevant MIC.

MICs may be entered into further to either (i) a spontaneous application, or (ii) a public tender. Public tenders may be optional or compulsory, depending on the geological potential of the relevant area and/or the qualification of the mineral to be exploited as strategic or non-strategic. Minerals may be classified as strategic by the Government depending on their economic relevance, its use for strategic purposes or other specific technical mining aspects. Other relevant criteria to qualify a mineral as strategic are its

rarity, its impact on economic development, the demand on the international market, the impact on its exploitation on job creation, its technological relevance, the impact of its exploitation in the balance of payments and/or its relevance for the military industry. Diamonds, gold and radioactive minerals are expressly qualified as strategic minerals in the Mining Code. Presidential Decree 231/16, of 8 December 2016, recently also classified rare metals and rare earth elements as strategic minerals.

In the absence of mandatory public tender, according to the requirements set forth in the Mining Code, the mineral rights may be granted on a first-come, first-served basis to the applicant who evidences the technical and financial capability required to carry out the relevant mineral activities.

Although all mineral rights (from exploration to marketing) are formally granted from the outset by means of a MIC, the holder of the mineral rights must obtain an exploration title – to be issued upon the approval of the MIC – and, subsequently, a mining title, in order to commence the mining activities in relation to each phase.

The transition from the exploration phase to the mining phase depends on the preparation and approval of a technical, economic and financial viability study (which must include an environmental impact study). Upon approval of this study by the MGM, a mining title should be issued.

2.3 What rights are required to conduct mining?

Please see our comments in question 2.2 above.

2.4 Are different procedures applicable to different minerals and on different types of land?

Depending on the geological potential of the relevant area and/or the qualification of the mineral to be exploited, the mineral rights may be granted further to either (i) spontaneous applications, or (ii) public tenders. The type of land is not a criterion to take into consideration for this purpose.

2.5 Are different procedures applicable to natural oil and gas?

Yes. The award of mineral rights for oil and gas exploitation is subject to a specific and comprehensive set of rules. The most relevant legal statute in this respect is the petroleum activities law (approved by Law 10/04 of 12 November 2004).

3 Foreign Ownership and Indigenous Ownership Requirements and Restrictions

3.1 What types of entity can own reconnaissance, exploration and mining rights?

Pursuant to the relevant provisions of the Mining Code, mineral rights for exploration and mining may be granted to any entities associated under structures foreseen in the law (such as incorporated or unincorporated JVs), provided that the following requirements are met: (a) the associates satisfy the conditions established in the Mining Code to access mineral rights; and (b) the associates are jointly and severally liability for compliance with the mineral obligations.

3.2 Can the entity owning the rights be a foreign entity or owned (directly or indirectly) by a foreign entity and are there special rules for foreign applicants?

As a rule, mineral rights may be owned directly or indirectly by a foreign entity. However, the latter are required to either register a branch or incorporate a company in the country to carry their business activities.

There are no special rules for foreign applicants. All the above apply to both national and foreign applicants. However, there are certain rights that may only be granted to Angolan citizens/entities (please see our comments in question 3.4 below) and foreign applicants may be required to engage national entities in their activities.

3.3 Are there any change of control restrictions applicable?

No express change of control restrictions are provided for in the law. However, the assignment, transfer or, more broadly, the disposal of mineral rights, is subject to a number of restrictions (please see our comments in question 5.1 below).

3.4 Are there requirements for ownership by indigenous persons or entities?

As a rule, no local content requirements apply to the mining industry. However, there are some exceptions, as in the case of mining artisanal activities, which may only be carried out by Angolan citizens, and mineral rights for civil construction and public works minerals and mineral-medicinal waters exploitation, which may only be granted to either Angolan citizens or legal persons having at least two thirds of its share capital owned by Angolan citizens.

As concerns diamonds, Endiama has been acting as the (exclusive) national concessionaire and is consistently engaged in projects as both a member of unincorporated joint ventures for the exploration stage and shareholder of the 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. 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 iron, gold and other miscellaneous minerals. Ferrangol usually associates itself with both national and foreign partners, through either unincorporated or incorporated joint ventures.

3.5 Does the State have free carry rights or options to acquire shareholdings?

As a consideration for the granting of the mineral rights for mining and marketing, the State is entitled to participate in mineral production (i) through a State-owned company holding an equity of at least 10% in the company to be set up for the mining phase, and/or (ii) receiving a share of the production in kind, in terms to be negotiated and defined taking into consideration the production cycles (as a rule, the State's share should increase along with the increase of the internal rate of return of the project).

4 Processing, Refining, Beneficiation and Export

4.1 Are there special regulatory provisions relating to processing, refining and further beneficiation of mined minerals?

Specific provisions apply to diamond cutting.

4.2 Are there restrictions on the export of minerals and levies payable in respect thereof?

The exportation of minerals is subject to licensing/clearance by the relevant body of the Ministry of Commerce and the Customs National Service, as well as notification to the MGM.

Prior to the export, strategic minerals must be valued and sorted using, whenever the circumstances or the nature of the minerals so require, an internationally renowned evaluation entity retained for such purpose. The producer has the right to use its own evaluator in all stages of the valuation process.

All minerals extracted in and exported from Angola must have a certificate of origin issued by the relevant authorities.

The exportation of minerals legally extracted and processed is not, in principle, subject to payment of duties or other customs charges, except for stamp duty and the customs officers' personal fees. However, mineral resources that are exported without being processed are subject to a 5% custom duty of their market value.

5 Transfer and Encumbrance

5.1 Are there restrictions on the transfer of rights to conduct reconnaissance, exploration and mining?

Mineral rights may be transferred to third parties, provided such transfer is previously authorised by the MGM or HOG, as the case may be. Transfer of mineral rights may only be authorised if the projected assignee meets the same technical and financial requirements of the transferor and is subject to the payment of fees and charges.

The transfer of mineral titles (i) must be recorded in the relevant exploration and/or mining title, with an express reference to the new holder and the transfer authorisation, and (ii) is subject to the same publication requirements as the original rights award.

5.2 Are the rights to conduct reconnaissance, exploration and mining capable of being mortgaged or otherwise secured to raise finance?

Mining rights may only be pledged to secure loans taken by the concessionaire to fund the geological mineral activities covered by the concession title.

6 Dealing in Rights by Means of Transferring Subdivisions, Ceding Undivided Shares and Mining of Mixed Minerals

6.1 Are rights to conduct reconnaissance, exploration and mining capable of being subdivided?

No, they are not.

6.2 Are rights to conduct reconnaissance, exploration and mining capable of being held in undivided shares?

No, they are not.

6.3 Is the holder of rights to explore for or mine a primary mineral entitled to explore or mine for secondary minerals?

Rights over accessory minerals must be expressly mentioned in the titles. Otherwise, the holder of the mineral rights does not have the right to exploit them. The exception relates to strategic minerals or minerals subject to a special framework, which are always subject to a new award procedure.

It is also worth noting that primary and secondary diamond deposits are deemed, from a legal standpoint, as different minerals and therefore, mineral rights over each one of these types of deposits must be expressly granted under the relevant MICs and mineral licences.

6.4 Is the holder of a right to conduct reconnaissance, exploration and mining entitled to exercise rights also over residue deposits on the land concerned?

Mineral rights cover a specific mineral or minerals (main and/or accessory) discovered within a specific area. If the residue deposits, cumulatively, are related to one of the minerals covered by the title and are located within the relevant area, the holder is allowed to exploit them.

6.5 Are there any special rules relating to offshore exploration and mining?

Yes. The Mining Code contains specific rules for mineral activities in the sea.

7 Rights to Use Surface of Land

7.1 Does the holder of a right to conduct reconnaissance, exploration or mining automatically own the right to use the surface of land?

The granting 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 such 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 upon obtaining the consent of the owners and/or possessors, in terms to be agreed between the holder and the owner (consent is deemed to be granted upon deposit of the annual rent and the posting of a provisional bond).

In case the concessionaire fails to reach an agreement with the owners and/or possessors during the mining phase, operations may not commence until the land is acquired by the holder or expropriated by the State on grounds of public interest.

Holders of mineral rights are entitled to request the creation of easements required for full exercise of their rights, rights of way included.

7.2 What obligations does the holder of a reconnaissance right, exploration right or mining right have *vis-à-vis* the landowner or lawful occupier?

Please see our comments in question 7.1 above.

7.3 What rights of expropriation exist?

Please see our comments in question 7.1 above.

8 Environmental

8.1 What environmental authorisations are required in order to conduct reconnaissance, exploration and mining operations?

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”), made on a case-by-case basis. In the case of the mining industry, holders of mineral rights are required to complete and obtain approval of a mandatory EIA prior to transitioning into the mining phase.

8.2 What provisions need to be made for storage of tailings and other waste products and for the closure of mines?

The mandatory EIA mentioned in question 8.1 above must contain, among other information, a waste management plan and an abandonment plan. Mining companies are also required to create legal reserves in an amount of 5% of the capital invested in the relevant project for mine closure and environmental restoration.

Mining companies are also subject to the requirements provided for in the general environmental statutes applicable to all industries, such as, without limitation, the waste management regulations, approved by Presidential Decree No. 190/12, of 24 August 2012.

8.3 What are the closure obligations of the holder of a reconnaissance right, exploration right or mining right?

Upon completion of the works, the holders of mineral rights must restore the land and landscape in the terms approved under the EIA. Prior to the definitive abandonment of the concession area, holders of mineral rights must request the MGM to inspect the area of the mineral operations. This inspection must be carried out in accordance with the plan for closure and abandonment of the mineral operations approved by the MGM as provided for in the Mining Code and the EIA.

8.4 Are there any zoning or planning requirements applicable to the exercise of a reconnaissance, exploration or mining right?

Areas subject to reconnaissance and exploration operations are subject to demarcation by the MGM. Holders of mining rights are required to demarcate the area with easily identifiable concrete markers, no later than 90 days as from the mineral title being issued or any change to the area being made. Mineral production areas are

divided into (i) restricted areas, (ii) protection areas, and (iii) reserve areas, as follows:

- (i) Restricted areas comprise mining areas, including the deposits or beds and the respective dressing facilities in a radius of up to 1,000 metres.
- (ii) Protection areas comprise: (a) the areas corresponding to the strips of land around restricted areas in a radius of up to 5km, to be established at the prudent discretion of the relevant body, as from the outer limits of the deposits protected by mineral demarcation; and (b) the areas corresponding to mineral occurrences discovered under an exploration title, plus a surrounding strip of up to 5km, to be established at the prudent discretion of the relevant body, as from the outer limits of the protected beds or deposits, during the period from the discovery of the occurrences to the granting of mining rights.
- (iii) Mineral reserve areas are areas of the national territory in relation to which no mineral rights have been previously awarded, but already allocated to future mining development.

Each type of area is subject to different rules concerning the movement of persons or goods, allowed business activities and residency rules.

9 Native Title and Land Rights

9.1 Does the holding of native title or other statutory surface use rights have an impact upon reconnaissance, exploration or mining operations?

No. The impact of land rights is as mentioned in question 7.1 above.

10 Health and Safety

10.1 What legislation governs health and safety in mining?

Although specially regulated in the Mining Code, health and safety requirements for mineral activities are also subject to the general statutes applicable to other activities, such as the general labour law (approved by Law 7/15 of 15 June 2015).

10.2 Are there obligations imposed upon owners, employers, managers and employees in relation to health and safety?

Yes. The Mining Code contains a broad provision requiring holders of mineral rights to adopt measures to ensure hygiene, health and safety at work, as well as to prevent occupational hazards and accidents at work, as set forth in specific regulations issued by the relevant bodies and approved by the MGM, the Ministry of Public Administration, Employment and Social Security and the Ministry of Health.

11 Administrative Aspects

11.1 Is there a central titles registration office?

Yes. The award, modification, transfer and expiry of mineral rights must be recorded with the Public Geological-Mineral Service.

11.2 Is there a system of appeals against administrative decisions in terms of the relevant mining legislation?

There is a system of administrative appeals provided for in the general administrative law, which also applies to mineral activities. The Mining Code also contains some specific rules on this matter (namely, without limitation, for the exercise of the rights of opposition and/or challenge to the requests for award of mineral rights).

12 Constitutional Law

12.1 Is there a constitution which has an impact upon rights to conduct reconnaissance, exploration and mining?

Yes. The Constitution of the Republic of Angola sets forth that natural resources are exclusively owned by the State, who determines the terms under which they may be exploited.

12.2 Are there any State investment treaties which are applicable?

The Angolan National Assembly has approved bilateral investment treaties between Angola and various countries, such as Cuba, Germany, Italy, Namibia, Portugal, Russia, South Africa, Switzerland and the United States.

13 Taxes and Royalties

13.1 Are there any special rules applicable to taxation of exploration and mining entities?

The Mining Code provides for special rules on taxation of mineral activities, from which we highlight the following:

- an industry-specific industrial tax rate of 25% (lower than the general industrial tax rate of 30%);
- a number of additional costs and expenses may be deductible to determine the taxable income, such as all the authorised exploration, evaluation and reconnaissance costs; and
- a surface fee (ranging from US\$2 to US\$40 per square kilometre). In case of extension of the exploration period, the above amounts are doubled.

Special customs rules are also included in the Mining Code.

13.2 Are there royalties payable to the State over and above any taxes?

A royalty to be levied on the value of extracted mineral resources is due at the following rates: strategic minerals and precious metallic minerals and stones – 5%; semi-precious stones – 4%; non-precious metallic minerals – 3%; and construction materials of mining origin and other minerals – 2%.

14 Regional and Local Rules and Laws

14.1 Are there any local provincial or municipal laws that need to be taken account of by a mining company over and above National Legislation?

No, there are not.

14.2 Are there any regional rules, protocols, policies or laws relating to several countries in the particular region that need to be taken account of by an exploration or mining company?

No, there are not.

15 Cancellation, Abandonment and Relinquishment

15.1 Are there any provisions in mining laws entitling the holder of a right to abandon it either totally or partially?

Without prejudice to the terms and conditions provided for in the relevant MICs, the holder of mining rights may abandon the mineral area, in whole or in part, at any time with a prior notice of no less than 180 days to the MGM.

The abandonment only becomes effective on the date it is approved by the MGM and may not take place in fewer than three months or after the prior notice period has expired.

In case the mineral area is abandoned entirely, the mining title expires. In case the mineral area is abandoned only in part, the holder must update the boundaries of the newly reduced area and promote the registration of such reduction and update the mining title.

The abandonment of any area pursuant to the preceding paragraphs does not release the holder from: (a) paying taxes, charges, fines or any compensation due up to the date of the abandonment formally acknowledged by the MGM; (b) complying with all obligations relating to environmental matters; and (c) complying with any obligations imposed by law or by the MIC until the effective date of the abandonment.

15.2 Are there obligations upon the holder of an exploration right or a mining right to relinquish a part thereof after a certain period of time?

At the term of the initial five-year exploration period, the holder of the mineral rights must relinquish 50% of the concession area and, at the end of each extension, must relinquish an area to be defined by the MGM upon assessment of the results obtained during the relevant extension period.

15.3 Are there any entitlements in the law for the State to cancel an exploration or mining right on the basis of failure to comply with conditions?

Failure to comply with all the obligations deriving from the law or the MIC allows the State or the national concessionaire company, as the case may be, to terminate the MIC and cancel the relevant title. However, (i) failure by concessionaires to comply with its obligations under the law or the MIC may only be invoked as grounds for termination in case of repeated default, and (ii) unilateral termination by the State must be preceded by notice to the concessionaire, stating the legal and factual grounds for termination and granting the holders of the minerals rights a minimum 60-day period to exercise its right of defence and oppose the termination.

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João joined VdA Vieira de Almeida in 2015, and is one of the partners of the Projects-Infrastructure, Energy & Natural Resources practice group and a member of the Oil & Gas practice group. In the last 20+ years, he has been involved in all kinds of projects and transactions in various jurisdictions, such as Timor-Leste, Angola, Portugal, Mozambique, Republic of Congo, DRC, Guinea Bissau and São Tomé and Príncipe. He is mainly focused on the energy (oil & gas upstream/downstream and power projects) and mining industry.

A frequent speaker in international mining and oil & gas upstream and downstream events, João has a detailed and comprehensive understanding of all typical projects and transactions of both industries. In particular, as concerns the mining industry, he has been involved in the abovementioned jurisdictions on behalf of both major and junior companies and a wide-range of service and supply companies.

He is the author or co-author of several articles on legal issues and trends in the area of Energy, Mining and Private Investment, namely, amongst others:

- *The Mining Law Review*, Law Business Research, 2014.
- *The Mining Law Review*, Law Business Research, 2013.
- *Why Angola is the Right Country in which to Expand your Mining Business*, Africa Law Today, Issue 3 (2013).
- *The Mining Law Review*, Law Business Research, 2012.
- *Minerals and Mining*, Globe Law and Business, 2012.
- *Getting the Deal Through Mining* 2011 to 2014.
- *The Future of the Angola Mining Sector*, Jornal Sol (weekly newspaper), 2010.

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Before joining VdA, Marília was an Associate with another law firm where she advised mining industry clients for seven years.

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Angola Counsel is the exclusive member of VdA Legal Partners in Angola. Founded by a group of independent lawyers, its ambition is to become a reference of excellence in the Angolan legal scene.

The Angola Counsel team is comprised of lawyers with a high level of expertise and experience and in-depth knowledge of the market and Angolan practice, who can deliver the most pragmatic solutions for any matter. Our lawyers have offered strong leadership in some of the most high-profile operations and projects in Angola over the last years, and provided legal assistance in a number of matters, particularly in the Oil&Gas, Mining, Banking&Finance and Telecommunications sectors.

The Angola Counsel leverages its responsiveness and expertise on VdA Legal Partners' international team of 250+ lawyers.

Armenia

Aram Orbelyan



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1 Relevant Authorities and Legislation

1.1 What regulates mining law?

The main law regulating relationships relating to the acquisition of subsoil rights (exploration and mining), the protection of the environment during mining works, the security of conducting works and public private cooperation is the Code on Subsoil of Armenia.

1.2 Which Government body/ies administer the mining industry?

The mining industry is regulated by the Ministry of Energy (granting permissions and supervision of activity) and the Ministry of Natural Protection (environmental issues, supervision of recultivation works).

1.3 Describe any other sources of law affecting the mining industry.

Sources of law that affect the mining industry include, among others:

- The Code on Subsoil.
- The Law on Payments for Nature Protection and Nature Usage.
- The Law on Wastes.
- The Law on Environmental Protection.
- The Land Code.
- The Water Code.

Natural protection and natural utilisation payments are payable for the protection of the environment, utilisation and other activities. The royalties payable on extracted resources are regulated by the Law on Nature Protection and nature utilisation payments.

2 Mechanics of Acquisition of Rights

2.1 What rights are required to conduct reconnaissance?

Armenian law does not require special rights for reconnaissance. Activities that are not considered exploration or mining are normally permissible with the agreement of the respective landowners. Other activities that are regarded as exploration or mining require

respective mining rights. The only requirement of reconnaissance is the state registration of all identified minerals, mines and reconnaissance works.

2.2 What rights are required to conduct exploration?

To conduct exploration, one needs an exploration right, which consists of respective permissions, agreements, a project, a plan and a land provision act.

In order to receive permission for exploration, an application must be submitted, which must include details of the working plan, the time needed for exploration, information on the mining object, the area which has to be explored, the financial and technical abilities of the applicant, and some other information.

2.3 What rights are required to conduct mining?

To conduct mining, one needs a mining (exploration or exploitation) right, which consists of respective permissions, agreements, a project, a plan and a land provision act.

Mining permission is needed for extracting minerals. In order to receive permission, an application must be submitted, including information on the exploitation terms, how the project will operate, the confirmed list of minerals, what must be exploited, the closing programme, the financial and technical abilities of the applicant, and some other information.

2.4 Are different procedures applicable to different minerals and on different types of land?

No different procedures are prescribed.

2.5 Are different procedures applicable to natural oil and gas?

These will be regulated by another legal act (as prescribed in the Code on Subsoil), but no such legal act has been adopted and no different procedures have been prescribed yet. It should be noted that there are currently no gas or oil mines on the territory of Armenia, though there are some rumours on the availability of shale gas; however, no real economic activity is currently taking place in this subsector.

3 Foreign Ownership and Indigenous Ownership Requirements and Restrictions

3.1 What types of entity can own reconnaissance, exploration and mining rights?

No special rules are prescribed.

3.2 Can the entity owning the rights be a foreign entity or owned (directly or indirectly) by a foreign entity and are there special rules for foreign applicants?

There are no limitations based on nationality in the mining sector. Full national treatment is given to foreign investors and the market is open for any investor without discrimination towards nationality/origin.

3.3 Are there any change of control restrictions applicable?

Change of control is free under mining law. Some restrictions may be applicable in competition and antitrust law, but not connected to the nationality of the owner.

3.4 Are there requirements for ownership by indigenous persons or entities?

No such requirements are prescribed.

3.5 Does the State have free carry rights or options to acquire shareholdings?

No such rights and options are prescribed by law.

4 Processing, Refining, Beneficiation and Export

4.1 Are there special regulatory provisions relating to processing, refining and further beneficiation of mined minerals?

The mining proposal must include information on the methods of exploitation based on the best international practice, the formation of infrastructures, the terms of operation based on technical and economic factors, the judgment of an expert about the impact of the project on the environment, an environmental management plan, a social influence valuation, and reclamation plans.

4.2 Are there restrictions on the export of minerals and levies payable in respect thereof?

No such restrictions are applicable, but since Armenia joined the Eurasian Economic Union, exportation licences have been required for the exportation of precious metals.

5 Transfer and Encumbrance

5.1 Are there restrictions on the transfer of rights to conduct reconnaissance, exploration and mining?

There are no such restrictions foreseen, as such; however, permission from the authorised governmental body is required. The authorised body shall decide on the issue within 30 days after the application is submitted. A report on the work already concluded must be submitted with the application.

5.2 Are the rights to conduct reconnaissance, exploration and mining capable of being mortgaged or otherwise secured to raise finance?

The Civil Code uses the term “security interest right”, which has substituted the pledge over movables since 2015. Mortgaging (including use of security interest) is not applicable to reconnaissance, as there is no special right to it. Exploration and mining rights can be subject to security interest (mortgaged) after informing the authorised government body. The mortgage (security interest) agreement must be listed in the mining register.

6 Dealing in Rights by Means of Transferring Subdivisions, Ceding Undivided Shares and Mining of Mixed Minerals

6.1 Are rights to conduct reconnaissance, exploration and mining capable of being subdivided?

The rights belong only to the owners and there is no procedure for subdivision.

6.2 Are rights to conduct reconnaissance, exploration and mining capable of being held in undivided shares?

There are no such procedures or rights prescribed by law.

6.3 Is the holder of rights to explore for or mine a primary mineral entitled to explore or mine for secondary minerals?

All minerals must be included in the mining proposal. No other element can be mined. However, most mining rights include secondary minerals as well, if their quantity and quality allows for commercial mining.

6.4 Is the holder of a right to conduct reconnaissance, exploration and mining entitled to exercise rights also over residue deposits on the land concerned?

All such elements must be included in the mining proposal.

6.5 Are there any special rules relating to offshore exploration and mining?

No such rules are prescribed.

7 Rights to Use Surface of Land

7.1 Does the holder of a right to conduct reconnaissance, exploration or mining automatically own the right to use the surface of land?

The subsoil is always state property, while the land on the surface can be either private or community/state-owned. The holder of the mining right can use the surface according to the land purchase, usage, lease or servitude agreement.

7.2 What obligations does the holder of a reconnaissance right, exploration right or mining right have *vis-à-vis* the landowner or lawful occupier?

All such obligations are regulated by the agreement on mining entered into with the authorised government body and the respective estate property-holder. Some environmental management issues and reclamation works are also to be prescribed by a mining proposal.

7.3 What rights of expropriation exist?

The Law on Alienation of Property for Public or State Use regulates the procedure of forced alienation (sale) of private property for public or state use; this also includes cases where the state may expropriate (by providing beforehand compensation equal to the market price plus 15%) land for legitimate purposes (this includes some cases of major investment projects), via a special procedure prescribed by law.

No special procedure on direct forced purchase by mining companies is prescribed by law.

8 Environmental

8.1 What environmental authorisations are required in order to conduct reconnaissance, exploration and mining operations?

An expert opinion is required with regards to the impact a project may have on the environment. This impact must be assessed on an ongoing basis.

8.2 What provisions need to be made for storage of tailings and other waste products and for the closure of mines?

The Code on Subsoil provides that mines must have a closure plan, which must include the following:

- a plan for the physical closure of the mine;
- a plan for land reclamation during and after mine exploitation;
- an employees' social mitigation plan, as provided by law (at the moment no such mitigation is provided);
- a health and safety monitoring plan for waste removal and security measures for the surrounding community;
- confirmation of the closure plan two years prior to a mine's closure; and
- financial guarantees for the mine's closure.

8.3 What are the closure obligations of the holder of a reconnaissance right, exploration right or mining right?

There is an obligation to perform all activities mentioned in question 8.2 above for exploration or mining right-holders.

8.4 Are there any zoning or planning requirements applicable to the exercise of a reconnaissance, exploration or mining right?

According to the Land Code of RA, mining is not permissible in places where it may harm the health of citizens. Some restrictions are prescribed when it comes to the use of forests, wetlands, or other special lands for mining.

9 Native Title and Land Rights

9.1 Does the holding of native title or other statutory surface use rights have an impact upon reconnaissance, exploration or mining operations?

Yes, the titleholder shall enter into an agreement with the mining right-holder, in order that the latter receives a right to conduct mining on the relevant territory. Expropriation of the land based on prevailing public interest and providing it to the mine right-holder is possible under prevailing public interest law; however, the land titleholder shall receive fair compensation and special procedures shall be respected.

10 Health and Safety

10.1 What legislation governs health and safety in mining?

The relevant legislation is mainly the Labour Code and the Law on State Regulation of the Maintenance of Technical Security, and relevant sub-legislation, including technical regulations governing health and safety in mining, has been adopted based on the said laws.

10.2 Are there obligations imposed upon owners, employers, managers and employees in relation to health and safety?

An expert opinion on technical security is required to be included in the project documents. It is unlawful to perform any activity without this document. The rights and responsibilities of employees, employers, and managers for each section are regulated by technical regulations set by government decisions (for underground mining processes, enrichment of precious metals, etc.).

11 Administrative Aspects

11.1 Is there a central titles registration office?

Yes; all information on rights of exploration or mining, personal information on companies, and information on mortgages are registered by the authorised body.

11.2 Is there a system of appeals against administrative decisions in terms of the relevant mining legislation?

Such decisions can be brought for appeal to both the administrative body and to its superior body or to the Administrative Court of RA. The procedures are regulated by the Law on Principles of Administration and Administrative Procedure, the Code on Subsoil and the Administrative Procedure Code.

12 Constitutional Law

12.1 Is there a constitution which has an impact upon rights to conduct reconnaissance, exploration and mining?

The Constitution of Armenia as amended in 2015 includes some provisions which impact mining, including: the state's ownership of the subsoil and water bodies, foreseen in article 10; protection of the environment and steady development, guaranteed under article 12; property and entrepreneurial rights; and some other regulations guaranteed by the Constitution.

12.2 Are there any State investment treaties which are applicable?

Armenia is party to more than 40 BITs (<http://bit.ly/2wcsSxI>) which contain investment guarantees. Besides, Armenia is a party to the ICSID Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), which have an impact on investment, including in the mining sector.

13 Taxes and Royalties

13.1 Are there any special rules applicable to taxation of exploration and mining entities?

Aside from general taxes (e.g. VAT, income tax, etc.), entities have to pay: nature protection payments (for the pollution of the environment (air and water basin)) with harmful substances; for allotting production and consumption wastes in the environment according to the specified procedure and for goods harmful for the environment; nature utilisation fees (payments for the use of water, and payments for the use of bio-resources); and royalties (for the use of precious metals and high income derived from the supply of such goods).

A special guarantee is set in the Code on Subsoil for subsoil right-holders. In the case of any change in legislation, right-holders, during a three-year time limit which starts from the date of acquiring such right, may apply to the authorised government body and register the same legal regulations relating to utilisation fees, income tax for residents and non-residents, and applicable royalties. A similar guarantee (but for five years) is foreseen in the Law on Foreign Investment in Armenia.

13.2 Are there royalties payable to the State over and above any taxes?

The base of royalties is calculated from the supply of concentrates of precious metals for the recording period. The royalty rate is

decided by the following formula: $R = 4 + (\text{profit before taxation}) / (\text{revenue from the supply of concentrates} \times 8) \times 100$. Besides this, there is a methodology for calculation and adjustment of "Revenue from the supply of concentrates", aimed at avoiding transfer pricing.

14 Regional and Local Rules and Laws

14.1 Are there any local provincial or municipal laws that need to be taken account of by a mining company over and above National Legislation?

Armenia is a unitary country, and the legislation is applicable to the whole country.

14.2 Are there any regional rules, protocols, policies or laws relating to several countries in the particular region that need to be taken account of by an exploration or mining company?

There are no such rules in practice. However, if the mining operations mentioned in the project documents may impact on the territory of another country, then an environmental impact assessment should be held according to the international convention of which RA is a member (e.g. the Convention on Long-Range Transboundary Air Pollution).

15 Cancellation, Abandonment and Relinquishment

15.1 Are there any provisions in mining laws entitling the holder of a right to abandon it either totally or partially?

According to article 45 of the Code on Subsoil, the holder of exploration rights may apply to the authorised state body for the right to totally or partially abandon a project with at least three months' prior notice before the planned abandonment date. The application must include information on works already performed and any documents evidencing such work. In the case of partial abandonment, an updated exploration proposal is also required. An application may be refused if the abovementioned documents were not presented or if the remaining part of the location cannot be used properly according to the contract on mining.

According to article 58 of the Code on Subsoil, the holder of the mining right may apply to the authorised state body for the right to totally or partially abandon a project with three months' prior notice before the planned abandonment date. An application must include details of the closing programme for the mine and financial guarantees for such closing. The authorised state body may propose a list of conditions for the abandonment of the project.

15.2 Are there obligations upon the holder of an exploration right or a mining right to relinquish a part thereof after a certain period of time?

Article 42 of the Code on Subsoil foresees the obligation to relinquish part (which cannot be less than half of the whole area) of the territory provided for exploration if extension of the exploration term is sought. There are no rules foreseeing the relinquishing obligation for exploitation (mining) licences.

15.3 Are there any entitlements in the law for the State to cancel an exploration or mining right on the basis of failure to comply with conditions?

The state may terminate the contract in case of a profound breach of the contractual obligations (mining in contradiction to the proposal, not performing expertise obligations, not developing recultivation works, non-payment of taxes, etc.). After the termination, any exploration or mining rights will also be terminated.



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Aram Orbelyan has represented mining companies in several high-level litigations and settlement negotiations connected to mining regulations and environmental issues, including extension of mining rights, invalidation of environmental fines and others, and he has consulted on investments in mining companies.



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Concern Dialog was established in 1998 as a company specialised in civil and administrative litigation services. The company's qualified and professional team provides high-quality legal services in a wide variety of fields to its individual and corporate clients in Yerevan and in all the regions of Armenia, as well as on the international level. Concern Dialog is one of the largest and most highly appreciated law firms in Armenia. The firm has five partners and more than 25 associates and paralegals.

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The firm is highly appreciated for its work in complex case litigation practice, labour and employment law, corporate and M&A, regulatory issues in mining, energy and telecommunications, taxes and support for transboundary transactions.

Australia

Allens

Gerard Woods



Daniel Knight



1 Relevant Authorities and Legislation

1.1 What regulates mining law?

A seminal element of Australian mining law is that virtually all minerals are vested in the Crown in right of the States (with respect to the Australian States) and the Commonwealth (with respect to the two Australian Territories). Accordingly, each of the States and the Northern Territory has enacted a separate legislative regime that governs the exploration for and extraction of minerals within their respective state or territorial boundaries. The Commonwealth has sovereignty in respect of minerals located beyond the low-water mark of the Australian continent, although through agreement with the States, has conferred certain rights to the States over minerals located within three nautical miles of the low-water mark. The primary legislative regimes governing mining in Australia include the following:

Legislation	Jurisdiction
<i>Planning and Development Act 2007</i>	Australian Capital Territory
<i>Offshore Minerals Act 1994 (Cth)</i>	Continental Shelf and Exclusive Economic Zone
<i>Mineral Titles Act 2010</i>	Northern Territory
<i>Offshore Minerals Act 1999 and Mining Act</i>	New South Wales
<i>Offshore Minerals Act 1998 and Mineral Resources Act 1989</i>	Queensland
<i>Offshore Minerals Act 2000 and Mining Act 1971</i>	South Australia
<i>Mineral Resources Development Act 1995</i>	Tasmania
<i>Underseas Mineral Resources Development Act 1963 and Mineral Resources (Sustainable Development) Act 1990</i>	Victoria
<i>Offshore Minerals Act 2003 and Mining Act 1978</i>	Western Australia

1.2 Which Government body/ies administer the mining industry?

Responsibility for the administration of each of these legislative regimes is vested in a Minister (who is an elected member of the government). The Minister is assisted by a separate department of the public service of the State or Territory.

1.3 Describe any other sources of law affecting the mining industry.

In addition to the legislation providing for the exploration for and extraction of minerals within their territorial boundaries, each of the States and Territories have legislated with respect to the plethora of legal issues affecting the mining industries including environmental law, access, health and safety, employment and real property.

The Commonwealth has constitutional powers over many of these aspects of law, and Commonwealth legislation in exercise of those powers overrides any inconsistent State legislation by virtue of the Commonwealth Constitution. Relevantly for the mining industry, the Commonwealth has legislated in respect of corporations, exports, taxation, national security/defence, indigenous rights, foreign affairs, competition, employment and environmental matters.

In addition, due to the size and scope of certain mining projects (particularly iron ore and coal projects), certain States have developed a practice of negotiating contractual agreements with the proponents of these large projects which are then ratified by the State parliament and, in some cases, override any inconsistent State law. State Agreements are intended to foster cooperation between proponents and the various State departments and authorities involved in the project, lend certainty to the development of the project, and so encourage investment.

2 Mechanics of Acquisition of Rights

2.1 What rights are required to conduct reconnaissance?

Most States and Territories (other than the Australian Capital Territory (ACT) and New South Wales (NSW)) recognise a right to 'prospect' or 'fossick' for minerals on a small scale. Such rights are granted for a short period (generally up to one or two years, other than in Western Australia (WA), where prospecting licences are granted for a four-year term), convey rights to conduct non-mechanised activities on the surface of the land only and are subject to the prior consent of any owner or occupier of private land. In certain jurisdictions (South Australia (SA) and WA), a prospecting licensee has a right to apply for and have granted a mining lease, or leases over land the subject of the prospecting licence.

2.2 What rights are required to conduct exploration?

All States and the Northern Territory (NT) recognise a right to

conduct large-scale exploration for minerals through the grant of an exploration licence or permit. An application for an exploration licence must include information relating to the type of minerals sought (i.e. Queensland (Qld) has a separate exploration licence for coal), a programme of work, intended expenditure, the financial and technical capacity of the applicant, and environmental impact, although these requirements vary between the States.

An exploration licence will generally grant the following rights:

- entry onto the land for purposes of exploration (including employing the use of vehicles, machinery and equipment);
- conducting works including digging pits, drilling holes, tunnelling and removing samples of the minerals noted in the licence; and
- exclusivity in the application for mining rights over that land.

An exploration licence will generally impose the following obligations:

- compensation payments to any existing owner or occupier;
- annual licence payments;
- minimum expenditure requirements;
- annual reports deliverable to the relevant department;
- environmental rehabilitation; and
- advertising and notice requirements.

Exploration licences are granted for longer terms than a prospecting licence, often up to five years, and may be renewed in special circumstances. Most States impose compulsory relinquishment requirements to halve the size of the exploration licence part-way through the term and on an annual basis thereafter.

2.3 What rights are required to conduct mining?

A mining lease is required in order to conduct commercial mining activities in any State or Territory. In certain States (Qld and WA), only holders of an existing licence or permit under the applicable regime may apply for a mining lease. An application for a mining lease must include a map, development proposal, information relating to the financial, technical and operational capacity of the applicant, an environmental impact and management plan, and must comply with notice and advertising requirements. Most jurisdictions provide for an objections period following advertising and a recommendation by an administrative magistrate (a 'mining warden') to the Minister to grant or not grant the mining lease.

A mining lease will generally grant the following rights:

- entry onto the land for purposes of mining;
- conducting mining works relating to the minerals noted in the application (including exploration work, extractive work, constructing processing, refining and disposal facilities and transport infrastructure);
- use of water (subject to certain limitations in certain States); and
- disposal of minerals.

A mining lease will generally impose the following obligations:

- compensation payments to any existing owner or occupier;
- rental payments;
- minimum expenditure requirements;
- annual reports deliverable to the relevant department;
- environmental rehabilitation, including posting of security bonds or contribution to rehabilitation funds;
- disposal of waste; and
- royalties on minerals recovered.

Mining leases are generally granted for a 21-year term (other than in Qld, where the Minister determines the term for each grant) and may be renewed in some circumstances.

2.4 Are different procedures applicable to different minerals and on different types of land?

Some minerals are subject to separate considerations in different States. For instance, in WA it is not possible to prospect for iron ore without the Minister's written authority, and in Qld coal must be the subject of a separate exploration licence and mining lease. In NSW, exploration licences in 'controlled release areas' can only be granted pursuant to a competitive selection process; 'controlled release areas' are designated by the Minister in relation to specific minerals and currently include the whole State with regard to coal.

In addition, due to Australia's obligations under the World Trade Organisation rules and trade agreements, rough diamonds and nuclear materials are subject to special procedures. Rough diamonds may only be exported to countries participating in the Kimberley Process Certification Scheme. Nuclear materials (generally defined as an element having an atomic number greater than 92) are subject to tight export controls imposed by the Commonwealth government under the *Atomic Energy Act 1953* (Cth), which imposes specific requirements for reporting discoveries, among other measures, and the *Customs Act 1901* (Cth).

In most States, a special prospecting licence, permitting prospecting for gemstones and semi-precious metals, may overlap other mining tenements. In WA a special prospecting licence may be obtained for alluvial gold located on land the subject of another mining tenement.

2.5 Are different procedures applicable to natural oil and gas?

Each of the States (other than Tasmania) and the NT has a separate legislative regime governing the exploration for and recovery of natural oil and gas. In addition, because the majority of Australia's existing natural oil and gas reserves are located offshore, the Commonwealth's legislative regime for natural oil and gas is particularly relevant and governs hydrocarbons located more than three nautical miles from the coastline.

Although responsibility for the administration of the legislative regime lies with the Commonwealth outside the three nautical mile limit and with the applicable State or Territory within that limit, all legislative regimes for offshore natural oil and gas are identical and permit exploration and production under separate licences. Onshore natural oil and gas is governed by State and Territorial legislative regimes that broadly divide rights between exploration, retention and production licences.

The interplay between the mining and natural oil and gas regimes has become more significant with the development of unconventional and coal seam gas projects, particularly in Qld, leading to the granting of overlapping tenure. This interplay forces the State to balance the interests of the mining (usually coal) proponent and the oil and gas proponent, a determination which is ultimately subject to the Minister's discretion.

3 Foreign Ownership and Indigenous Ownership Requirements and Restrictions

3.1 What types of entity can own reconnaissance, exploration and mining rights?

There are no restrictions on the types of entity that can hold

reconnaissance, exploration and mining rights. An application for reconnaissance, exploration or mining rights can be made by an individual or a company (incorporated under the *Corporations Act 2001* (Cth)). It is most common for a company to hold reconnaissance, exploration and mining rights. Such rights may be held under an incorporated joint venture structure (i.e. a company in which shares are held in agreed proportions by shareholders in that company) or an unincorporated joint venture structure (i.e. where a number of entities agree to hold assets such as a mining tenement as tenants in common, in agreed proportions).

3.2 Can the entity owning the rights be a foreign entity or owned (directly or indirectly) by a foreign entity and are there special rules for foreign applicants?

The entity holding the rights can be a foreign entity or owned directly or indirectly by a foreign entity.

However, certain acquisitions of interests in entities, businesses and land in Australia by 'foreign persons' must be approved by the Commonwealth Treasurer, acting on the advice of the Foreign Investment Review Board (**FIRB**). The regime applies to individuals not ordinarily resident in Australia; foreign governments and foreign government investors; and entities in which an individual not ordinarily resident in Australia, a foreign corporation or foreign government holds an interest of at least 20%, or two or more of those persons hold an aggregate interest of at least 40%. Applications are assessed against the national interest, which is generally determined by reference to factors including national security, competition, federal government policies (including tax), the impact on the economy and the community and the character of the investor. Foreign government investors are subject to more rigorous screening than other investors.

Foreign investment approvals are governed by the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (the **FATA**). There are two mechanisms by which the FATA governs transactions:

- For **significant actions**, the Treasurer has broad powers to make orders if satisfied that the transaction would be contrary to the national interest. The transaction may be prohibited, or, if it has already occurred, an order may require disposal. The Treasurer can also impose binding conditions (whether or not the foreign investor asks for FIRB approval) if necessary, to ensure the transaction is not contrary to the national interest. The risk of adverse orders is removed if FIRB approval for the transaction is obtained.
- For **notifiable actions**, there are criminal penalties if FIRB approval is not obtained before proceeding.

Mining or production tenements

Acquisitions of interests in mining or production tenements are generally both notifiable and significant actions. Mining or production tenements include mining leases and licences and petroleum production leases, rights that preserve a right to recover minerals, oil or gas, leases under which the lessee has rights to recover minerals, oil or gas and an 'interest' in any of these (including certain interests in profit/income sharing agreements). There is an exemption for tenements granted directly by the Australian government (however, this does not apply to foreign government investors).

Acquisitions of interests in exploration and prospecting tenements may be notifiable in certain circumstances. The relevant question is whether the exploration or prospecting tenement gives a right to occupy Australian land for a term (including extensions and renewals) that is reasonably likely at the time of grant to exceed five

years. This will depend on the nature of the rights conferred by the relevant State, Territory or Commonwealth legislative regime.

Mining and oil and gas companies

The acquisition by a foreign person (together with its associates) of an interest of 20% or more (or an interest of 40% or more in aggregate with other, non-associated foreign persons) in an Australian mining or oil and gas company with a value over an indexed threshold is a notifiable action. The current threshold is generally \$252 million, and \$1,094 million for Chilean, Japanese, Korean, New Zealand, Chinese and United States private investors.

The acquisition of an interest in a mining or oil and gas company may also be notifiable, as an acquisition of an interest in an Australian land corporation, where the company's interests in Australian land (including mining or production tenements) exceed 50% of its total assets.

The acquisition of shares in an Australian mining or oil and gas company will also be a significant action where it meets the prescribed threshold (generally \$252 million), where the company carries on an Australian business, and the action results in a change of control. Entering into, or terminating, an agreement with the holder of a mining or production tenement, where the total value of the business exceeds \$252 million and the action results in a change in control of the business, is also a significant action. Agreements include those relating to leasing assets, the right to use assets, participating in profits or management and control of the business.

Agricultural land register

Foreign persons are also required to register certain interests in Australian agricultural land, as well as any new acquisitions or divestments of such interests. Agricultural land includes land in Australia that is used, or that could reasonably be used, for a primary production business. There are, however, some limited exemptions in the definition for certain types of land associated with mining and oil and gas projects.

3.3 Are there any change of control restrictions applicable?

The transfer of mining tenements in most States require Ministerial consent and registration in order to become effective, and in most States there is no consent required in relation to the change of control of a corporation that holds a mining tenement (other than in NSW and SA, where the Minister's consent to such a proposed acquisition is required). The *Corporations Act 2001* (Cth) requires transactions involving the acquisition of a 20% or greater interest in an Australian company to comply with certain structure, procedure and disclosure requirements.

A change in control in favour of a foreign person should be notified to FIRB under the FATA, irrespective of the position under the State legislation.

3.4 Are there requirements for ownership by indigenous persons or entities?

Ownership by indigenous persons or entities is not a standard condition or requirement.

3.5 Does the State have free carry rights or options to acquire shareholdings?

There are no free carry rights or options to acquire shareholdings in favour of States, Territories or the Commonwealth.

4 Processing, Refining, Beneficiation and Export

4.1 Are there special regulatory provisions relating to processing, refining and further beneficiation of mined minerals?

There are no special regulatory provisions relating to processing, refining and beneficiation of mined minerals, although a Minister under most State regimes has discretion to impose any such conditions on the grant of mining tenements. These matters are most often addressed in a State Agreement on a project-by-project basis, and by agreement.

4.2 Are there restrictions on the export of minerals and levies payable in respect thereof?

There are restrictions on the export of diamonds and nuclear materials that are based upon Australia's international treaty obligations and membership of international organisations. See the answer to question 2.4 for an explanation of these restrictions. One of the pre-conditions for export is to hold a permission granted by the Minister responsible for the relevant legislation. However, there are no fees or levies associated with lodging an application for such a permission.

5 Transfer and Encumbrance

5.1 Are there restrictions on the transfer of rights to conduct reconnaissance, exploration and mining?

The sale, purchase or transfer of an interest in mining tenements in most States requires Ministerial consent and registration in order to become effective. The relevant Minister will generally assess the proposed transferee's financial, technical and operational capacity to fulfil the exploration or mining work plan set out in the application for the applicable mining tenement. In states such as Qld and WA, only transfers, mortgages, discharges of mortgages and name changes affecting legal interests are required to be registered, while other dealings with beneficial or equitable interests do not require Ministerial approval and registration. See also FIRB requirements addressed in answer to question 3.1.

5.2 Are the rights to conduct reconnaissance, exploration and mining capable of being mortgaged or otherwise secured to raise finance?

Security interests in mining tenements, including mortgages, are generally capable of being created to secure finance, but because mining tenements, being personal property, are exempted from the *Personal Property Securities Act 2009* (Cth), it is necessary for the security interest to be registered as a statutory mortgage or charge in order for it to be effectual.

6 Dealing in Rights by Means of Transferring Subdivisions, Ceding Undivided Shares and Mining of Mixed Minerals

6.1 Are rights to conduct reconnaissance, exploration and mining capable of being subdivided?

The transfer of a legal interest in part only of a mining tenement is not

permitted in most States and Territories, although such subdivisions are permitted in NSW and Victoria where, following subdivision, the two parts of the original tenement are registered under separate instruments. Certain jurisdictions also allow dealings with equitable or beneficial interests in parts of mining tenements, but approval and registration of those dealings does not relieve the registered holders of the mining tenement from any statutory obligations.

6.2 Are rights to conduct reconnaissance, exploration and mining capable of being held in undivided shares?

Many mining projects in Australia are undertaken by multiple proponents through a joint venture arrangement in order to pool technical, financial and operational resources. Such arrangements often take the form of an unincorporated joint venture, in which the proponents hold their interests in the mining assets directly, as tenants in common. Most jurisdictions support these arrangements by allowing multiple holders of mining tenements, and their relative holdings, to be recorded on the applicable register. In certain jurisdictions, such as NSW and Victoria, multiple owners may be recorded on the register, but their relative holdings are not, and so they appear as joint tenants.

6.3 Is the holder of rights to explore for or mine a primary mineral entitled to explore or mine for secondary minerals?

Most jurisdictions do not permit a tenement holder to conduct mining or exploration activities with respect to minerals other than those minerals specified on the relevant mining or exploration licence. In WA, rights to conduct exploration and mining activities are granted with respect to all minerals generally, other than with respect to iron ore which may only be explored for with the Minister's consent.

In addition, special rules apply in most States with respect to the mining of nuclear materials, which has been a politically charged issue in Australia for decades. In SA, uranium mining is permitted, provided Ministerial authorisation of such operations is obtained. A ban on uranium mining in WA was removed in 2008 but reintroduced following a change in government in 2017. However, existing projects granted State Ministerial approval by the former government have been allowed to progress. In Qld, a ban on uranium mining was removed in 2008 and reinstated following a change in government in 2015. In NSW, mining uranium is prohibited, but a ban on exploration for uranium was repealed in 2012. In Victoria, exploration for and mining of uranium and thorium is prohibited. In Tasmania, uranium mining is permitted, but there are no significant known uranium deposits in that State.

6.4 Is the holder of a right to conduct reconnaissance, exploration and mining entitled to exercise rights also over residue deposits on the land concerned?

Generally, rights to conduct exploration and mining activities may be exercised over minerals that remain in the land and those in residue deposits located on the land the subject of the applicable tenement.

6.5 Are there any special rules relating to offshore exploration and mining?

The Commonwealth retains ownership and legislative power over minerals located on the continental shelf and more than three

nautical miles from the coastline, and mining of these minerals is governed by the *Offshore Minerals Act 1994* (Cth). Within the three nautical mile zone, minerals are vested in the applicable State or Territory. Separate regimes exist for exploration and production of petroleum – see the answer to question 2.5.

7 Rights to Use Surface of Land

7.1 Does the holder of a right to conduct reconnaissance, exploration or mining automatically own the right to use the surface of land?

The right to use the surface of the land for purposes consistent with the nature of the tenement is generally one of the rights granted, among others, when the tenement is awarded. Accordingly, the application process for such licences usually involves seeking the consent of, and the agreement of compensation arrangements with, the owners and occupiers of such land. However, in WA a proponent may apply for sub-surface exploration or mining rights only, which obviates such consent and compensation requirements. If necessary, the holder of a tenement for subsurface rights may only seek an extension of such rights to the surface of the land upon application to the Minister, and such holder must then satisfy the consent and compensation requirements with respect to any owners or occupiers on such surface areas.

7.2 What obligations does the holder of a reconnaissance right, exploration right or mining right have vis-à-vis the landowner or lawful occupier?

All State and Territory legislative regimes require that compensation be paid to owners or occupiers of land the subject of exploration or mining tenements as part of the application process. If a proponent cannot reach agreement with owners or occupiers regarding such compensation arrangements, a court process determines appropriate compensation. Such arrangements generally take into account damage to the land and improvements, loss of use and access, but not the value of minerals extracted.

7.3 What rights of expropriation exist?

The Crown in right of the Commonwealth is entitled compulsorily to acquire land for public purposes only, but must pay just terms compensation for such expropriation. The private holders of exploration or mining tenements are not permitted to expropriate land for any purpose, although mining leases may confer a right to exclusive possession during mining operations.

8 Environmental

8.1 What environmental authorisations are required in order to conduct reconnaissance, exploration and mining operations?

Environmental authorisations are required at all stages of mining operations. Standard approvals are generally granted for early stage operations causing minimal disturbance to the land, and more significant and complex approvals are required for more invasive operations, or in areas with highly sensitive environments.

Such approvals are required at the State or Territory government level in connection with the tenement application process, and will involve varying degrees of public comment, consultation and appeal. Projects involving significant or complex environmental issues will require an environmental impact statement, which involves detailed studies, assessment, community consultation and a comprehensive environmental management plan and may take 12 months or more to develop. The Minister with responsibility for the environment will generally be empowered to grant the approval, and such approvals are commonly granted subject to conditions around which the environmental management plan must be built.

If a project is likely to have a significant impact on a matter of national environmental significance, such as nationally listed threatened species and ecological communities, migratory species, nuclear actions, World Heritage, and National Heritage areas, the Commonwealth Minister must determine whether approval is required under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (*EPBC Act*). If the Minister believes that coal seam gas development or large coal mining development is likely to have a significant impact on water resources, including any impacts on associated salt production and/or salinity, the EPBC Act requires the Minister to obtain the advice of the Independent Expert Scientific Committee on the development before deciding whether to grant approval.

8.2 What provisions need to be made for storage of tailings and other waste products and for the closure of mines?

Storage of tailings and other waste products are matters generally addressed in environmental management plans submitted in satisfaction of environmental approvals at State and Territory government levels. However, if a tailings or waste storage facility is likely to have a significant impact on a matter of national environmental significance, approval may be required under the EPBC Act. Regulators expect these management plans to demonstrate that storage of tailings and other waste will be safe and non-polluting, both during operations and after mine closure. Some states, like NSW, have enacted specific legislation addressing tailings storage facility safety and management. Other states, like Victoria, WA and Qld, have issued guidelines in relation to tailings storage facility design and operation.

Mine closure is a critical part of the development proposal required for mining lease applications in all States and Territories, which must provide for the return of the land into substantially its condition prior to commencement of exploration or mining activities. Liability for fulfilment of the mine closure plan remains with the proponent of the mine and in most States and Territories must be secured by the posting of a security bond or, in WA, regular contributions to a general rehabilitation fund. Special mine closure and monitoring obligations apply to mines for nuclear materials.

8.3 What are the closure obligations of the holder of a reconnaissance right, exploration right or mining right?

The proponent of a mining right retains liability to rehabilitate the land which has been the subject of mining activities. This liability is only discharged, and any security bond returned, once all regulatory obligations have been fulfilled and the land use objectives specified in the mine closure plan have been achieved. In Queensland, liability for failure to meet environmental obligations also may be imposed on entities or persons related to the proponent(s).

8.4 Are there any zoning or planning requirements applicable to the exercise of a reconnaissance, exploration or mining right?

The requirement for zoning and planning approvals depends on the local and regional planning schemes in which the reconnaissance, exploration or mining activities are proposed. Construction of buildings or mining infrastructure will generally attract local government planning approvals. There may also be requirements to notify local governments of mining applications and proposals. Major projects which are the subject of State Agreements will commonly have such zoning and planning approvals incorporated into the State Agreement itself.

9 Native Title and Land Rights

9.1 Does the holding of native title or other statutory surface use rights have an impact upon reconnaissance, exploration or mining operations?

In Australia, native title is recognised as a bundle of rights and interests vested in indigenous people over lands with which they have maintained a traditional and continuous connection. Native title rights are deemed extinguished if that continuous connection is broken, including by the grant of freehold title to the relevant land. Since 1 January 1994, the application of the *Native Title Act 1993* (Cth) (*NTA*) requires that any action (including the potential grant of any mining rights) which might be inconsistent with registered native title rights comply with a negotiation regime. The goal of this regime is that the affected native title parties and the proponent agree upon the terms (such as an access arrangement) on which the action may go ahead without disturbing those rights, or by suspending those rights in exchange for compensation (typically indigenous employment conditions, preferred service provider requirements or monetary). If no agreement is reached after six months of good faith negotiation, the National Native Title Tribunal will determine whether the action may go ahead with appropriate compensation, or that compensation is inadequate and the action may not proceed.

In order to register their native title rights under the NTA, traditional landowners must make an application to the Federal Court, which may hear evidence from affected parties (including farmers and mining proponents) before determining the nature and extent of the native title rights of such traditional landowners.

There are separate Commonwealth and State regulatory regimes that protect indigenous cultural heritage through the preservation of areas and objects of significance, as well as the imposition of a duty of care in some States, namely Qld and NSW. This duty of care requires that proponents take reasonable measures to protect cultural heritage (even in areas where native title has been extinguished) such as commissioning cultural heritage surveys and protecting known sites.

10 Health and Safety

10.1 What legislation governs health and safety in mining?

The Commonwealth and each of the States and Territories have enacted workplace health and safety (*WHS*) laws that apply to all workplaces in the jurisdiction, and some States (such as NSW, Qld and WA) also have health and safety regimes that apply specifically to mining workplaces. These regimes impose strict rules aimed at

establishing a high level of safety in Australian mines, and carry significant penalties for non-compliance.

10.2 Are there obligations imposed upon owners, employers, managers and employees in relation to health and safety?

Most WHS laws impose obligations upon owners, employers, managers, employees, officers and directors to ensure the safety of all persons working on site. The obligations extend to persons who design and manufacture plant and equipment as well as those who install or construct it. WHS laws generally require that officers and directors of a corporation exercise due diligence to ensure the corporation complies with WHS laws. In addition, the mining industry in Australia is heavily unionised and workplace health and safety standards are often included in industrial awards that cover mining sites.

11 Administrative Aspects

11.1 Is there a central titles registration office?

States and Territories maintain registers of mining interests that evidence grant, encumbrances and dealings with respect to mining tenements. Title is not made indefeasible through registration; the regulatory system in each jurisdiction is one for registration of title, rather than title by registration. However, a person dealing with a registered holder can generally rely on the register to take title to a tenement free of unregistered interests.

11.2 Is there a system of appeals against administrative decisions in terms of the relevant mining legislation?

Administrative decisions relating to mining are vested in the applicable mining department of the State or Territory or the warden, which is an office established under the mining legislation in most States and the Northern Territory that has a judicial and an administrative function. Appeals from the decisions of the mining department and the administrative decisions of the warden are generally available to the applicable District Court or equivalent, and appeals from the judicial decisions of the warden are generally available to the applicable Supreme Court.

In addition, administrative decisions taken by the Minister may be appealed to the applicable State or Territory Supreme Court. Such judicial review of the Minister's application of discretion under the applicable mining legislation is rarely successful because the mining legislation generally casts the Minister's discretion very broadly.

12 Constitutional Law

12.1 Is there a constitution which has an impact upon rights to conduct reconnaissance, exploration and mining?

Under the Commonwealth Constitution, the power to legislate with respect to onshore minerals is vested in the relevant State or Territory and with respect to offshore minerals located beyond three nautical miles of the coastline is vested in the Commonwealth.

The Commonwealth also has constitutional powers over many aspects of law that impact upon mining projects. See the answer to question 1.3 for a discussion of the Commonwealth's powers in this regard.

12.2 Are there any State investment treaties which are applicable?

There are no investment treaties that apply specifically to mining, but Australia is a party to many regional, multilateral and bilateral free trade agreements, security arrangements (mostly relevant to the export of nuclear materials) and international tax agreements that apply to a varying extent to mining projects. Sanctions regimes may also, from time to time, impact upon mining investments in Australia.

13 Taxes and Royalties

13.1 Are there any special rules applicable to taxation of exploration and mining entities?

Generally, non-residents are only taxed on Australia-sourced income and capital gains related to taxable Australian property (which includes exploration and mining rights). Non-residents are also subject to generally applicable taxation laws that apply to dividends, thin capitalisation rules and transfer pricing. Special taxation rules govern the availability of deductions for mining equipment and expenditure and the depreciation of mining tenure (for instance, current Commonwealth tax policy narrows the availability of the immediate deduction on exploration activities to exclude expenditures on the acquisition of mining rights).

13.2 Are there royalties payable to the State over and above any taxes?

Royalties are payable to the State or Territory from which the minerals are extracted in accordance with the royalties regime of such State or Territory, and royalties are payable to the Commonwealth in respect of natural oil and gas won from areas outside the three nautical mile limit. Although the rates of royalties vary between the States and Territories, most States impose an *ad valorem* royalty at the mine gate or on an FOB basis, while others impose flat rate or profit-related royalties. Royalties qualify as a deduction for company income tax purposes, levied exclusively at the Commonwealth level.

14 Regional and Local Rules and Laws

14.1 Are there any local provincial or municipal laws that need to be taken account of by a mining company over and above National Legislation?

Most onshore mining activities are regulated by laws enacted at the State or Territory level. Local government laws are most often applicable for planning and approvals purposes prior to the construction of plant and infrastructure at operational mines. Although Commonwealth and State laws are primarily responsible for environmental regulation, some local government laws may also be applicable to the environmental approvals process of mining projects.

14.2 Are there any regional rules, protocols, policies or laws relating to several countries in the particular region that need to be taken account of by an exploration or mining company?

Australia's membership to the World Trade Organisation and a plethora of regional and bilateral trade agreements (including with New Zealand, the Association of South East Asian Nations, Chile, Singapore, Thailand, Malaysia, China, Korea, Japan and the United States) are designed to foster economic ties within the Asia-Pacific region and have a significant impact on mining activities in Australia. Some of these arrangements provide for arbitration with reference to international law as a means to protect foreign investment from certain adverse sovereign actions of the host country in which the mining activities take place.

15 Cancellation, Abandonment and Relinquishment

15.1 Are there any provisions in mining laws entitling the holder of a right to abandon it either totally or partially?

Each State explicitly permits the holder of a mining tenement to surrender all or relinquish a portion of the tenement, subject to certain limitations relating to the shape of the remaining tenement (in the case of partial surrender). The holder of a surrendered tenement remains liable in respect of any obligation incurred, or condition required to be performed, on or before the date of surrender of the tenement (including any accrued but unpaid rent or expenditure obligations).

15.2 Are there obligations upon the holder of an exploration right or a mining right to relinquish a part thereof after a certain period of time?

Most States impose requirements to relinquish half of the area the subject of an exploration tenement part-way through the term of the tenement, and at regular intervals thereafter. However, none of the States impose equivalent relinquishment obligations in respect of mining tenements, which are generally granted only in respect of the area of the exploration tenement required for mining operations. All mining tenements are granted for defined terms, and may be renewed in certain circumstances.

15.3 Are there any entitlements in the law for the State to cancel an exploration or mining right on the basis of failure to comply with conditions?

In each of the States, the applicable Minister or mining warden is entitled to suspend, cancel or forfeit a mining tenement for failure by the holder to comply with a condition subject to which the tenement was granted (including expenditure conditions), a direction given by the Minister or mining warden, or a provision of the applicable legislation. In WA, any person may apply to the mining warden for the forfeiture of a mining tenement (although in respect of exploration tenements, the grounds for such an application are limited to failure to comply with the expenditure conditions).

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Brazil

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1 Relevant Authorities and Legislation

1.1 What regulates mining law?

Any mining activity is subject to the regulation of the Ministry of Mines and Energy (MME) through the Secretariat of Geology, Mining and Mineral Processing (SGM). SGM is in charge of general mining policies and coordination.

MME also regulates mining activity through the National Mining Agency (ANM), an agency created with the purpose of promoting exploration and exploitation of mineral resources, as well as overseeing and inspecting mining activities in the Brazilian territory. The ANM also manages mineral resources, controls the emission of some mining titles, collects statistical data and gathers comprehensive information in databanks.

With regard to Mining Law, miners are subject to the Brazilian Mining Code (Decree-Law No. 227/1967) and, alternatively, the Regulation of the Mining Code (Decree-Law No. 62,934/1968). These two rules set forth basic rights and obligations. The details of each right and obligation are set forth by the ANM, through ordinances and normative rulings.

Ordinance No. 155/2016 regulates most of the situations miners face when performing their activities.

Updates to the Mining Code have been under discussion for almost a decade. In July, 2017, major changes to relevant mining law were introduced through Executive Orders (MPs) No. 789, 790 and 791/2017. MPs have full force of law in Brazil and depend on Congress approval to be signed into law. Its effects cease to exist if the Congress does not approve them within 120 days. When preparing this chapter, the analysis was still ongoing.

The MPs address three topics: (i) the extinction of the National Department of Mineral Production (DNPM) and the creation of the ANM, with greater management and financial autonomy, and basing its decisions on collegiate rulings; (ii) changes in the mining royalties (CFEM), which will be calculated over the gross revenue with higher rates; and (iii) changes in the Mining Code.

As mentioned, now the Congress has 120 days to discuss the matter and possibly amend the MPs. In this case, the MPs will be processed as bills of law.

Additionally, updates to the Regulation of the Mining Code are expected as soon as the discussions about the MPs are over.

1.2 Which Government body/ies administer the mining industry?

There are two Government bodies responsible for the administration of the mining industry: the MME; and the ANM.

MME, the highest authority, is responsible for granting mining concessions. The ANM, in its turn, is the Federal Government agency responsible for managing and monitoring the performance of mining activities throughout the country, ensuring that the exploitation of mineral resources is carried out in a rational, controlled and sustainable way. It is also responsible for inspecting mining activities.

MP No. 791/2017 transformed DNPM into the ANM, but the MP is still under discussion in Congress and its effects may cease if not ratified within 120 days.

1.3 Describe any other sources of law affecting the mining industry.

Mining is subject to federal statutes and rules enacted by the ANM. Also, the Attorney-General's opinions have a binding nature on controversial matters.

Other laws affecting the mining industry are:

- i. the Labour Law, due to the hiring of manpower to operate and work at the mines;
- ii. the Tax Law, due to the payment of major taxes and the general rules applicable to royalties and some other taxes that arise from mining activities;
- iii. the Environmental Law, due to the requirements to comply with environmental matters and obtainment of licences to operate mines and plants; and
- iv. the Competition Law, to avoid concentration and abuse of dominant position in the mining industry.

2 Mechanics of Acquisition of Rights

2.1 What rights are required to conduct reconnaissance?

Geological reconnaissance is permitted by the ANM, provided that a prior approval from the National Defense Council is issued.

Pursuant to article 91 of the Mining Code, as well as articles 39 to 44 of the Regulation of the Mining Code, geological reconnaissance

is made by aerial prospection, through photography, geophysical equipment and remote sensors to the extension of 12,000 km².

The holder of the reconnaissance title must carry out its works within 90 days, in order to obtain the priority right over the researched area. After raising data, the permit holder must submit a report with its findings, even if the area proves to be geologically unprofitable.

Reconnaissance is allowed even during the exploration phase, but it is not a mandatory requirement to claim priority over available areas. Generally, the prospective miner requests an exploration permit without carrying out reconnaissance works.

2.2 What rights are required to conduct exploration?

Miners applying for exploration must file a specific form provided by the ANM, demonstrate sufficient knowledge of the area to be explored through a Location Map, and submit an Exploration Plan. This Exploration Plan comprises information such as the intended minerals, minimum evidence of occurrence, sampling and drilling methods. If this report is approved, the ANM will issue an Exploration Permit, which will entitle the explorer to conduct exploration works.

MP No. 790/2017 allows miners to keep the right to exploration works while the ANM does not analyse the mining concession request.

2.3 What rights are required to conduct mining?

In order to apply to conduct mining, the company must have accomplished the exploration works, supplied the Final Exploration Report (RFP) and submitted the Plan for Economic Use of the Mine (PAE). Also, environmental licences must have been issued.

The mining concession is granted by MME through a mining ordinance, published in the Official Gazette. Mineral resources are Federal Government property.

Once conceded, the mine extraction can only take place in accordance to the PAE, and any substantial change in the mining performance must be communicated to and previously approved by the ANM.

2.4 Are different procedures applicable to different minerals and on different types of land?

Minerals are subject to different regimes.

As a general rule, mineral resources are subject to the authorisation and concession regulation. Mining rights are granted through an exploration permit and a mining concession.

Other regulations include licence, permission and monopoly regulations.

Gravel, stone, clay and crushed stone (“aggregates”), for instance, are subject to licensing. These minerals have a different regime because they have immediate application in construction.

Additionally, small-scale mining authorises natural persons to dig for gold and some gemstones in a non-industrial fashion.

There are also nuclear minerals that are subject to a monopoly of exploration by the Federal Government.

All Brazilian territory follows the same rules for mining activities, except border strip areas, which are subject to a stricter regulation due to national security reasons, according to the description provided under question 3.1.

Besides, a “legal void” prevents mining from taking place within native lands, as described under question 9.1.

2.5 Are different procedures applicable to natural oil and gas?

The exploration and production of oil and natural gas in Brazil follows considerably different regimes than that of other minerals. There are currently three models in the Brazilian legal framework: concessions; production sharing agreements; and onerous assignment.

In the concession regime, in order for an area to be subject to exploration and production, it must be included in a bidding round by the Brazilian Agency of Oil, Natural Gas and Biofuels (ANP).

The production sharing model, recently implemented in Brazil specifically for the pre-salt and other strategic areas, also requires the insertion of the blocks in a bidding round. However, some differences apply, such as the fact that Petrobras have a preference to operate all the blocks, and (as opposed to the concession regime) consortium members are not the owners of all the oil and gas produced, for instance.

In the onerous assignment agreement, the Federal Government granted Petrobras the right to explore and produce, without the need of a bidding round, 5 billion barrels of oil equivalent (BOE) in contractually determined blocks of the pre-salt area.

3 Foreign Ownership and Indigenous Ownership Requirements and Restrictions

3.1 What types of entity can own reconnaissance, exploration and mining rights?

Individuals can only own exploration rights. Mining companies can own reconnaissance, exploration and mining rights. In Brazil, companies can be structured as limited liability companies (Ltda.) or corporations (S.A.).

3.2 Can the entity owning the rights be a foreign entity or owned (directly or indirectly) by a foreign entity and are there special rules for foreign applicants?

Yes; according to the Federal Constitution, miners, in order to be authorised to explore mineral resources in Brazil, must be Brazilian or companies incorporated under Brazilian law.

Foreign capital can be wired to the country with no relevant restriction. The registration of foreign capital with the Central Bank (BACEN) is provided for by Law No. 4, 131/62 and Law No. 4, 390/64, ensuring equal treatment of foreign and national capital. Implementing regulations on foreign capital matters are enacted from time-to-time by the National Monetary Council and by BACEN.

Foreign capital is defined as goods, machinery and equipment imported to Brazil without prior foreign capital disbursements, for the production of goods or services, as well as financial or monetary resources invested in Brazil for application in economic legal entities resident, domiciled or with a head office abroad. The term ‘goods’ has been defined to include trademarks, patents and technology transfers registered with the National Industrial Property Institute.

In light of heated discussions within the Federal Government regarding the exploitation by foreigners of natural resources,

the Federal Government sought alternative measures to impose restrictions on the acquisition of rural land in Brazil by Brazilian companies held (in their major part) by foreigners and to create workable mechanisms to control the ownership of rural land in Brazil.

As a result of these discussions, the National Council of Justice (CNJ) issued a recommendation and the Federal Government Attorney's General Office issued Opinion AGU-LA-01/2010, which aimed to reinstate the restrictions of Law No. 5,709/71 on the acquisition of rural land in Brazil by Brazilian companies held (in the majority part) by foreigners.

There are strong arguments to establish that such restrictions violate Brazil's Federal Constitution and, therefore, for legal and/or administrative defence of Brazilian companies held (in the majority part) by foreigners that see their purchases of rural properties hampered or hindered. However, there can be no assurance of the outcome in a dispute discussing this matter given the lack of material precedents from the Brazilian courts.

Furthermore, once mining activities usually prevail over surface rights, it is not essential for mining companies to own the lands where the operation is located (please refer to question 7.1).

The only exception for nationality requirements applies for border strip areas. If the mining project is located in border areas, approval is required from the National Defense Council (CDN) prior to commencement of the activities. In order to obtain such approval, the following requisites should be complied with:

- i. Brazilians must hold a majority shareholding in the company;
- ii. the company must be managed, mainly, by Brazilians; and
- iii. more than ⅔ of the company's manpower must comprise Brazilians.

The execution of mining activities within a border strip area without prior approval from the CDN may be declared null and void and also subjects the miner to fines of 20% over the declared amount related to the irregularly conducted activities.

3.3 Are there any change of control restrictions applicable?

There is no change of control restriction from a mining regulation standpoint.

3.4 Are there requirements for ownership by indigenous persons or entities?

Indigenous people are classified by their level of integration into civil society, according to Indigenous Statute ("*Estatuto do Índio*"). If the National Foundation for the Indigenous (FUNAI) understands that there is full integration into society, then indigenous people are able to execute contracts as a regular civil person. If partially integrated, indigenous people will have their civil capacity specified by the public authority in regard to what kinds of civil acts they can perform. If found isolated (the third level of integration), natives cannot perform most of the civil acts.

3.5 Does the State have free carry rights or options to acquire shareholdings?

The State does not have carry rights in regard to private companies.

4 Processing, Refining, Beneficiation and Export

4.1 Are there special regulatory provisions relating to processing, refining and further beneficiation of mined minerals?

From a mining regulation perspective, there is no special rule relating to processing, refining and beneficiation of mined minerals.

As to an environmental perspective, the law establishes that mining activities and beneficiation of mined minerals shall be subject to environmental licensing, which consists of a public administrative proceeding by means of which the environmental agency evaluates and authorises the location, installation and operation of a certain project, considering the applicable legal provisions and the socio-environmental impact caused by such activity (please, refer to question 8.1 for more information).

Also, for the disposal of waste, treatment and discharge of effluents and air emissions, the entrepreneur shall observe specific legal provisions.

4.2 Are there restrictions on the export of minerals and levies payable in respect thereof?

The Brazilian Customs Regulations do not restrict the export of minerals, except when minerals are subject to specific Export Controls. The Export Controls are restrictions to the export of some goods that are considered sensitive by the Brazilian Customs Authorities, (i.e. uranium, etc.).

The Brazilian exporter must check the Computerised Integrated System of Foreign Trade's (SISCOMEX) administrative controls for every export operation and the lists of sensitive goods (the exports subject to restrictions and their respective Export Controls) to determine which minerals are controlled and the competent authority that regulates their exportation.

There are no specific levies payable in respect of exporting minerals.

5 Transfer and Encumbrance

5.1 Are there restrictions on the transfer of rights to conduct reconnaissance, exploration and mining?

Reconnaissance rights cannot be transferred. Exploration permits and mining concessions can be transferred after the ANM's assessment, provided that the assignee is also able to perform mining.

The Authorities shall assess matters, such as:

- i. stage of exploration;
- ii. ability to carry on the mining works;
- iii. correctness of corporate documents;
- iv. availability to federal agent's inspection; and
- v. proper indication of the area.

Depending on the inaccuracy of such information, the ANM may request more information, clarification or amendment of data provided. Ultimately, if the amendments do not suffice, the ANM may deny a request of transfer.

5.2 Are the rights to conduct reconnaissance, exploration and mining capable of being mortgaged or otherwise secured to raise finance?

Rights to conduct reconnaissance and exploration cannot serve as security. However, mining concessions can be subject to a pledge in order to raise finance, pursuant to article 55 of the Brazilian Mining Code. The pledge must be filed with and approved by the ANM to be valid and effective.

6 Dealing in Rights by Means of Transferring Subdivisions, Ceding Undivided Shares and Mining of Mixed Minerals

6.1 Are rights to conduct reconnaissance, exploration and mining capable of being subdivided?

The rights to conduct reconnaissance, exploration and mining are subdivided. The Mining Authority divides each one with one specific title to conduct separate activities.

Reconnaissance permits cannot be divided, but they are not mandatory. In most cases, miners do not in fact obtain reconnaissance permits.

Exploration permits and mining concessions, in turn, are capable of being subdivided and negotiated.

6.2 Are rights to conduct reconnaissance, exploration and mining capable of being held in undivided shares?

No, rights to conduct reconnaissance, exploration and mining are not capable of being held in undivided shares.

6.3 Is the holder of rights to explore for or mine a primary mineral entitled to explore or mine for secondary minerals?

The holder of the title is entitled to explore/mine solely the mineral it applied for. If, by any chance, a new mineral resource is found in the area, the miner must communicate to the ANM immediately and apply for its extraction.

6.4 Is the holder of a right to conduct reconnaissance, exploration and mining entitled to exercise rights also over residue deposits on the land concerned?

It is possible to conduct reconnaissance, exploration and mining over residue deposits, as long as it has been previously approved by the ANM. If such activities were not comprised in the PAE, new studies must be filed in order to allow these activities.

The miner not only has rights over residue deposits, but must also comply with environmental and mineral obligations. The PAE comprises information about the waste dump, and the management of the residue deposits must be supervised by the geologist/mine engineer. Mining Regulatory Rule – NRM 19 provides a set of rules which must be observed by the miner in regard to the deposits.

6.5 Are there any special rules relating to offshore exploration and mining?

Brazil signed and ratified the United Nations Convention on the Law of the Sea, which outlines the general rules on the matter.

However, there is no specific statute to regulate offshore exploration, which ends up following the same rules as territorial mining.

The Regulation of the Mining Code sets forth the potential interference between the activities inspected by the ANM and the activities inspected by other authorities. In Brazil, offshore areas have been exploited mostly for the extraction of oil and gas, and in case of finding any material which the competence for extraction belongs to the ANM, the ANP, together with Petrobras and the National Committee for Nuclear Energy (CNEN), are required to inform the ANM of any activities carried out offshore that might interfere with the ANM's sphere of competence.

7 Rights to Use Surface of Land

7.1 Does the holder of a right to conduct reconnaissance, exploration or mining automatically own the right to use the surface of land?

Partially, yes. Surface rights and underground rights are parallel rights that co-exist. Whenever these two rights conflict, underground rights tend to prevail. As a general rule, mineral resources are a matter of public policy and interest, since they are constitutionally protected and the property of the Federal Government. The miner shall perform mining within the land, regardless of the surface owner's consent. This limitation of the right of property is compensated, as described in question 7.2 below.

7.2 What obligations does the holder of a reconnaissance right, exploration right or mining right have vis-à-vis the landowner or lawful occupier?

The miner must compensate the landowner for any damages caused to his property. Moreover, miners must pay a monthly income for the occupation of the area. Finally, there must be a surface agreement between the landowner and a miner, so that the landowner is entitled to a percentage of the profits obtained with the mineral production.

7.3 What rights of expropriation exist?

If the landowner opposes to the mining activities, there are actions for the limitation of his rights of property.

The creation of mineral easements limits property rights; it includes usufruct rights and security interests in liens over the surface, for the specific purpose of mining performance.

Another measure is the writ of entry, for the right to have access to the mine. However, this last remedy does not grant liens over the surface. It is a judicial remedy to enforce the miner's right to entry to the land.

8 Environmental

8.1 What environmental authorisations are required in order to conduct reconnaissance, exploration and mining operations?

In relation to the prospecting phase, the only situation in which environmental licensing is expressly required is when it involves the usage of *Guia de Utilização*, which is a special licence that allows the use of small amounts of minerals for specific purposes before the concession to mine.

However, mining activities and beneficiation of mined minerals are subject to prior environmental licensing proceedings.

The licensing proceedings encompass three distinct and successive phases in which the environmental feasibility of the project is analysed (preliminary, installation and operating licences). The Environmental Protection Agency may impose conditions in accordance to the environmental impact of each project.

8.2 What provisions need to be made for storage of tailings and other waste products and for the closure of mines?

There is a constitutional provision for the obligation to recover the impact caused by mining activities. According to article 225, §2, “the person exploiting mineral resources must recover the degraded environment, in accordance to the technical solution required by the competent public authority, as set forth by law”.

Firstly, the miner must previously inform MME, filing a report with updated information related to environmental matters of the mine. Secondly, the miner shall finalise the execution of the mine closure plan, which shall be included in the PAE.

The PAE comprises relevant information about the mineral substances, output volume, reserves, production flow and, among this information, mine closure.

One of the documents that must be included in the mine closure plan is the Report of Recovery Plan of the Degraded Area (PRAD), which must be approved by the Environmental Protection Agency and is a condition for the issuance of the Preliminary Licence (LP).

Currently, no cost contingency is required.

8.3 What are the closure obligations of the holder of a reconnaissance right, exploration right or mining right?

The miner must perform the closure pursuant to the PAE in order to recover the degraded area. This takes place when mining activities are over. These obligations are not applicable to the reconnaissance and exploration phases.

8.4 Are there any zoning or planning requirements applicable to the exercise of a reconnaissance, exploration or mining right?

According to the Brazilian Federal Constitution, each municipality has the ability to enact rules dividing its territory into specific zones (i.e., residential, industrial, rural, environmentally protected) aiming to better organise land occupation, and to promote public health and sustainable development. Such rules regulate land occupation and the type of economic activity that is allowed throughout the territory of each municipality, including areas in which permit mining activities and those that do not.

Therefore, in order to exercise mining activities in Brazil, any company or individual should obtain a permit from the relevant municipality. Prior to issuing such permit, the municipality will issue a land use and occupation certificate indicating the activities that are permitted in the relevant area.

9 Native Title and Land Rights

9.1 Does the holding of native title or other statutory surface use rights have an impact upon reconnaissance, exploration or mining operations?

Native titles are areas where indigenous communities are located. These areas are commonly known as native lands, which are protected by the Constitution. These areas are the property of the Federal Government and are permanently occupied by indigenous peoples.

Mining activities can take place within native lands only after the approval from the National Congress and formal request to the tribes. Also, mining must be carried out in conformity to specific legislation provided by the Constitution, which has not been enacted yet. Therefore, the current “legal void” prevents any mining from taking place within native areas.

10 Health and Safety

10.1 What legislation governs health and safety in mining?

In Brazil, labour relations are a matter of Federal law. Therefore, labour rights are nationally standardised, and the same labour costs and consequences will apply regardless of an employer’s place of business or place of incorporation.

Regarding occupational health and safety, there is a specific regulation for miners: Regulatory Standard NR 22. The measures set out in NR 22 must be applied jointly with other regulations related to workers’ health and safety protection. NR 22 deals with the health and safety requirements in mining in detail.

10.2 Are there obligations imposed upon owners, employers, managers and employees in relation to health and safety?

Workers hired to work in mines qualify for the same social rights as other workers (i.e., compensation, holidays, working hours, working days, equal pay, etc.).

The measures set out in NR 22 apply to underground and open-pit mining, alluvial mining, mineral processing and mineral research, and address matters such as circulation and transport of people and materials, workplace organisation, underground openings and hydraulic disassembling, as well as safety and equipment provision.

11 Administrative Aspects

11.1 Is there a central titles registration office?

The mining agency has local offices in each of the federated states. In Brasília, there is the Federal bureau where every mining company is registered, as well as mining concessions and other relevant information.

The changes recently enacted through the MPs authorise the agency to close some of these offices, which seems to be the plan the MME has designed to better allocate the ANM's resources. However, this has not been regulated yet.

11.2 Is there a system of appeals against administrative decisions in terms of the relevant mining legislation?

Yes; decisions issued by both local and central offices are subject to administrative review. Judicial review is also available.

12 Constitutional Law

12.1 Is there a constitution which has an impact upon rights to conduct reconnaissance, exploration and mining?

Brazilian Constitution sets forth specific provisions regarding mineral resources. It provides that mines are the property of the Federal Government and that only its production can be owned. It also provides that companies must be organised under Brazilian laws, with head offices and administration in Brazil, and outlines the permission to mine within native areas, in accordance with specific statutes yet to be enacted.

However, the rights to conduct reconnaissance, exploration and mining are not further regulated at the constitutional level.

12.2 Are there any State investment treaties which are applicable?

Brazil has not ratified any investment treaties.

13 Taxes and Royalties

13.1 Are there any special rules applicable to taxation of exploration and mining entities?

In the Brazilian mining business, specific tax provisions relate to pricing. Even though transfer pricing rules allow taxpayers to elect the best method to calculate pricing, in the mining sector, companies are obliged to use international prices as established by major metals exchanges throughout the world, as metals are commodities.

Mining production is not subject to Federal excise tax due to constitutional exemption. With regards to state VAT, this tax is normally charged differently depending on the state, and exemptions apply upon exportation. Other taxes include taxes on total revenue and corporate income taxes.

Another tax that may be important for mining companies relates to property taxes – tax on rural land or tax on urban property.

13.2 Are there royalties payable to the State over and above any taxes?

Financial Compensation for the Exploration of Mineral Resources (CFEM) is the payable royalty derived from the economic use of mineral resources, which are Federal Government property.

The main charge levied against mining activity is the CFEM. Other charges include the annual hectare fee (TAH) and the Mining Activities Inspection Fee (TFAM).

The recent MPs changed CFEM calculation, but they should be ratified by National Congress. Now, mining companies should use the gross revenues as a basis. The rates are also under discussion and are likely to raise for most minerals, varying from 0.2% to 4%. Iron ore will probably have progressive rates, in tandem with the international prices.

Also, there will be changes introduced to the TFAM, levied on a yearly basis for each mining right held by the company, with prices depending on the project's phase.

14 Regional and Local Rules and Laws

14.1 Are there any local provincial or municipal laws that need to be taken account of by a mining company over and above National Legislation?

Yes; Brazilian mining legislation operates on a federal level, but state and local rules also apply to the operation of a mining project. Mining permits must have an environmental licence to operate, and the environmental authority in charge of such issuance has a state-level jurisdiction. Therefore, mining permits will only be issued after an official environmental state grant. Also, plants and facilities need a local authorisation to work, known as an operating licence, and a permit for adequate occupancy, issued after a local agent inspection, known as a certificate of occupancy. Also, in specific types of mining exploration – licence for exploration, for instance – the authorisation of the municipality and the surface owner are mandatory to carry out a mining project.

14.2 Are there any regional rules, protocols, policies or laws relating to several countries in the particular region that need to be taken account of by an exploration or mining company?

In Brazil, there are no enforceable rules of this nature in regard to mining. There are some bilateral understandings between Brazil and other countries and treaties and conventions that Brazil is a part of, but they only address mining indirectly. For instance, this is the case of human rights treaties that govern indigenous communities and sea laws that address, among other topics, offshore mining. None of them approach mining activities specifically.

15 Cancellation, Abandonment and Relinquishment

15.1 Are there any provisions in mining laws entitling the holder of a right to abandon it either totally or partially?

When a mining title is granted to a miner in Brazil, the miner agrees to fulfil several requirements, such as, among others: (i) perform the exploration according to the exploration plan; (ii) not to discontinue the exploration works for more than three consecutive months or 120 non-consecutive days; (iii) perform the mining works according to the mining plan; (iv) not to discontinue the mining works for more than six months; (v) comply with the environmental legislation; and (vi) comply with the mine closure plan.

Thus, the abandonment of a mining right may be subject to penalties for the miner, including the expiry of the mining right and imposition of fines for each default committed.

15.2 Are there obligations upon the holder of an exploration right or a mining right to relinquish a part thereof after a certain period of time?

Yes; if the mining company no longer intends to proceed with a certain project, it is entitled to request the relinquishment of the right to explore or mine a certain area, totally or partially. In general, regarding the exploration permit regime, the miner may relinquish the right by filing a partial exploration report.

On the other hand, regarding the mining concession regime, the miner must indicate the reasons for the relinquishment and also produce reports indicating the works developed so far, the current situation of the mine and its future potential. It is only upon the inspection of the ANM's agents that the Minister of Mines and Energy would decide whether to approve or not the relinquishment, applying penalties if it is the case.

15.3 Are there any entitlements in the law for the State to cancel an exploration or mining right on the basis of failure to comply with conditions?

There are several behaviours of the miner that can lead to the cancellation/expiry of a mining right, in most cases, after the imposition of other penalties which may vary from admonition to the imposition of fines.

According to the recent changes, the expiry of the mining right can be declared in the event of:

- i. abandonment of the mining activities;
- ii. predatory exploitation, understood as activities that may compromise the future economic usage of the resources; and
- iii. second recidivism in not following the guidance of the ANM's inspections, applicable in a two-year period.



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Since 1976, TozziniFreire has distinguished itself as a premier, full-service law firm by consistently providing legal services to domestic and international companies in a wide variety of business sectors. Over the years, the firm has played a major role in many of the most significant transactions in the Brazilian market.

The highly qualified lawyers in TozziniFreire's Mining industry group have significant experience in transactions related to the sector, bringing expertise in regulatory, corporate/M&A, litigation, tax, environment, administrative law, real estate and labour matters, among others. The team is also fully prepared to monitor and advise on the actions of regulatory bodies throughout the country. The group's client portfolio includes domestic and international junior, mid-size and senior mining companies.

Canada

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1 Relevant Authorities and Legislation

1.1 What regulates mining law?

Canada is a constitutional monarchy, a parliamentary democracy and a federation comprised of 10 provinces and three territories. Canada's judiciary is independent of the legislative and executive branches of government. Responsibilities and functions under this democratic structure are distributed through a federal system of parliamentary government whereby the federal or central government shares governing responsibilities and functions with the provincial and territorial governments pursuant to the division of powers under the *Constitution Act, 1867* (see question 12.1). The Prime Minister, elected by the public, is the head of Government in Canada.

Certain areas within the federal government's jurisdiction may affect a mining project, for example: aboriginal rights; trade and commerce; railways; nuclear energy; and environmental matters that involve matters of federal jurisdiction, such as fisheries. However, most of the areas which will affect a mining project are within the provincial governments' jurisdiction.

1.2 Which Government body/ies administer the mining industry?

Pursuant to the division of powers under the *Constitution Act, 1867*, both the federal government and the provincial or territorial governments regulate mining activity in Canada (see question 12.1). Exploration, development and extraction of mineral resources, and the construction, management, reclamation and closure of mine sites are all primarily within the jurisdiction of the provinces of Canada, the Yukon and the Northwest Territories (with some exceptions). In Nunavut and certain areas of the Northwest Territories, public lands and natural resources are governed and administered by the federal government. Other than Nunavut, each province and territory has its own mining legislation and mineral tenure system, though certain mineral rights in the Northwest Territories are administered by the federal government. The provinces and territories (other than Nunavut) own the majority of the mineral rights in Canada, though mineral rights may also be held by private entities, by Aboriginal groups and by the federal government. In Nunavut, mineral rights are owned by the federal government, by Aboriginal groups or by private entities.

Federal government involvement in the regulation of mining operations is limited to those undertakings that fall within federal jurisdiction. These specific undertakings include uranium in the context of the nuclear fuel cycle (i.e., from exploration through to the final disposal of reactor and mine waste), mineral activities

related to federal Crown corporations, and mineral activities on federal lands and in offshore areas. The manufacture, sale, use, storage and transportation of explosives used in exploration and mining also all fall within federal jurisdiction. These are regulated under the *Explosives Act* (Canada). Federal jurisdiction also covers the export, import and transit across Canada of rough diamonds, which is regulated under the *Export and Import of Rough Diamonds Act*. The federal *Extractive Sector Transparency Measures Act* creates stringent reporting standards for Canadian oil, gas and mining companies, in order to implement Canada's international commitments in combatting domestic and foreign corruption. All (i) entities that are listed on a stock exchange in Canada; and (ii) entities that have a place of business in Canada, do business in Canada or have assets in Canada and that meet certain thresholds must report payments including taxes, royalties, fees, production entitlements, bonuses, dividends and infrastructure improvement payments of 100,000 Canadian dollars or more, in the aggregate, to local and foreign governments, and as of 2017 this includes sums paid to Aboriginal governments.

Any mining disclosure (whether oral or written, and including presentations to investors and disclosure on a mining company's website) made available to the public in Canada is governed by National Instrument 43-101, Standards for Disclosure in Mineral Projects. This instrument was developed by the Canadian Securities Administrators and is administered by the relevant provincial and territorial securities commissions.

1.3 Describe any other sources of law affecting the mining industry.

The areas of contract law and tort law are generally regulated by the provinces pursuant to their "property and civil rights" powers delineated under the *Constitution Act, 1867*. These bodies of law are mostly "common law" (i.e., "judge-made" law, rather than law created under legislation by Parliament or legislatures). Common law can be superseded or changed by subsequent legislation.

Québec, unlike the other provinces, is governed by civil law. Civil law is a codified law that is written into statutes (ex. Civil Code of Québec) which are then strictly interpreted by the courts.

2 Mechanics of Acquisition of Rights

2.1 What rights are required to conduct reconnaissance?

Reconnaissance right requirements in Canada vary by jurisdiction. In the Northwest Territories, Nunavut, British Columbia, Manitoba,

New Brunswick and Prince Edward Island, both individuals and companies are required to obtain a prospector's licence from the applicable provincial or territorial government in order to engage in prospecting for minerals, subject to certain exceptions. There are similar requirements in Ontario and Québec, though those provinces do not issue prospector's licences to corporations. In Nova Scotia, individuals and companies are required to register as a prospector and pay the prescribed fees, but no "licence" is required.

Prospector's licences (or their equivalent) can be obtained in the majority of jurisdictions by contacting the applicable provincial or territorial governmental authority, completing the requisite form and paying a small fee. In most cases, prospector's licences expire after a period of time (for example, one year in British Columbia), but can be renewed.

Prospectors' licence requirements differ from jurisdiction to jurisdiction. In general, the government does not have the discretion to refuse to issue a licence; prospector's licences are granted automatically if the applicant meets the statutory criteria. However, it should be noted that a prospector's licence can be cancelled or suspended for a contravention of applicable mining legislation.

In the Northwest Territories and Nunavut, a prospector may also obtain a "prospecting permit", which grants the holder exclusive rights to explore and have mineral claims recorded within the assigned boundaries of a given permit area for a specified period of time. Similarly, in Saskatchewan, holders of permits issued by the Minister of Environment are granted the exclusive right to explore the lands in question and subsequently can convert the permit into a mineral claim.

Reconnaissance right requirements are less stringent in the Yukon, Alberta, Saskatchewan and Newfoundland and Labrador, as one can conduct prospecting activities without a licence or other formal registration.

2.2 What rights are required to conduct exploration?

In Canada, any significant exploration by a prospector will require that prospector to hold the mineral rights to the area of interest. Mineral rights are obtained by "staking" a mineral claim, or "licence" or "permit" in some jurisdictions. The permitted methods for staking a claim vary from jurisdiction to jurisdiction, and include physically staking a claim on the ground, on a map or through an online computer registration system. Applicable fees and documents are often required to complete the staking and recordation process and in some jurisdictions (for example, the Yukon), there may be a requirement to notify or engage with Aboriginal groups prior to recordation.

The provinces and territories (other than Nunavut) each have their own mineral tenure system, though certain mineral rights in the Northwest Territories are administered by the federal government. Nunavut (except with respect to Inuit-owned lands) utilises a mineral titles system administered by the federal government.

With respect to federally owned lands within the provinces, the federal *Public Lands Mineral Regulations* regulate the issuance of exploration and mining rights (in the form of a lease). The federal regulations differ from the provincial systems in that they provide for a competitive bidding process for mineral claims.

In order to retain a mineral claim, prescribed amounts of work must be conducted thereon. In addition to exploration, an "assessment report" describing the exploration and its costs must be filed each year with the relevant mining recorder. If the prescribed exploration costs are not incurred, most jurisdictions permit a claim holder to pay an amount of money *in lieu* of incurring exploration costs. If

the assessment report is not filed, or if money is not paid *in lieu*, the claim will be forfeited by the holder.

The duration of a claim will differ from jurisdiction to jurisdiction. In some jurisdictions (such as British Columbia), a mineral claim may be renewed indefinitely. In other jurisdictions, a mineral claim may only be held for a limited period of time. For example, in the Northwest Territories and Nunavut, a mineral claim may be held for a maximum of 10 years and after such time, it will expire, unless it has been converted into a lease or an extension has been granted by the relevant mining recorder.

In general, a mineral claim or licence only entitles the holder to the right to conduct exploration and not any additional mining operations, subject to certain exceptions. The Yukon is an exception to this general position.

A mineral claim holder will generally have rights of access to explore the claim; however, if the surface is privately owned, a notice to, or an agreement with, the surface owner will usually be required. The legislation in most provinces and territories provides for some form of tribunal or other dispute resolution mechanism to resolve disputes between the holders of mineral claims and surface rights owners (see question 7.2). If there are parties who hold other rights to the land, notice to such parties may also be required.

The above describes the situation where minerals are held by the applicable government. However, minerals may also be held by private entities and originate from either Crown grants or patents or freehold tenures that were issued as part and parcel of another type of grant, such as historic railway grants. The owner of such privately held minerals is entitled to conduct reconnaissance and exploration activities and develop those minerals, provided that he or she obtains the necessary surface access (in cases where the surface is separately held).

In some cases, Aboriginal groups may hold the surface rights and/or mineral rights, in which case it is necessary to negotiate with the applicable Aboriginal group the terms on which one can access the lands and conduct exploration activities thereon. Surface access may take the form of a licence or exploration lease and exploration activities may be governed by an exploration agreement.

2.3 What rights are required to conduct mining?

Generally, mineral claims must be replaced by mining leases prior to commencing mining activities, the Yukon being an exception. A mining lease is a longer term and more secure form of tenure than a mineral claim.

Mining leases permit full exploitation of the resource (subject to obtaining other required permits and authorisations for mining activities) and, depending on the jurisdiction, generally have a term of 10 to 30 years and provide that rent is payable annually to the government that issued the lease. Mining leases are renewable for further periods, provided annual rent is paid and the terms and conditions of the lease are complied with.

The same comment as set forth above regarding privately held minerals is applicable to mining activities.

A mineral operator must acquire a government permit approving the proposed mining project. For a major mining operation, the mineral operator will be required to submit a detailed mining plan and reclamation plan and may also be required to submit an environmental assessment (see question 8.1).

Where Aboriginal groups hold the surface rights and/or mineral rights, land tenure may take the form of a lease and the right to develop the minerals may take the form of a production lease. The Aboriginal group and mining company will frequently negotiate

another agreement in parallel with these agreements: an impact benefit agreement. This agreement offers a negotiated means to mitigate detrimental impacts of the project and to provide economic benefits for the Aboriginal group and its members. It documents the basis on which the mining company has acquired its “social licence to operate”.

2.4 Are different procedures applicable to different minerals and on different types of land?

Generally speaking, there are different sets of rules depending on the type of substances being mined, and there are varying requirements depending on the type of land under which the minerals are located.

The rules governing hard rock minerals (including precious metals), placer minerals, coal and industrial minerals are often set out in different legislation. The federal *Export and Import of Rough Diamonds Act* provides for controls on the export, import or transit of rough diamonds across Canada, and for a certification scheme for the export of rough diamonds, which was established to meet Canada’s obligations under the Kimberley Process adopted by the United Nations General Assembly in 2000. The regulation of uranium and thorium includes additional rules with respect to their production, refinement and treatment. These rules are within federal jurisdiction for purposes of national security and to fulfil Canada’s international obligations in respect of such minerals.

There are also varying regimes depending on the owner of the land under which the minerals are located. The surface land may be owned by a private entity, by Aboriginal groups, or by the Crown and may be subject to aboriginal rights.

Where there is private ownership of the land, the recorded holder of the mineral claim will usually be required either to: (i) issue a notice of access to the surface owner; (ii) come to an agreement for access with the landowner; or (iii) obtain an order from the provincial or territorial authority. Generally, the recorded holder of the mineral claim will also be required to compensate the surface rights owner for the access granted. Depending on the jurisdiction, where the parties cannot agree, compensation may be determined either by a dispute resolution mechanism provided for in the legislation, by reference to the competent tribunal, or by application to court. Exceptionally, in Québec, where an agreement cannot be reached, the holder of mining rights will then have to resort directly to expropriation procedures.

Aboriginal groups may also own the land over which the minerals are found. Where this is the case, permission for access must be acquired from the Aboriginal group. For example, Inuit-owned lands in Nunavut require that surface access be obtained from the Regional Inuit Association and may require a licence or lease.

With respect to Crown-owned land, a recorded holder of the mineral claim or lease will generally be permitted to access the surface of the land for the purposes of mining activities, though land-use permits or leases may be required in some instances. However, where land is subject to Aboriginal rights, crown consultation and accommodation of the affected Aboriginal groups will dictate access rights and requirements of mining proponents. The extent of consultation and accommodation will vary depending on the affected groups and their recognised rights. While consultation and accommodation is a Crown obligation, it is often the practice of mining companies to negotiate impact benefit agreements with Aboriginal groups in order to obtain community support of the project.

2.5 Are different procedures applicable to natural oil and gas?

In Canada, oil and gas licences or leases, which provide the holder with the right to produce oil and gas, are issued by the provinces and territories (and the federal government, with respect to Nunavut) through a competitive bidding process. This differs from the first-come, first-served basis on which mineral rights are obtained.

3 Foreign Ownership and Indigenous Ownership Requirements and Restrictions

3.1 What types of entity can own reconnaissance, exploration and mining rights?

In jurisdictions where a prospector’s licence is required, individuals who have reached the age of majority, and corporations, may generally apply for and hold such a licence. Ontario and Québec are exceptions, in that they do not issue prospector’s licences to corporations. Some jurisdictions, such as British Columbia and Prince Edward Island, specify that partnerships may also hold a licence.

3.2 Can the entity owning the rights be a foreign entity or owned (directly or indirectly) by a foreign entity and are there special rules for foreign applicants?

Individuals and corporations are generally entitled to hold mining rights. In some jurisdictions, however, such as the Northwest Territories and Nunavut, partnerships and limited partnerships are not permitted to acquire mineral claims or mining leases in their name.

Generally, there are few restrictions on mining rights being directly or indirectly owned by a foreign entity. Most jurisdictions require corporations to be registered or otherwise authorised to carry on business in the jurisdiction in order to acquire a prospector’s licence (or the equivalent). The Northwest Territories previously imposed Canadian citizenship and ownership requirements on the grant of mining leases, but these restrictions no longer exist.

If an acquisition of an operating Canadian mining business exceeds certain financial thresholds, it will be subject to government review under the *Investment Canada Act* (ICA). The review threshold is 1 billion Canadian dollars in enterprise value for investments to directly acquire control of a Canadian business by WTO investors. The threshold for review is much lower for investors or vendors residing in non-WTO member countries (5 million Canadian dollars in asset value for direct investments and 50 million Canadian dollars in asset value for indirect transactions). In general, a proposed transaction that meets the review threshold cannot be completed until the federal Minister of Industry has made a determination that the proposed transaction is likely to be of net benefit to Canada. This ministerial review requirement does not apply to acquisitions of exploration properties or non-producing mines. In addition, the Canadian government has reserved the right to review any transaction if it considers that the investment could be injurious to national security.

There are special rules applicable to uranium mining. Federal government policy requires a minimum of 51 per cent Canadian ownership in uranium mining properties which are at the first stage of production, with exemptions from the policy if the project is *de facto* Canadian controlled or if Canadian partners cannot be found.

In 2015, the federal government granted the first exemption since the policy was implemented in 1987. An Australian company was allowed majority ownership of a uranium mine in Newfoundland and Labrador. The company was able to demonstrate that there were no Canadian partners interested in developing a proposed mining project. Canada has signed the *Canada and European Union Comprehensive Economic and Trade Agreement* with the European Union as well as the *Trans-Pacific Partnership Agreement* with Pacific Rim trading partners, both of which are subject to ratification. If and when the agreements are ratified, investors from signatory countries would be able to apply for an exemption from the federal policy applicable to uranium mining, without first seeking a Canadian partner. Uranium mining properties at the exploration stage do not require Canadian ownership.

3.3 Are there any change of control restrictions applicable?

The “net benefit review” and “national security review” rules discussed in question 3.2 apply in all instances where a non-Canadian acquires control, directly or indirectly, of a Canadian business.

In addition, proposed foreign investment may be subject to review by the Canadian Competition Bureau under the federal *Competition Act*. Where each of certain thresholds are met, a proposed investment requires pre-merger notification and either approval or expiry of a statutory waiting period before the transaction may go forward. The Canadian Competition Bureau also has jurisdiction to review and challenge all mergers within one year of completion on the grounds that the transaction will result in a substantial lessening or prevention of competition.

3.4 Are there requirements for ownership by indigenous persons or entities?

Please see question 9.1 regarding aboriginal and treaty rights of the Aboriginal peoples of Canada.

3.5 Does the State have free carry rights or options to acquire shareholdings?

No, it does not.

4 Processing, Refining, Beneficiation and Export

4.1 Are there special regulatory provisions relating to processing, refining and further beneficiation of mined minerals?

Mineral processing, refining and further beneficiation will generally be subject to the same legislative regimes that apply to mineral exploration and mineral extraction, as the provincial, territorial and federal statutes regulate all stages of the mining process. If mineral processing will be undertaken at the mine site, it will have been approved through the mine permit application and the environmental assessment process, where applicable.

The majority of jurisdictions do not require mineral processing to occur within the province or territory of extraction. Nova Scotia is an exception to that general proposition, unless an exemption is obtained from the appropriate Minister. The Ontario *Mining Act*

provides that, unless an exemption has been obtained, ores and minerals extracted in that province must be treated and refined in Canada. In New Brunswick and Newfoundland and Labrador, the government may make an order requiring minerals to be processed within the province. In Saskatchewan, lease holders may not export quarriable minerals in their natural or unprocessed state without the written permission of the Minister of Mineral Resources, and diamonds must be presented for valuation at facilities located in Saskatchewan before they are removed from the processing facility or sold. Some jurisdictions, such as Manitoba, encourage the beneficiation of minerals inside the province by providing tax deductions that are permitted only for the processing of minerals within the province.

Other than as noted above, there is no general prohibition on the export of un-beneficiated minerals. However, there are mineral-specific exceptions. Pursuant to the *Nuclear Non-Proliferation Import and Export Control Regulations*, uranium may not be exported unless the Canadian Nuclear Safety Commission grants a licence. Similarly, diamonds may not be exported unless they have been issued a Kimberley Process Certificate and the transaction has been reported to the federal Minister of Natural Resources.

4.2 Are there restrictions on the export of minerals and levies payable in respect thereof?

Canada is a party to a number of international agreements relating to wastes and recyclable materials, pursuant to which it has various obligations on trans-boundary movements of hazardous wastes and hazardous recyclable materials.

In addition to Canada’s international obligations, the federal *Export and Import Permits Act* provides permitting requirements and associated fees for the export of goods listed on the Export Control List (a list of controlled goods). The *Export and Import Permits Act* provides authority to the Governor in Council to establish and amend the Export Control List for certain prescribed purposes. Notably, one such purpose is to ensure that actions taken to promote the processing in Canada of a natural resource produced in Canada are not rendered ineffective by unrestricted exportation. Currently, uranium is a controlled substance on the Export Control List where certain characteristics are present. It is important to refer to the Guide to Canada’s Export Controls and to the Export Control List for any amendments that may affect the products being exported.

Further, the *Export and Import of Rough Diamonds Act* restricts the export, import and transit across Canada of rough diamonds, while the *Nuclear Non-Proliferation Import and Export Control Regulations* require a licence issued by the Canadian Nuclear Safety Commission for the export of uranium.

5 Transfer and Encumbrance

5.1 Are there restrictions on the transfer of rights to conduct reconnaissance, exploration and mining?

In general, prospectors’ licences are not transferable.

Mineral claims are transferable, though the transfer is often subject to provincial, territorial, and federal legislative requirements. A general precondition to the transfer of a mineral claim is that it be in writing and executed by the holder of the claim. Several jurisdictions are more stringent and require the use of a prescribed form to validate a transfer, and in Nova Scotia, the transfer of a mineral claim is also contingent upon the consent of the Minister of

Natural Resources. Transfers of mineral claims in British Columbia are completed by the transferor and transferee through the online mineral title system.

Mining leases are generally transferable. The transferability of the lease will be governed by the terms of the lease in question and applicable legislation. A common requirement is that the transfer agreement be in writing and signed by the holder of the interest. In addition, in some jurisdictions, including, for example, Ontario, government consent is required in order to transfer a mining lease.

Another general requirement related to the transfer of a mineral claim or mining lease is that the transfer must be recorded in a prescribed office. In some jurisdictions, recordation of the mining lease is not required but is permitted.

5.2 Are the rights to conduct reconnaissance, exploration and mining capable of being mortgaged or otherwise secured to raise finance?

Generally speaking, in Canada, indebtedness may be secured by all types of real and personal property under the real and personal property security regimes of each of the provinces and territories and by virtue of the common law. The nature of the charge granted to secure such indebtedness, for example, whether a mortgage, charge, pledge or other, will need to be considered in each circumstance.

There is some uncertainty as to whether a prospector's licence can be charged as security for indebtedness.

It is possible to create a charge against a mineral claim or mining lease. In some jurisdictions, consent of the applicable governmental authority will be required, however, such as in Ontario, where a mining lease cannot be mortgaged, charged, or made subject to a debenture, unless the applicable Minister consents in writing to the transaction.

Security documents granting such a charge are typically registered in the applicable mining registries against the mineral claims or mining leases, whose registration will serve as notice to third parties of the grant of the charge. In many jurisdictions, registration of documents purporting to charge mineral claims or mining leases is permissive while in other jurisdictions, registration is mandatory in order to be given effect. Generally, the applicable legislation does not set a scheme of priorities for registered and unregistered charges or as between them. Whether the security document validly and effectively creates a mortgage or charge is a matter determined by the common law.

6 Dealing in Rights by Means of Transferring Subdivisions, Ceding Undivided Shares and Mining of Mixed Minerals

6.1 Are rights to conduct reconnaissance, exploration and mining capable of being subdivided?

A prospector's licence cannot be subdivided.

In some jurisdictions, a mineral claim may be subdivided. For example, in British Columbia, which uses electronic mapping for mineral claims, claims made up of two or more mineral "cells" can be subdivided into claims that are no less than one cell in size.

With respect to the subdivision of mining leases, the state of the law is not uniform across Canada. Subdivision of mining leases is not possible in British Columbia; however, an application can be made to reduce the land area subject to the lease, which will reduce the lease rental payments. Where subdivision of mining leases is permitted, the rules governing the subdivision vary by province and territory.

6.2 Are rights to conduct reconnaissance, exploration and mining capable of being held in undivided shares?

Mining activity in Canada can be structured in a variety of ways. A common structure is through a joint venture. Joint ventures can be formed through a variety of legal vehicles, including partnerships, corporations and unincorporated joint ventures.

Partnerships are governed by provincial and territorial legislation. General partnerships are generally defined as the relationship between two or more persons carrying on a business in common with a view to profit. Limited partnerships are a type of partnership created amongst partners of different classes: limited partners, who typically are not engaged in the management or control of the business and who, subject to certain exceptions, have limited liability in respect of the debts and liabilities of the partnership; and general partners, who operate and manage the business of the partnership and have unlimited liability. In some jurisdictions, such as the Northwest Territories and Nunavut, partnerships and limited partnerships are not permitted to acquire mineral claims or mining leases in their name.

Parties may incorporate a corporation to conduct a joint venture project. Usually, the joint venture property and assets are transferred to, and held by, the corporation and a shareholders' agreement will govern the conduct and management of the joint venture corporation. Joint venture corporations are governed by the provincial, territorial or federal legislation under which the corporation was incorporated.

Unincorporated joint ventures are formed and governed by a contract. A benefit of the unincorporated joint venture is that parties to the contract have considerable flexibility in setting out the terms of an agreement. Typically, the joint venture property is held by one of the joint venture parties on behalf of the joint venture and operations are managed by one of the joint venture parties or in some cases, a third party. In some cases, depending on the applicable legislation, the property and/or assets may be held as tenants in common. Income and losses of the mining activity conducted by unincorporated joint ventures are computed and taxed in the hands of the individual joint venture parties.

6.3 Is the holder of rights to explore for or mine a primary mineral entitled to explore or mine for secondary minerals?

The applicable legislation under which the mineral tenure in question has been obtained will often circumscribe the minerals that the tenure covers (e.g. hard rock minerals, placer minerals, coal, industrial minerals). For example, in British Columbia, the *Mineral Tenure Act* regulates the exploration and, in part, the development and mining of hard rock minerals and placer minerals and the definition of what constitute "minerals" is very broad. Similarly, a holder of a placer claim is entitled to explore for placer minerals. Other examples include the British Columbia *Coal Act* that regulates the exploration and production of coal, and the British Columbia *Land Act* that regulates earth, soil, sand, gravel, rock and other natural substances used for a construction purpose.

6.4 Is the holder of a right to conduct reconnaissance, exploration and mining entitled to exercise rights also over residue deposits on the land concerned?

The entitlement to tailings and waste dumps depends on a determination of whether such materials belong to the mineral owner or the surface owner. Some provinces expressly address the

rights over tailings and waste dumps in legislation. For example, in British Columbia, tailings and waste dumps become part of the rights to a mineral or placer claim.

In provinces and territories where residue deposits such as tailings and waste dumps are not explicitly dealt with in legislation, the instrument that separates mineral rights from surface rights must be interpreted in order to determine the rights over such materials.

6.5 Are there any special rules relating to offshore exploration and mining?

Pursuant to international law, Canada has exclusive sovereignty over the territorial sea (12 nautical miles seaward from the low water line along the coast) and the exclusive right to explore and exploit the mineral resources of the continental shelf (the area extending beyond the territorial sea to the outer edge of the continental margin, or to a distance of 200 nautical miles from the low water line, whichever distance is greater). Canada has made partial submissions to the Commission on the Limits of the Continental Shelf, pursuant to Section 76(8) of the United Nations Convention on the Law of the Sea, and intends to make a further submission in 2018 to delineate an extended continental shelf beyond the 200-nautical-mile limit in the Arctic.

The *Oceans Act* (Canada) provides that provincial laws do not apply to the territorial sea or the continental shelf with respect to minerals or other non-living natural resources, unless regulations are enacted to make provincial laws apply.

Unlike in the oil and gas sector, there is no federal legislation currently in place that provides for the issuance of offshore mining rights.

7 Rights to Use Surface of Land

7.1 Does the holder of a right to conduct reconnaissance, exploration or mining automatically own the right to use the surface of land?

Most often, pursuant to the applicable mining legislation, the holder of a prospecting permit will automatically be permitted to access the surface where the Crown holds the underlying mineral rights. Where the surface rights are privately held, the miner will either be required to issue a notice of access, come to an agreement with the surface owner or seek a court order. A right to compensation for entry and damage caused to the property is generally provided for in the applicable mining or surface rights legislation. The applicable legislation usually contains dispute-resolution provisions to resolve disputes between a mineral rights holder and the surface owner.

In Prince Edward Island, Nova Scotia, Saskatchewan, the Northwest Territories and Nunavut (other than Inuit-owned lands), surface rights are not automatically granted as part of a mineral claim or lease. A land-use permit may be required for any work under a mineral claim. Work conducted on a lease will also require a land-use permit or a surface lease. On Inuit-owned lands, a licence or lease may be required to gain access to the surface.

7.2 What obligations does the holder of a reconnaissance right, exploration right or mining right have vis-à-vis the landowner or lawful occupier?

As most mining activity in Canada occurs outside of population settlements, mineral operators usually deal primarily with the Crown, rather than with private owners. In situations where a

mineral operator wants to enter privately held land, the operator's obligations are set out in applicable legislation and the common law (and civil law in Québec). Generally, a mineral operator must either obtain the permission of the owner to enter their land, often in the form of a lease, or obtain an order from the prescribed authority allowing the operator to proceed without the owner's permission. However, in British Columbia, permission from the owner is not a necessary requirement. Under the *Mineral Tenure Act*, an operator cannot begin mining activity unless the operator first serves notice to the owner of the surface.

The general common law rule requires the mineral owner to use his or her property so as not to injure his or her neighbour, the surface owner. Legislation also addresses the rights as between mineral owners and surface owners. For example, in British Columbia, an operator is liable to compensate the owner of a surface area for loss or damage caused by a mining operation.

7.3 What rights of expropriation exist?

In every Canadian jurisdiction, pursuant to the applicable legislation, the Crown is authorised to expropriate lands or interests in land. Depending on the legislation of the relevant jurisdiction, this authority of the Crown may enable a mineral owner to acquire surface rights. For example, under the British Columbia *Mining Right of Way Act*, a miner has a right to expropriate private land for access to a mine site where the owner of the land, or a person with an interest in the land, does not grant a right of way.

In exceptional circumstances, mineral rights have been effectively expropriated by the Crown, though, in such cases, compensation has generally been paid.

8 Environmental

8.1 What environmental authorisations are required in order to conduct reconnaissance, exploration and mining operations?

In most Canadian jurisdictions, there are statutorily prescribed environmental assessment requirements that apply to certain classes of projects that are over a certain threshold size. Most major mining projects trigger the impact assessment requirements. For example, the British Columbia *Environmental Assessment Act* requires an environmental assessment of any proposed new mine that will have a production capacity equal to or greater than 75,000 tonnes per year of mineral ore.

While the process is not uniform across Canada, in some jurisdictions there may be a requirement for a public hearing. Other environmental authorisations or permits issued by provincial or territorial governments may be required.

In addition to the aforementioned potential environmental assessment, the federal government may also conduct an environmental assessment if a proposed project is of a prescribed type or size. In certain circumstances, the federal legislation allows the Minister of Environment and Climate Change to make a decision on a project based upon a provincial assessment process, thus making it possible to avoid redundant assessments. In 2016, the Minister of Environment and Climate Change established an Expert Panel to review the federal environmental assessment process under the *Canadian Environmental Assessment Act, 2012*. The Expert Panel has proposed a number of changes to the way environmental assessments are conducted, including the creation of a single authority, structured as a quasi-judicial tribunal, which would have the mandate to conduct

and decide upon environmental assessments on behalf of the federal government. It remains to be seen whether the Expert Panel's recommendations will be implemented.

8.2 What provisions need to be made for storage of tailings and other waste products and for the closure of mines?

Mining projects must comply with both provincial and federal environmental legislation. Generally, provincial legislation will set requirements for the storage of tailings and other waste products. For example, following the failure of a tailings storage facility in 2014, British Columbia updated its *Health, Safety and Reclamation Code for Mines in British Columbia* to require mines to develop and maintain a tailings management system that includes regular audits. Managers are required to retain an engineer of record to ensure that the mine's tailings storage facility has been designed and constructed in accordance with the applicable guidelines, standards and regulations. The manager and engineer of record must report any unresolved safety issues to the Chief Inspector of Mines.

At the federal level, the Government of Canada may be responsible for regulatory decisions specific to tailings management if they involve uranium tailings, navigable waters, fish-bearing waters and fisheries, environmental matters of international and inter-provincial concern or federal lands. The Minister of the Environment and Climate Change is required by the *Canadian Environmental Protection Act* to establish and publish a national inventory of releases of pollutants, including substances that are transported to waste rock storage areas and tailings-impoundment areas.

The approval of mine closure plans to rehabilitate and restore properties after the completion of mining operations is provided for in the mining legislation of most Canadian jurisdictions. Most jurisdictions require financial security or a guarantee and an approved closure plan to be filed prior to the mine production. Certain jurisdictions require the closure plan to be filed prior to any exploration activities being undertaken.

8.3 What are the closure obligations of the holder of a reconnaissance right, exploration right or mining right?

Generally, the provincial government will need to approve rehabilitation, restoration, reclamation or closure plan submissions prior to any mining activities, pursuant to provincial mining laws and regulations. Upon the closure of operations, the approved plans must be executed so as to restore the site to an acceptable condition. Additionally, in certain jurisdictions, the closure of mining activities may be subject to contaminated site remediation obligations.

8.4 Are there any zoning or planning requirements applicable to the exercise of a reconnaissance, exploration or mining right?

In most jurisdictions, the development of a mine will require mine plans to be submitted and approved. In some jurisdictions, this is done in conjunction with the environmental assessment process, but in others mine planning and permitting requires a separate process under a separate regulator.

In some jurisdictions, specific reserves for areas of land, such as agricultural or environmental reserves, will require additional authorisations or approvals for proposed undertakings that fall outside the specified uses. In circumstances where a mining project is located within the boundaries of a municipality or other local

government, the applicable municipal laws such as zoning bylaws will need to be adhered to.

9 Native Title and Land Rights

9.1 Does the holding of native title or other statutory surface use rights have an impact upon reconnaissance, exploration or mining operations?

In Canada, the *Constitution Act, 1982* protects aboriginal and treaty rights of the Aboriginal peoples of Canada. Aboriginal rights themselves are not strictly defined. The Supreme Court of Canada has defined these rights in relation to a spectrum dependent on the degree of connection with the land, the highest level of right being aboriginal title. Aboriginal rights can also be defined by treaty. Where aboriginal rights remain undefined, they can continue to exist until a treaty is reached with the Crown or until they are proven by claimants and defined by the Courts.

A 2014 Supreme Court of Canada decision, *Tsilhqot'in Nation v. British Columbia*, provided the first declaration of Aboriginal title in Canada, over a limited area of land. The potential impact of the decision on mining companies remains unclear, given the very specific facts on which the decision was based.

In certain circumstances the Crown owes a duty to consult with the Aboriginal peoples and to accommodate them where appropriate, even where Aboriginal rights have not been proven. The extent of consultation and accommodation required of the Crown will vary depending on the circumstances. The impact of consultation obligations and Aboriginal rights with respect to reconnaissance, exploration and mining operations rights will thus depend on the individual circumstances of a given case.

In May 2016, Canada officially removed its objector status to the UN Declaration on the Rights of Indigenous Peoples and announced its intent to adopt and implement the Declaration in accordance with the Canadian Constitution. It is currently unclear how the Declaration will be implemented into Canadian law.

10 Health and Safety

10.1 What legislation governs health and safety in mining?

In general, worker health and safety falls within provincial jurisdiction unless the subject matter of the undertaking falls within federal jurisdiction. For example, federal government employees are governed under the *Government Employees Compensation Act*. Generally this Act is administered by provincial and territorial workers' compensation boards and commissions.

The federal government also has jurisdiction over competency of workers dealing with uranium and thorium. The qualifications and training of certain workers who deal with uranium and thorium are governed by the federal *Nuclear Safety and Control Act*. The Act also creates offences relating to inadequate staffing and work practices at a uranium or thorium mine.

Each province and territory in Canada has its own workers' compensation board or commission, although the Northwest Territories and Nunavut have a combined workers' compensation board. These boards or commissions generally provide a preventative function by administering occupational health and safety laws, and an administrative function by administering insurance schemes for injured workers.

Some provinces and territories also have legislation and regulations that specifically apply to the mining industry in addition to workers' compensation legislation. For example, British Columbia has the *Health, Safety and Reclamation Code for Mines in British Columbia* (Code), which applies to both exploration and production mine sites in British Columbia. The Code sets out obligations for owners to develop a health and safety programme, and to establish a joint management-worker health and safety committee. In addition, the Code prescribes reporting requirements for accidents, deaths and dangerous occurrences and the maximum hours of work at a mine site.

10.2 Are there obligations imposed upon owners, employers, managers and employees in relation to health and safety?

Generally, the governing health and safety legislation of the province or territory where the work is conducted will impose obligations on owners, supervisors and employees. While these obligations are not uniform across the country, in general, mine owners are obligated to ensure that applicable laws and regulations are followed, and to take all reasonable precautions to ensure the health and safety of employees. Supervisors generally have a duty to ensure that proper training is given to employees on site and to ensure the safety and well-being of employees. Employees have an obligation to inform supervisors of any potential risks or dangers on the worksite as well as to protect their own personal health and safety (see question 10.1).

11 Administrative Aspects

11.1 Is there a central titles registration office?

There is no central titles registration office in Canada. With the exception of Nunavut, which is primarily regulated by the Federal Department of Aboriginal Affairs and Northern Development Canada, and the Northwest Territories, which is regulated by both the federal and territorial governments, each of the provinces and territories is responsible for issuing prospectors' permits (if applicable) and registering mineral titles.

11.2 Is there a system of appeals against administrative decisions in terms of the relevant mining legislation?

All provinces and territories, with the exception of the Yukon and Saskatchewan, include a dispute-resolution mechanism in their respective mining legislation. In general, all decisions made by a tribunal or official carrying out a statutory function are subject to judicial review by the courts in the relevant jurisdiction.

Certain provinces like Manitoba, New Brunswick, Ontario and Newfoundland and Labrador have created distinct tribunals that are separate from the department in charge of administering the mining legislation. Other provinces (for example, British Columbia), have internal dispute-resolution systems with appeals to the courts.

The Yukon and Saskatchewan have not developed distinct dispute-resolution systems, and as such the dispute-resolution mechanisms available are those normally provided by the court systems in those jurisdictions.

12 Constitutional Law

12.1 Is there a constitution which has an impact upon rights to conduct reconnaissance, exploration and mining?

The jurisdictional powers of both levels of government, provincial and federal, are set out in the *Constitution Act, 1867*. The *Constitution Act, 1867* provides the federal government with the power to create laws in relation to trade and commerce, banking, navigation and shipping, sea coasts and inland fisheries as well as other matters. On the other hand, the provincial Legislatures have the power to create laws in relation to property and civil rights (including laws relating to property, contracts and torts), natural resources, and local works and undertakings, among other matters. There are, however, some matters that fall within the purview of both federal and provincial jurisdictions. In such a case, each level of government may create laws in respect of a particular subject matter insofar as it relates to their jurisdiction. For example, both the federal and provincial governments have their own form of environmental legislation. The federal government may regulate approvals for a proposed mine in an effort to protect fish, and the province may regulate that same proposed mine for reasons relating to emissions that could pollute the environment. Federal and provincial statutes which deal with the same subject matter may co-exist, though if there is conflict or inconsistency between federal and provincial law, in the sense of impossibility of dual compliance or frustration of federal purpose, the federal statute prevails.

Canada's three territories, the Yukon, Northwest Territories and Nunavut, do not yet have provincial status and are at different stages in terms of devolution of powers to their territorial government from the federal government. Their legislative powers are enumerated in specific federal statutes (the *Yukon Act*, the *Northwest Territories Act* and the *Nunavut Act*). From a practical perspective, the territorial legislative powers are quite similar to those of the provinces under the *Constitution Act, 1867*, but the relevant statute must be consulted in each case.

12.2 Are there any State investment treaties which are applicable?

Please refer to question 3.2 with regard to the *Investment Canada Act*.

13 Taxes and Royalties

13.1 Are there any special rules applicable to taxation of exploration and mining entities?

In Canada, there are both federal and provincial statutes that provide a number of deductions, allowances, and credits to a taxpayer engaged in qualifying mining activities and to a taxpayer who invests in certain mining companies. A specific tax incentive that is unique to the resource sector in Canada, found in the *Income Tax Act* (Canada) (ITA), is the use of flow-through shares which enables junior mining companies to raise money for exploration and development by providing the investor with tax relief in exchange for their investment. Costs incurred for the purpose of determining the existence, location, extent or quality of an oil, gas or mineral resource in Canada are characterised as "Canadian exploration expenses" or "CEE" under the ITA. A taxpayer can deduct from their reported income up to 100% of its cumulative CEE. However,

junior mining companies often have little to no net income and accordingly, they are left with CEE deductions which they are unable to use. Flow-through shares allow corporations to monetise expenses that they are unable to use by entering into an agreement with an investor, whereby the investor subscribes for shares of the company and the company agrees to use the subscription proceeds to incur qualifying CEE which it then renounces to the investor. Under the ITA, the CEE are deemed to have been incurred by the holder of the flow-through shares rather than the mining company, so the investor is able to deduct the CEE from the investor's income for tax purposes.

Additionally, the ITA and certain provincial statutes offer other investment tax credits to taxpayers for certain types of mining-related expenditures. The Mineral Exploration Tax Credit (METC) is a 15% credit in flow-through shares that can be claimed on specified CEE. While the METC was initially intended to be temporary, it has recently been announced that eligibility will be extended until March 2018. In January 2017, the Canada Revenue Agency updated its "Guidelines for determining the tax treatment of certain exploration expenses" to confirm that costs associated with environmental studies and community consultations undertaken to meet a legal or informal requirement to obtain a permit are eligible for treatment as CEE.

13.2 Are there royalties payable to the State over and above any taxes?

There are a range of additional taxes imposed by the provinces and territories on mining operations within their boundaries. Ontario, Québec, Manitoba and Newfoundland and Labrador impose a profits tax ranging generally from 5% to 20%. British Columbia, Alberta, Saskatchewan, Nova Scotia and New Brunswick generally impose taxes based on a combination of net revenue, net profits, or production from mining operations. The remaining jurisdictions, other than Prince Edward Island, impose graduated royalties where the royalty rate increases with revenue, running as high as 14%. The foregoing is applicable to most minerals, but taxes or royalties on certain minerals, including coal, potash and uranium, are sometimes dealt with differently.

14 Regional and Local Rules and Laws

14.1 Are there any local provincial or municipal laws that need to be taken account of by a mining company over and above National Legislation?

Generally speaking, a mining company will be governed by federal and provincial laws in respect of its projects. Provincial legislation that should be considered by mining companies has been discussed in several of the above sections. There may also be circumstances where municipal laws can affect a proposed mining project. For example, if a proposed operation is located within municipal boundaries, applicable municipal laws such as zoning laws and property taxes will need to be adhered to.

It should be noted that Québec has amended its *Mining Act* and related regulations in order to provide municipalities with more legislatively prescribed powers in relation to mining exploration and projects. If a mining company has acquired a right on municipal land, the amendments provide that a claim holder must notify the relevant municipality before beginning exploration work on the claim, and satisfy additional public consultation requirements before applying for a mining lease, subject to certain conditions. They also

require mining lease holders to establish a monitoring committee in order to foster the involvement of the local community.

However, other jurisdictions have not followed suit in adopting similar laws and developments in British Columbia have taken a different direction. In a 2013 British Columbia Court of Appeal decision, municipal laws were found to be subordinate to conflicting mining legislation. The court held that municipal bylaws that frustrated the terms of the British Columbia *Mines Act* permits, issued by the British Columbia Ministry of Energy, Mines and Petroleum Resources, were invalid.

14.2 Are there any regional rules, protocols, policies or laws relating to several countries in the particular region that need to be taken account of by an exploration or mining company?

Canada's free trade agreements reduce the costs of exporting Canadian mined minerals and related value-added products. Such agreements should be taken into account by exploration or mining companies, as they can result in incentives for establishing production in Canada.

Canada has entered into a number of bilateral Foreign Investment Promotion and Protection Agreements (FIPAs) aimed at encouraging reciprocal investment in each country that is party to the agreement. For example, under the Canada-China FIPA, both countries agree to a most-favoured-nation commitment, which ensures investors from both countries are not discriminated against relative to other foreign investors. The effect of this agreement in Canada is that Chinese State Owned Enterprises (SOE) seeking investment in Canada will be treated on a merit basis, with considerations of business orientation and the extent of political influence over its affairs as significant factors.

The FIPA also provides for protections to both prospective and existing investments by allowing investors to benefit from protections found in their home country. Under the FIPA, Canadian investments will benefit from Canadian protection measures against risks of investor discrimination, expropriation without compensation and arbitrary decisions from the government, among others.

As well, the FIPA provides that disputes that affect foreign investment, including those concerning resource development and environmental issues, will be dealt with through international arbitration as opposed to domestic courts.

However, the FIPA does not affect the Government of Canada's ability to review or reject investments from China for reasons of national interest. "Net benefit" decisions under the *Investment Canada Act* are expressly excluded from the FIPA.

Canada is also a signatory to the Trans-Pacific Partnership (TPP), a multilateral trade agreement that currently includes 10 other countries: Australia; Brunei Darussalam; Chile; Japan; Malaysia; Mexico; New Zealand; Peru; Singapore; and Vietnam. The U.S. recently withdrew from the TPP, significantly impeding its ratification. The remaining signatories agreed in May 2017 to revive the TPP without U.S. participation; if revived, the agreement will gradually eliminate tariffs on Canadian mineral exports, and in general, increase certainty, transparency, and foreign investment protections for Canadian mining companies.

Some legislation in Canada allows compliance with similar legislation in foreign jurisdictions to substitute for compliance in Canada. For example, the recent federal *Extractive Sector Transparency Measures Act* allows payment reporting requirements of certain other jurisdictions to be satisfied *in lieu* of compliance with the Canadian statute, at the discretion of the Minister of Natural Resources.

15 Cancellation, Abandonment and Relinquishment

15.1 Are there any provisions in mining laws entitling the holder of a right to abandon it either totally or partially?

Generally, recorded holders may abandon mineral claims and surrender mining leases upon notice or application to the provincial or territorial governing body. The procedure by which a recorded holder may do so differs among each province and territory. For example, in British Columbia, the recorded holder wishing to abandon a claim or surrender a lease must register a discharge with the chief gold commissioner, while in Manitoba a notice of abandonment must be filed along with reports, plans and statistical data.

Further, recorded holders may also apply for a reduction of claim areas, effectively entitling them to partially abandon their claim or lease. Where such reduction is permitted, the method by which the area shall be reduced, and the requirements for a reduction, vary by province and territory. For example, in British Columbia the reduced claim area must comply with the following requirements: (i) it must consist of at least one cell; (ii) if there are two or more cells they must be adjoining; and (iii) the reduced area cannot result in open areas within the cell claim. In Saskatchewan there is also a requirement that the reduced area's total length not exceed six times its total width.

Upon abandonment or surrender, all minerals covered by the mineral claim or lease revert back to the government or the holder of the underlying rights. The recorded holder may remove chattels and fixtures from the land abandoned or surrendered; however, authorisation to do so is required in some jurisdictions, such as in Prince Edward Island. Further, timelines may be imposed for the removal of such property, such as in British Columbia, where the last recorded holder must remove all property within one year after the abandonment.

15.2 Are there obligations upon the holder of an exploration right or a mining right to relinquish a part thereof after a certain period of time?

In most jurisdictions, mineral claims may be renewed indefinitely from term to term until a lease is obtained or the claim is abandoned. However, in certain jurisdictions, mineral claims extinguish upon the expiration of a defined term. In Nunavut and the Northwest Territories, for example, the duration of a mineral claim is 10 years from the date it is recorded unless it is converted into a lease (subject to certain rights of extension).

15.3 Are there any entitlements in the law for the State to cancel an exploration or mining right on the basis of failure to comply with conditions?

Relevant provincial and territorial mining ministries may cancel mineral claims and mining leases where a recorded holder is in breach of an obligation under the applicable legislation.

Mineral claims and mining leases are most commonly cancelled where recorded holders either fail to complete the required assessment work, fail to make payments *in lieu* of assessment work, fail to submit reports respecting the assessment work completed, or fail to make annual lease rental payments. Generally, the cancellation of the mineral claim will take effect immediately upon the failure of the recorded holder to comply with the completion of, the reporting on, or the payment *in lieu* of, assessment work. With respect to mining leases, the provincial or territorial authority will more commonly issue a notice of cancellation, either affording the recorded holder a grace period to comply with the requirement or to enquire into the grounds for cancellation.

Additionally, mineral claims and mining leases may also be cancelled for breach of the provincial or territorial mining legislation, and on various grounds set out in such legislation. A common ground for cancellation is the misrepresentation of the assessment work performed on the claim, though additional grounds may be found in different jurisdictions. For example, in Saskatchewan, there is a further ground for cancellation of a mineral claim or mining lease where an environmental assessment determines that the development should not proceed. In such cases, the legislation itself often provides a procedure for cancellation and review of the decision. In most instances, a notice of breach will be issued first, providing the recorded holder with a grace period to comply with the requirement, following which the provincial or territorial authority may order the cancellation where the recorded holder has not complied. However, in some instances, mineral claims may be cancelled without prior notice to the recorded holder. For example, in Manitoba the provincial authority may cancel a mineral claim or mining lease without prior notice if it is satisfied the claim was recorded as a result of a material misrepresentation in the application to record the claim or lease.

Cancellation proceedings are subject to judicial review by the courts. Please refer to question 11.2 for further discussion on reviewing ministerial decisions.

Note

This chapter is not a compendium of Canadian mining law, as the topic is simply too large for the scope of this chapter. Canadian mining law is location-dependent, and there are many, many locations: 10 provinces and three territories, each with its own laws, and within each province or territory areas within Aboriginal land claim settlement areas or reserves; areas in which the surface is owned by the Crown or by Aboriginal groups or privately; and areas in which the minerals are owned by the Crown or by Aboriginal groups or privately. Canadian mining law is also commodity-dependent, with different laws applicable to hard rock minerals, coal, industrial minerals, petroleum and natural gas, uranium, etc.

As a cautionary note, all of what is set forth above is intended to be indicative only. Even where topics are discussed in some detail they are not intended to be complete, and nothing in this chapter should be relied upon as legal advice.

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1 Relevant Authorities and Legislation

1.1 What regulates mining law?

Mining in Chile is mainly regulated by three legal bodies, which are:

- i) The Chilean Constitution, which establishes the exclusive ownership of the State over all mines and a strong protection of property rights of the private concessionaire over its concession.
- ii) The Mining Concessions Act No. 18,097, which regulates mining concessions, their constitution, acquisition, extinction and the obligations and rights of the mining concessionaire. Also, this act states which kind of substances cannot be granted in concession.
- iii) The Mining Code ("MC") (Law No. 18,248), and its Regulation (Decree No. 1/1989), which establishes the regulation of the mining activity, and in particular, the minerals exploration, exploitation and benefit.

1.2 Which Government body/ies administer the mining industry?

The Government institution related to mining activities is the Ministry of Mining. Its mission is to lead and develop public policies in order to maximise the contribution of the activity to the nation.

Furthermore, under the supervision of the Ministry of Mining, is the National Geology and Mining Service ("SERNAGEOMIN", for its Spanish acronym) which approves technical and safety issues of mining projects and supervises their accomplishment. SERNAGEOMIN is also commanded to perform geological studies of the Chilean territory in order to provide essential information and promote investment.

1.3 Describe any other sources of law affecting the mining industry.

Besides the three legal bodies mentioned in question 1.1, there are some other important regulations that may directly affect the mining industry, such as:

- Mining Safety Regulation, Decree No. 132/2004.
- The Environmental Act No. 19,300, which establishes that certain projects must undergo an environmental impact assessment process (please refer to section 8).

- The Mining Sites and Facilities Closing Act No. 20,551, which regulates the concessionaire obligations related to the closure of the mine and its facilities.
- The Mining Activity Royalty Act No. 20,026 and No. 20,469, which establishes a special tax over mining sales.

Also, regarding the other commonly related aspects of this activity, some other regulations which shall apply are health and safety regulations, labour law, tax law and indigenous law.

2 Mechanics of Acquisition of Rights

2.1 What rights are required to conduct reconnaissance?

According to the Chilean MC, every natural person or legal entity, foreign or national, has the right to conduct reconnaissance on any lands, regardless of who the owner is, except within the limits of an existing mining concession.

Despite that, there are some circumstances stated in the law under which reconnaissance is limited (regulated reconnaissance) or forbidden (prohibited reconnaissance).

Lands of regulated reconnaissance are those fenced or cultivated, where the landowner's authorisation is needed but can be replaced by a court order. Also, certain specially qualified lands, e.g. national parks, border areas, areas of scientific interest and beaches of authorised harbours may also need other approvals from the corresponding authorities.

On the other hand, prohibited reconnaissance occurs over lands which have houses, facilities or have been planted with trees or vines, where it is not possible to overrule the land owner's will.

To conduct reconnaissance, the right holder may impose temporary easements on surface lands.

The easement's duration in this case cannot exceed six months. It will not be necessary to constitute easements to develop reconnaissance activities over state or municipal surface lands not fenced or cultivated in which there are no third parties exploration or exploitation concessions constituted.

2.2 What rights are required to conduct exploration?

In order to conduct exploration activities that would require more invasive measures (e.g. bigger excavations, ground movements), a mining concession is required. As mentioned in question 1.1, in Chile the State owns all mines and the exploration and/or exploitation of those mines must be granted by a mining concession.

Mining concessions are granted through a process before the relevant court. Once granted, the mining concession is a right *in rem*.

The exploration concession is temporary. Its duration is limited to two years. Its purpose is only to study the existence of minerals in a certain area, so it does not allow the concessionaire to exploit the minerals.

In addition, the holder of the mining concession shall require a mining easement over the surface land. The MC regulates a strong system of mining easements, which grants the necessary rights to expedite the mining exploration and exploitation over surface land. At the same time, the MC protects the property rights of the surface land's owner by stating that the mining concessionaire shall pay compensation in order to obtain the easement.

These easements are essentially transitory: they are constituted only for specific mining purposes and terminate once the mining activity finishes.

Finally, it may be necessary to obtain the relevant environmental authorisations, as referred in question 8.1.

2.3 What rights are required to conduct mining?

An exploitation concession is required to pursue mining exploitation activities. The exploitation mining concession has indefinite duration and it will last as long as the concessionaire pays a mandatory licence and accomplishes all requirements according to the MC.

Furthermore, mining easements will be required, and environmental authorisation may be necessary.

2.4 Are different procedures applicable to different minerals and on different types of land?

Questions 2.1, 2.2 and 2.3 above are the general applicable rules for reconnaissance, exploration or exploitation of minerals. Nevertheless, there are some substances that are considered minerals which cannot be granted in concession. This is the case for natural oil and gas, lithium, deposits placed in maritime waters under national jurisdiction, or substances of any kind located in areas that, by law, have been classified as important to national security. These substances may only be exploited by State-owned companies, through administrative concessions, or by entering into special operational agreements.

Additionally, thorium and uranium receive special treatment. These substances can be granted in concession, but because of its potential nuclear use, the State will always have a first purchase option over them.

2.5 Are different procedures applicable to natural oil and gas?

As mentioned above, they can only be explored or exploited by State-owned companies or through special operational contracts or administrative concessions.

3 Foreign Ownership and Indigenous Ownership Requirements and Restrictions

3.1 What types of entity can own reconnaissance, exploration and mining rights?

There is no restriction regarding the types of entity that can pursue

reconnaissance or own exploration or exploitation rights. In this sense, there are no differences between national and foreign, natural persons and legal entities, with only a few exceptions as referred to in question 3.2.

3.2 Can the entity owning the rights be a foreign entity or owned (directly or indirectly) by a foreign entity and are there special rules for foreign applicants?

As mentioned, anyone can own mining rights in Chile, with only very few restrictions. In this sense, there are limitations for foreign entities and persons to acquire State-owned lands located 10 kilometres from the country borderline or five kilometres from the coast. These lands cannot be sold, rented or granted with any other right to foreign entities or persons.

3.3 Are there any change of control restrictions applicable?

In Chilean Mining Law, the general rule is that there are no applicable specific change of control regulations. However, there is no restriction to agree to them through Change of Control Agreement provisions.

Also, there is a legal exception in connection with the mining property that belongs to "CODELCO", the State-owned mining company. Its concessions and mining rights are subject to restrictions to be sold, transferred, seized, encumbered or assigned to third parties.

3.4 Are there requirements for ownership by indigenous persons or entities?

There are no requirements for ownership of mining concessions by indigenous persons or entities. Nevertheless, there are limitations regarding indigenous lands, as it is referred to in question 9.1.

3.5 Does the State have free carry rights or options to acquire shareholdings?

No, there are no special rules that entitle the Chilean State to acquire shareholdings (please see question 2.4 above in connection with the State option to acquire thorium and uranium).

4 Processing, Refining, Beneficiation and Export

4.1 Are there special regulatory provisions relating to processing, refining and further beneficiation of mined minerals?

For Chilean law, processing, refining and further beneficiation of mined minerals are also mining activities and are regulated by its legal framework. The MC expressly recognises the right of the concessionaire to constitute easements over the surface land in order to develop a benefit plant.

However, note that processing, refining and beneficiation facilities would require safety, health and eventually environmental authorisations (please refer to sections 8 and 10 below).

4.2 Are there restrictions on the export of minerals and levies payable in respect thereof?

For most of the substances, there are no special restrictions on the

exportation. However, approval from the Chilean Nuclear Energy Commission is required to perform any act regarding nuclear substances as lithium, thorium and uranium. Thereby, this approval is required to export these substances.

Also, note that export minerals where exploitation is reserved to the State, as mentioned in question 2.4 above, will be limited by the provisions of the special operation contract or administrative concession that authorises its exploitation.

5 Transfer and Encumbrance

5.1 Are there restrictions on the transfer of rights to conduct reconnaissance, exploration and mining?

As reconnaissance can be pursued by any person, no transfer or registration is necessary in connection with this right. On the other hand, mining exploration and exploitation concessions shall be transferred through a regulated and formal process.

These concessions can be transferred without any restriction. However, compliance with all the formal requirements established by law is necessary. In this sense, the transfer of exploration and exploitation concessions must be conducted through the execution of a public deed, which shall be recorded in the Mining Property Registry of the corresponding Mining Registrar.

5.2 Are the rights to conduct reconnaissance, exploration and mining capable of being mortgaged or otherwise secured to raise finance?

Exploration and exploitation concessions can be mortgaged in the same way as any other right *in rem*. It is also possible to grant other encumbrances over these concessions, such as easements, usufructs or options.

All mortgages and encumbrances constituted on these concessions must be recorded in the registry of Mortgages and Encumbrances of the corresponding Mining Registrar.

6 Dealing in Rights by Means of Transferring Subdivisions, Ceding Undivided Shares and Mining of Mixed Minerals

6.1 Are rights to conduct reconnaissance, exploration and mining capable of being subdivided?

According to the MC, exploration and exploitation concessions are capable of being subdivided prior to authorisation of SERNAGEOMIN, which shall state that all the resulting parts of the subdivided concession fulfil the minimum legal requirements that every single concession must comply, such as the minimum surface size, shape and orientation. Once the subdivision has been approved, each of the resulting parts will be considered as independent mining concessions.

As previously stated, every person is entitled to pursue reconnaissance. As it is not a formal right, it is not possible to subdivide it.

6.2 Are rights to conduct reconnaissance, exploration and mining capable of being held in undivided shares?

In Chile, when two or more persons jointly constitute or acquire an

exploration or exploitation mining concession, a legal entity called Legal Mining Company is formed by the sole effect of the law, which will own the concession. This legal entity can be transformed, at any time, into a mining corporation, through the agreement of its members or shareholders.

6.3 Is the holder of rights to explore for or mine a primary mineral entitled to explore or mine for secondary minerals?

Following the Chilean Constitution and the Mining Concessions Act No. 18,097, the holders of exploration and exploitation concessions are entitled to explore and mine all the metallic and non-metallic substances that are in the concession area, except those reserved to the Chilean State as indicated in question 2.4.

6.4 Is the holder of a right to conduct reconnaissance, exploration and mining entitled to exercise rights also over residue deposits on the land concerned?

The MC establishes that minerals substances located in residue deposits may be granted in concession once a prior mining concession has expired or when the owner of those mining facilities has abandoned them. Therefore, only with a new concession over the area where these mineral substances are located, a concessionaire will be entitled to exercise its rights of exploration and exploitation over residue deposits that exist on the relevant land.

In any case, the holder of these rights would not be able to explore or exploit the deposits without the relevant easement over the surface land, as mentioned in question 2.2.

6.5 Are there any special rules relating to offshore exploration and mining?

As referred above, according to Chilean law, minerals located in maritime waters of national jurisdiction can only be granted in concessions when they are reachable by tunnels from the coast. To explore and exploit these substances, the general regime of authorisations, as stated in the answers above, is applicable.

On the other hand, mineral substances under waters of national jurisdiction that are not reachable by tunnels cannot be granted in concession. They can only be exploited by State-owned companies or through administrative concessions or special operational agreements (please refer to question 2.4). In these cases, it could be necessary to obtain a maritime concession from the Ministry of Defence. In addition, other relevant authorisations according to environmental, health and labour laws shall be applicable.

7 Rights to Use Surface of Land

7.1 Does the holder of a right to conduct reconnaissance, exploration or mining automatically own the right to use the surface of land?

No, the property rights over exploration or exploitation concessions are different from property rights over the surface lands where the mining concessions are located. Those concessions do not grant any right to use the surface land, but it is possible to constitute and impose mining easements over the surface land to exercise these rights.

Note that the Chilean Constitution states that surface lands shall be subject to the obligations and limitations that the law may provide

with the purpose of expediting the exploration and exploitation of mines (please refer to question 2.2).

7.2 What obligations does the holder of a reconnaissance right, exploration right or mining right have *vis-à-vis* the landowner or lawful occupier?

In the event that it is necessary to constitute an easement over the surface land in order to perform the mining activities, the holder of the exploration or exploitation concession will be compelled to compensate the owner of the surface land for the damages caused by its mining activities. The amount of this compensation must be determined before the constitution of the easement by the relevant parties or by the relevant court if such agreement is not reached.

7.3 What rights of expropriation exist?

The exploration and exploitation concessionaires do not have any expropriation rights over the surface lands in order to develop their mining operations. However, as mentioned in the answer to question 2.2, the MC regulates a strong system of mining easements which grants the necessary rights to expedite mining exploration and exploitation over the surface land.

8 Environmental

8.1 What environmental authorisations are required in order to conduct reconnaissance, exploration and mining operations?

The Environmental Act and its Regulation distinguish among exploration, prospection and exploitation for the purposes of the environmental assessment of mining activities. According to this regulation, exploration does not require an environmental assessment. However, note that prospection requires such assessment. The difference between one and the other is that prospecting is works and actions performed with the purpose of reducing geological uncertainties related to mineral concentrations in a mining project and which require more than 40 platforms (or 20 platforms in certain regions). Exploration, on the other hand, requires fewer platforms than prospecting. Finally, mining exploitation would require an environmental assessment when its purpose is to mine one or more deposits of which the mineral extraction capacity is over 5,000 tonnes per month.

Also, mining waste and tailings disposals of mining exploitation projects that need environmental authorisation will need to undergo an environmental assessment (tailing dams will also require an environmental assessment due to its capacity or dam size, as stated in question 8.2 below).

It should also be considered that after a project obtains its environmental authorisation, it must obtain all other necessary legal authorisations before the sectorial authorities, such as authorisations for construction, waste management, water treatment, exploitation of native forest, wildlife capture, excavation in archaeological sites, etc. Note that the relevant authorities cannot deny such authorisations due to environmental reasons.

For those projects or activities that do not require an environmental assessment, each specific authorisation or permit must be requested directly before the corresponding sectorial authority.

8.2 What provisions need to be made for storage of tailings and other waste products and for the closure of mines?

In addition to what it is mentioned in question 8.1 above, Decree No. 248/2007 about approval, design, construction, operation and closure of tailings deposits states that an approval from SERNAGEOMIN is needed to build and operate any waste or tailing dump. Also, any amendment to the approved project during construction or operation has to be authorised by SERNAGEOMIN before its implementation.

Tailing dumps need the authorisation of the General Water Bureau, when their capacity is of 5,000 m³ or more, or its wall is taller than five metres.

Finally, to shut down tailings or waste deposits, a Closure Plan, including safety and environmental measures, must be filed and approved by the SERNAGEOMIN.

8.3 What are the closure obligations of the holder of a reconnaissance right, exploration right or mining right?

The Mining Sites and Facilities Closing Act No. 20,551 and its Regulation, which specifically regulates the process and requirements for the closure of a mining exploration or exploitation site, and their facilities, compels every mine to have a Closure Plan approved by SERNAGEOMIN before the beginning of the mining operations. Such Closure Plan shall also be periodically updated as the mining exploration or exploitation project is executed.

A Closure Plan is a document that contains all the actions and measures that shall be taken in order to mitigate the negative effects generated with the closure of the mine. It has to consider every facility of the mining operation in order to ensure physical and chemical stability in accordance with environmental applicable regulations. The execution of these actions and measures has to safeguard life, health, safety of the population and the environment.

Mining companies must provide a warranty to ensure the complete and timely fulfilment of the obligations stated in the approved Closure Plan. The amount of the warranty shall be estimated according to the criteria stated in the law.

8.4 Are there any zoning or planning requirements applicable to the exercise of a reconnaissance, exploration or mining right?

The MC establishes that to pursue mining activities some authorisations will be required under certain circumstances due to zoning reasons. For example, pursuing mining activities:

- within cities or towns, cemeteries, beaches of habilitated harbours, potable water extraction points require the authorisation of the corresponding Governor;
- within national parks, national reservoirs or natural monuments, this requires the authorisation of the corresponding “Intendente”;
- within zones declared as border areas for mining purposes, this requires the authorisation of the Border and Limits Department of the Foreign Affairs Ministry;
- within military zones and facilities like harbours and aerodromes, this requires the authorisation of the Defence Ministry; and
- within zones declared as of scientific interest for mining purposes, this requires the authorisation of the President of the Republic.

Also, according to the General Law of Urbanism and Construction (Decree No. 458/1976) every activity (including mining activities) has to be performed in accordance with zoning and territory planning regulations. Mining reconnaissance, exploration and exploitation activities are subject to these regulations.

9 Native Title and Land Rights

9.1 Does the holding of native title or other statutory surface use rights have an impact upon reconnaissance, exploration or mining operations?

Native property is protected by the Indigenous Act (No. 19,253). According to this regulation, no indigenous land can be transferred, seized, encumbered, nor subjected to a statute of limitations, except between indigenous people or communities of the same ethnicity. Nonetheless, the National Corporation for Indigenous Development (“CONADI” for its Spanish acronym) may authorise its encumbrance when it does not include the family’s house and necessary land for their livelihood.

In this sense, it is possible to have mining exploration or exploitation concessions located within indigenous lands; but, as mentioned in the answer to question 2.2, the concessionaire shall obtain a mining easement over such surface land, for which purpose the approval of CONADI is needed.

10 Health and Safety

10.1 What legislation governs health and safety in mining?

Decree No. 132/2004 about Mining Safety is the relevant regulation regarding health and safety matters in mining. The aim of this regulation is to protect life and health of those who work in and are related to the mining activities, and to safeguard the facilities and infrastructure of the mining projects.

Additionally, there are other relevant regulations regarding this subject that are compulsory for the mining industry, such as the Labour Code, the Sanitary Code and Decree No. 594/1999 that establishes the sanitary and safety conditions necessary for working places.

10.2 Are there obligations imposed upon owners, employers, managers and employees in relation to health and safety?

Applicable regulations impose several relevant obligations to mining employers regarding health and safety. For example: train the workers to safely operate the mining machinery and equipment, provide the necessary personal protection equipment to its workers, permanently maintain a first aid kit and provide transportation to the injured workers. Generally, the mining company as a direct or indirect employer shall pursue every action to guarantee the safety and physical integrity of its workers, its facilities, equipment and machinery.

On the other hand, there are obligations imposed upon workers, such as following the rules and internal regulations regarding health and safety, checking the proper functioning of the machinery and equipment, use of the personal protection equipment, etc.

Furthermore, there are also obligations imposed upon managers, such as supervising the workers and enforcing the safety rules.

11 Administrative Aspects

11.1 Is there a central titles registration office?

Chile has local Mining Registrars where exploration and exploitation mining concessions are registered. According to the MC, the judgment granting a mining concession shall be registered in the corresponding Mining Registrar. In addition, such Registrar shall note concessions transfers, incorporation of mining corporations, share transfers, mortgages, liens, interdictions, prohibitions and lawsuits related to the mining concessions registered on its registries. In addition, certain acts, agreements and contracts related to mining concessions shall also be registered.

11.2 Is there a system of appeals against administrative decisions in terms of the relevant mining legislation?

According to Chilean public law rules, all the administrative decisions are subject to review before the authority who issued the decision or before its superior (in case it exists) and after this, they may be claimed before ordinary courts.

12 Constitutional Law

12.1 Is there a constitution which has an impact upon rights to conduct reconnaissance, exploration and mining?

As said in the answer to question 1.1, the Chilean Constitution provides the legal grounds for the mining regulation.

The Constitution states that all mines belong exclusively to the State of Chile, and any person or company may be granted exploration and exploitation rights over minerals and substances through mining concessions. These mining concessions must be granted through a judicial proceeding. The Constitution grants the concessionaire with property rights over them.

Also, as mentioned in the answer to question 7.2, the Chilean Constitution states that surface land is subject to the obligations and limitations that the law may provide with the purpose of expediting the exploration and exploitation of mines.

12.2 Are there any State investment treaties which are applicable?

Chile has signed several bilateral and multilateral free trade agreements with other countries, such as the United States, Canada, Mexico, China and the European Union. In addition, Chile is part in the Trans-Pacific Partnership treaty and has signed numerous double taxation treaties. To consult a specific treaty, we suggest to visit the following link: https://www.leychile.cl/consulta/tratados_por_pais.

13 Taxes and Royalties

13.1 Are there any special rules applicable to taxation of exploration and mining entities?

As a general rule, mining activity in Chile is subject to the general tax regime applicable to all companies. Therefore, Corporate Tax is applied on profits, after acquittal of the specific mining tax (see

the answer to question 13.2), and a Withholding Tax of 35% shall be deemed to any distributions or dividends remitted abroad. Please note that the Corporate Tax paid may be partially or totally deducted from the Withholding Tax, depending on the tax regime elected and the domicile of the person/legal entity receiving the distribution.

In special cases, mining companies may apply for special Value Added Tax exemptions.

In addition, an annual payment of a mining licence is required to keep the mining concessions in good standing.

Also, holders of a Foreign Investment Contract signed before December 1st, 2004, are protected by a general tax stability and/or a stability pact under the Foreign Investment Statute, and shall not be affected by this specific mining tax for as long as their stability pact lasts.

13.2 Are there royalties payable to the State over and above any taxes?

Mining companies are subject to an additional taxation (locally referred to as “mining royalty”) depending on the amount of the annual sales. This tax is applicable for mining companies with sales of minerals over which concessions may be granted and for sales over 12,000 metric tonnes of fine copper. The value of a metric tonne of fine copper is used as a measure to determine the amount of the tax. The tax rate of this “mining royalty” may vary from exempt to 14% for companies with annual sales exceeding 50,000 metric tonnes of fine copper. For the purposes of calculating the annual sales, sales made by related entities must be considered.

This “mining royalty” is a deductible expense for Corporate Tax purposes.

The taxable base is determined upon the net taxable income of the company (according to the general provisions of the Chilean Income Tax Law), with some specific adjustments.

14 Regional and Local Rules and Laws

14.1 Are there any local provincial or municipal laws that need to be taken account of by a mining company over and above National Legislation?

Despite specific regulations regarding territory zoning and planning that were referred to in question 8.4 above, there are no regional, provincial or municipal laws to be taken into account

14.2 Are there any regional rules, protocols, policies or laws relating to several countries in the particular region that need to be taken account of by an exploration or mining company?

No, there are not.

15 Cancellation, Abandonment and Relinquishment

15.1 Are there any provisions in mining laws entitling the holder of a right to abandon it either totally or partially?

The concessionaire has the right to abandon by unilaterally relinquishing, totally or partially, its exploration and exploitation mining concessions. Nevertheless, it shall never affect third-party rights. The abandonment must be performed by public deed, and will only produce its effects with the cancellation of the registration of the mining concession.

15.2 Are there obligations upon the holder of an exploration right or a mining right to relinquish a part thereof after a certain period of time?

Our law establishes a case of mandatory relinquishment of mining concessions only in connection with exploration concessions. It settles that the exploration concession is granted for two years and that at the end of this period, the concession's owner is entitled to request an extension for two more years. If it requests such extension, it will be forced to abandon, at least half of the original concession area. The exploration concession will be extinguished in the relinquished part and extended only for the remaining area.

15.3 Are there any entitlements in the law for the State to cancel an exploration or mining right on the basis of failure to comply with conditions?

The holder of a mining right or concession is bound to an annual payment for either exploration or exploitation concessions. The lack of payment or partial or late payment enables the Treasury Department to initiate a process before courts in order to sell the mining concession in a public auction. Only in the event that there is no bidder will the judge declare the concession extinct, ordering the cancellation of its registration.

In addition, the exploration concession has a special rule on this which establishes that a judge must declare the expiration of an exploration concession when the concessionaire starts mining within the limits of the concession.

As it can be noted, in both cases the cancellation process is conducted before a judge and not before the administration, thus ensuring a process without arbitrariness or discrimination.

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Colombia

Martínez Córdoba & Abogados Asociados

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1 Relevant Authorities and Legislation

1.1 What regulates mining law?

Mining-related regulation:

- The Colombian Constitution considers subsoil as part of the Colombian territory (article 101) and declares, as a National State, ownership of the mining subsoil in which the exploitation of minerals is subject to royalties' payment (articles 330, 332, 360 and 361). It also states that through the law, conditions for exploration and exploitation shall be settled as well as royalty related payment.
- Mining Law (Law 685/2001) regulates mining activities and the concession contract, which grants rights to explore, exploit and have easements to perform mining operations.
- Law 1658/2013, known as "mercury law" which introduces mechanisms to formalise illegal mining activities through subcontracts with registered concession holders.
- There are some mining titles granted according to previous mining law, which are ruled by it (Decree 2655/1988).
- Law 1753/2015 (National Development Plan Law) modified the Mining Code with regard to extension of the concession contracts and the existence of a preference right to obtain a new concession in small-scale projects when the previous licence's term finishes.
- Law 1753/2015 also included a provision ordering a differentiation of mining projects based on scale (Small, Medium and Large-Scale). This will allow the implementation of a public policy for each type of mining and its corresponding regulation.
- Law 1753/2015, prescribes a new Social Program as a mining concession obligation in addition to the Corporate Social Responsibility and social obligations already included in the Environmental Licence.
- Decree 2504/2015 orders to issue new Terms of Reference to elaborate the Works and Instalment Program for Small Scale Mining.
- Decree 1666/2016 established the criteria for mining classification based on extension for exploration and production for exploitation. Further regulations are currently pending to be issued.
- Decree 0276/2015 created the Mining Trading Registry (RUCOM), in order to control authorised trading companies.
- Resolution 91544/2014 Mining sanctioning regime. Fines applicable to concession holders.

- Resolution 483/2015 rules the submission of geological information to the National Mining Agency, which is pending to be enforced due to technical problems to receive such information.
- Resolution 41265/2016 about requisites to exercise preference right to obtain new concessions in small-scale projects which previous licence's term has finished.
- Resolution 40103/2017 states amount of production for subsistence mining.

Royalty-related regulation:

- An amendment to articles 360 and 361 of the Colombian Constitution was made in 2011 to create a new Royalty General System, in order to develop a better distribution among the different regions and a better investment of the income received.
- Also a new Law was issued in 2012, Law 1530/2012, regulating the organisation and functioning of the Royalty General System, and creating five (5) funds in which the income will be credited for further distribution.
- Decree 1493/2015 regulated royalty participation among the corresponding territorial entities.
- Resolution 855/2013 establishes the terms and conditions for the determination of the liquidation basis for royalty liquidations and set-off in coal production.
- Resolution 848/2014 establishes the terms and conditions for the determination of the liquidation basis for royalty liquidations and set-off in precious stones and metals, iron, and other metallic minerals' production.

Environmental-related regulation:

- Colombian Constitution is well known as a "green constitution" and prescribes a sustainable development model for the country. Citizens have the right to a healthy environment.
- Decree 2811/1974 is the Renewable Natural Resources and Environmental Code, applicable to mining in the pertinent aspects.
- Law 99/1993 is the Environmental National Law and Decree 1076 of 2015 is a new compilation of all existing decrees regarding the environment and sustainable development sector, in issues such as air pollution permits, water usage, discharge permit, logging of forests species permit, required for mining projects.
- Law 1333/2009 regarding Environmental Sanctioning Regime for regulations violation, environmental damages and breaching of environmental licences provisions.
- Law 1450/2015 introduces new prohibitions to carry out mining activities in Environmental Protected Areas, in addition to the ones included in the Environmental Protected

Areas System, such as wetlands and conservation forestry reserves.

- Decree 2372/2010 creates the Environmental Protected Areas System, which are prohibited or restricted areas for mining activities according to article 34 of Law 685/2001 (Mining Code).
- Decree 330/2007 about Environmental Licensing Public Audience, regulates the citizen participation during the administrative procedures of environmental licensing for mining projects.

Social-related regulation:

- Colombia's Constitution gives special protection to ethnic minorities and their territories. It also states the right for them to be consulted about any legal or administrative decision that may impair the cultural, social and economical integrity of ethnic communities.
- Law 1757/2015 regarding citizen participation on public affairs.
- Law 448/2011 about Land Restitution to Victims of Violence, which may restrict mining activities in order to facilitate victims' land restitution.

Other applicable regulation:

- Criminal code.
- Tax statute.
- Foreign Exchange Regulation (law 9 of 1991 and Decree 1735/1993) and a special regime for coal, ferronickel and uranium (chapter 11 of the external regulatory circular – DCIN-83 issued by the Board of Director of the Central Bank).
- Law 1682/2011 modified by Law 742/2014 known as Road Transport Law that rules the usage of sand and gravel to build and maintain roads.

1.2 Which Government body/ies administer the mining industry?

The head of the mining sector is the Minister of Mines and Energy. This Minister has a Vice-Minister for mining exclusively and two Directors (corporate mining and formalisation of irregular mining activities) and several ascribed entities involved in mining affairs: Mining National Agency (ANM), responsible for the administration of the mining resources, granting the mining concessions, following projects and administering the Mining Registry and Mining Cadaster, known as "Mining Authority"; Colombian Geological Service (SGC), responsible for the study of the subsoil and its resources; and the Mining and Energy Planning Unit (UPME), responsible for investigation, raising information for public policies designing, fixing prices of minerals for royalty payments and administering the Mining Information System.

There is a special case in the Province of Antioquia where a delegation has been given to a Mining Secretary of the province to administer the mining resources, due to their leadership in a number of mining projects. This Secretary is also a Mining Authority for the province.

The head in the environmental sector is the Minister of Environment and Sustainable Development, the National Environmental Licensing Authority (ANLA), responsible for granting environmental licences for Large-Scale Mining Projects and the Autonomous Regional Corporations (CAR), responsible for granting Environmental Licences to Medium and Small-Scale Mining Projects.

For minorities consultation, the Minister of Interior has a specialised group in charge of leading the consultation process who are required during the environmental licensing procedures. The Colombian

Institute of Anthropology and History (ICANH) cares for cultural patrimony conservation and has a role in mining. The National Land Agency (ANT) is responsible for ruling the minorities' territories and granting the collective property to these peoples.

The Minister of Defence and a special ascribed entity (INDUMIL) is in charge of providing explosives required by certain types of mining. A certificate is provided by the Mining Authority to be handled by INDUMIL concerning the mining plan and the need for explosives.

1.3 Describe any other sources of law affecting the mining industry.

Decisions by high courts in Colombia have great impact on the interpretation of existing regulation and its application by national, regional and local authorities. The Constitutional Court is responsible for interpretation of the Constitution and protection of Human Rights, first, second and third (collective) generation rights; the Council of State acts as head of the Administrative Justice; and the Supreme Court acts as head of the Civil Justice, all of them playing an important role in developing case law impacting the mining sector.

2 Mechanics of Acquisition of Rights

2.1 What rights are required to conduct reconnaissance?

Reconnaissance activities according to the Mining Code do not require a concession. Such activities may be carried out freely except in areas where natural reserves or ethnic minorities are located. Private Property has also to be respected and authorisation from the landowner may be required.

2.2 What rights are required to conduct exploration?

Exploration requires a mining concession. Therefore the interested person must obtain a concession granted by the Mining Authority (ANM) that should be executed and registered in the National Mining Registry before commencing exploration activities.

Regarding environment, the concessionaire must apply environmental exploration guidelines and obtain specific permits that may be required, e.g. for conducting drilling, such as a water consumption permit or a discharge permit.

With respect to access to the land, there are three main considerations: (i) private property – the concessionaire requires easements and these can be agreed with the landowner through direct private negotiations or through administrative/judicial proceedings; (ii) minorities' territories – prior consultation is required with the correspondent peoples; and (iii) territory ordinance – the municipalities and district authorities and the Mining Authority should coordinate their administrative competences in order to adopt adequate measures to protect the environment, health, hydrological basins, and the economic and cultural development of communities in the location or region where the project will stand, in compliance with ruling C-123/2014 from the Constitutional Court.

2.3 What rights are required to conduct mining?

A mining concession is required for mining. The Mining Authority grants the concession with two main faculties: explore; and exploit. According to mining law, the concession contract has three stages:

exploration; construction; and installation and exploitation. Once exploration is finished, the concessionaire prepares two studies: (i) a Works and Installations Program; and (ii) an Environmental Assessment Study, in order to obtain authorisations from the Mining and Environmental authorities. When the authorisations are granted, exploitation can be commenced. Mining activities must not be interrupted without previous authorisation from the Mining Authority due to specific causes such as *force majeure* or technical or economic difficulties sufficiently proven by the concessionaire. Royalties should be paid quarterly and technical information should also be provided periodically, in order to facilitate supervision by the authority. The amount of mineral produced must be the one approved in the Works and Installations Program and the Environmental Licence. If there are changes in the project, all authorisations must be modified as well.

2.4 Are different procedures applicable to different minerals and on different types of land?

There is a new classification of projects by scales (small, medium and large-scale) in order to adopt different public policies and regulations. On the other hand, depending on the mineral royalty payments vary.

With respect on the type of land, there are three possibilities (i) publicly owned land, (ii) privately owned land, and (iii) minority-owned land. Easements are required to occupy third parties owned land. As mentioned above, previous consultation is required to occupy minorities' land in addition to establishment of easements.

2.5 Are different procedures applicable to natural oil and gas?

Yes. Natural oil and gas have their own regulation and procedures. The exploration and exploitation of these resources are not considered to be mining activities. The oil and gas authority is the National Hydrocarbons Agency (ANH). The gas methane in coal deposits or coalmines is considered a hydrocarbon, and for that reason is administered by the ANH.

3 Foreign Ownership and Indigenous Ownership Requirements and Restrictions

3.1 What types of entity can own reconnaissance, exploration and mining rights?

Individuals and corporations can be concessionaires. For individuals, the condition is to be legally capable. Regarding corporations, they can have national or foreign capital, and they are equally treated. There is a legal condition of having exploration and exploitation as a purpose of the company to be a mining concessionaire.

3.2 Can the entity owning the rights be a foreign entity or owned (directly or indirectly) by a foreign entity and are there special rules for foreign applicants?

Foreign entities should have a local branch or an affiliated or subsidiary in Colombia to be the concessionaire.

3.3 Are there any change of control restrictions applicable?

Not yet. There are currently discussions about the convenience of

establishing this kind of control provisions, but nothing has been adopted yet.

3.4 Are there requirements for ownership by indigenous persons or entities?

Within indigenous or Afro-Colombian territories, these communities can ask for concessions to perform mining activities, and they have a preference right to the mining concession. The concession shall be granted to the community and not the individuals. This is an exception to the rule "first in line, first in right".

3.5 Does the State have free carry rights or options to acquire shareholdings?

The State does not have rights to acquire mining rights or to participate in mining activities in the current legislation.

4 Processing, Refining, Beneficiation and Export

4.1 Are there special regulatory provisions relating to processing, refining and further beneficiation of mined minerals?

Processing, refining, beneficiation and transformation of minerals are authorised activities to be performed as part of the mining project. It is optional to the concessionaire to include part or all of these activities. If they are not included, they are considered free industrial activity. Nevertheless the refining and beneficiation plants must be registered in the Mining Trading Registry (RUCOM), in order to exercise control over mineral products commercialised, distributed and exported.

4.2 Are there restrictions on the export of minerals and levies payable in respect thereof?

Exports of mined minerals are governed by general foreign trade regulation and there are no restrictions applicable particularly to the sector except for providing evidence of payment of the corresponding royalties.

5 Transfer and Encumbrance

5.1 Are there restrictions on the transfer of rights to conduct reconnaissance, exploration and mining?

For reconnaissance there are no restrictions since it is a free activity. Transfer can be done over rights or area. When is done with respect to rights, percentages or rights can be transferred and a co-ownership will rise with solidarity between the concessionaires. When the transfer means a division of the concession's area, a new concession shall be granted to the assignee. That means the assignor shall have its concession reduced in area and the Works and Installations Program and the Environmental Licence modified. The assignee shall have to submit a Works and Installations Program and an Environmental Assessment Study to support its newly granted concession and the Environmental Licence.

As requisites to be fulfilled, parties in an assignment must give prior notice to the Mining Authority and provide the necessary

information about the assignee, its legal capacity, technical and economic sufficiency and labour and environmental suitability.

5.2 Are the rights to conduct reconnaissance, exploration and mining capable of being mortgaged or otherwise secured to raise finance?

Mining law allows pledging mining rights and mining current and future products. Also, those rights can be used in securitisation processes. The procedures are stated in commercial and public market regulations.

Law 1676/2013 known as “mobile guaranties law” has modified the Mining Code with respect to giving publicity to mining pledges. No longer the National Mining Registry gives the required publicity and the necessary priority to this kind of guarantee when paying debts. For that reason, it is highly recommended to inscribe mining pledges in the mobile guaranties register.

Finally, it is important to mention Colombia is working on a Project of Standardisation and Classification of Resources and Reserves, working on two key management axes. The first is to structure and establish a standard for Colombia in the submission of technical reports on the results of exploration, estimation and classification of mining resources and reserves. The second objective is to manage the formation of the Colombian Qualification Commission of Resources and Reserves. The International Committee for the Reporting of Mining Resources and Reserves (CRIRSCO) has been permanently accompanying the project led by the ANM in coordination with the Ministry of Mines and Energy, as well as the Chilean Qualification Commission on Resources and Reserves; the Brazilian Commission on Resources and Reserves (CBRR) and the Australian Joint Ore Reserves Committee (JORC).

6 Dealing in Rights by Means of Transferring Subdivisions, Ceding Undivided Shares and Mining of Mixed Minerals

6.1 Are rights to conduct reconnaissance, exploration and mining capable of being subdivided?

The mining concession can be subdivided and a new concession shall be granted as a result of the division. The mining authority must be informed and administrative proceedings shall be performed in order to have the concession modified and the new areas arisen covered by new concessions. Each concession will require its own Works and Installations Program and Environmental Licence.

6.2 Are rights to conduct reconnaissance, exploration and mining capable of being held in undivided shares?

Yes. Several individuals or corporations can own one concession. There will be solidarity with respect to rights and obligations derived from the concession. They can also negotiate their rights with third parties individually.

6.3 Is the holder of rights to explore for or mine a primary mineral entitled to explore or mine for secondary minerals?

The concessionaire has the right to exploit those minerals that are found linked or associated with the primary mineral or obtained as

sub-products of the exploitation. Nevertheless, when minerals of important quality and quantity justify, for technical and economic reasons a separate project, the concession shall be modified to add a second primary mineral. No longer can a mineral with such characteristics be mined as a sub-product.

6.4 Is the holder of a right to conduct reconnaissance, exploration and mining entitled to exercise rights also over residue deposits on the land concerned?

Yes. Residue deposits on the land may be mined by the concession-holder, provided the Works and Installations Program and the Environmental Licence are modified to include this activity and the royalties are paid. New regulations regarding subsistence mining have also allowed artisan miners to mine those residues and agreements between concessionaires and artisan miners are required.

6.5 Are there any special rules relating to offshore exploration and mining?

The Mining Code has a special chapter for offshore exploration and mining in national and international waters. This kind of activity requires an environmental licence and a favourable opinion of the General Maritime Directorate of the Ministry of Defence.

7 Rights to Use Surface of Land

7.1 Does the holder of a right to conduct reconnaissance, exploration or mining automatically own the right to use the surface of land?

There is no obligation for the concessionaire to have surface land ownership. The mining concession grants the right to affect with easements the property of third parties over the land. It also can be upon the expropriation of land to perform mining activities, through a mixed procedure: partially administrative; and partially judicial. The necessity of the land to the project has to be proven by the concessionaire.

The mining easements are compulsory and although the Mining Code mentions several, they are not the only ones possible. The concessionaire may ask for any facilities the project may require. Compensation has to be paid to the owner of the land and also when an expropriation is declared.

When the land belongs to ethnic minorities, a prior consultation has to be performed.

7.2 What obligations does the holder of a reconnaissance right, exploration right or mining right have vis-à-vis the landowner or lawful occupier?

As already mentioned, compensation has to be paid to the landowner or the lawful occupier. Although law mentions some rules, it allows for private agreements in other ways.

7.3 What rights of expropriation exist?

An Expropriation right can be exercised over real estate. Usually, this is asked for in the exploitation phase and only in exceptional circumstances is asked for in the exploration phase. Expropriation cannot be exercised between miners.

8 Environmental

8.1 What environmental authorisations are required in order to conduct reconnaissance, exploration and mining operations?

Reconnaissance activities do not require any environmental authorisation unless natural renewable resources are used. In that case, permits are required.

Exploration activities require the application of environmental guidelines and permits when natural resources are used (water usage, waste disposal, logging of forest species).

8.2 What provisions need to be made for storage of tailings and other waste products and for the closure of mines?

The Mining Code establishes mine closure as a stage of the mining project, and therefore an obligation of the mining concession. A closure plan must be included in the Works and Installation Program. Also the environmental legal framework considers closure plan as an obligation and should be included in the Environmental Assessment Study.

Law 1753/2015 states the government shall establish the environmental, technical, financial, social conditions and other issues that the mining concessionaire must observe when executing the mine closure and abandonment plan, including the provision of resources for that purpose and/or its guarantees. In addition, the government shall adopt the procedure for the approval of said plan and the compliance with this obligation. Those regulations are pending being issued and shall modify the existing regulations about closure.

8.3 What are the closure obligations of the holder of a reconnaissance right, exploration right or mining right?

Closure obligations are of a technical, environmental, financial and social nature. They are included in the Works and Installation Program and the Environmental Assessment Study approved, and in the future new conditions shall be established in the new regulations to be issued.

In addition, an insurance policy is required for the term of the concession and three more years, to guarantee compliance of mining and environmental obligations due at the time of termination, including closure.

8.4 Are there any zoning or planning requirements applicable to the exercise of a reconnaissance, exploration or mining right?

Although the subsoil belongs to the State, and the Mining Authority can grant concessions almost in every part of the territory, environmental prohibitions or restrictions can be established by competent authorities, affecting areas for mining. Articles 34 and 35 of the Mining Code sets part of those prohibited and restricted areas. Nevertheless, the Constitutional Court has ruled that these are not the only prohibited areas for mining and has encouraged the environmental authorities to continue studying zones and limiting for protection purposes additional areas. Currently, the Mining Cadastre can be consulted about most of the prohibited or restricted areas.

9 Native Title and Land Rights

9.1 Does the holding of native title or other statutory surface use rights have an impact upon reconnaissance, exploration or mining operations?

Please see answers on preferential rights and prior consultation proceedings under questions 2.2 and 3.3 above.

10 Health and Safety

10.1 What legislation governs health and safety in mining?

There are two health and safety specialised regulations for mining: (i) Decree 2222/1993 for Open Pit mining; and (ii) Decree 1886/2015 for underground mining.

In addition, the general regulation is also applicable:

- Decree 1443/2014 regulates the health and safety of the workplace system.
- Decree 1477/2014 introduces a new chart with the list of labour-related diseases.
- Decree 1072/2015 is a compilation of all existing decrees in the labour sector.

Therefore, the authorities' supervision verifies compliance with both sets of rules.

10.2 Are there obligations imposed upon owners, employers, managers and employees in relation to health and safety?

Obligations on mining safety include: forming a committee of medicine; industrial hygiene and safety; providing workers with necessary protective elements; and enrolling them in the social security and fringe benefits systems. Other HSE-related regulations refer to: the construction of camps, medical and paramedical services; handling of explosives; transport of individuals and materials; storage of fuels and materials; handling of machinery and equipment; fire prevention and control; lighting; work carried out at heights; temperature and humidity; pollution of air, water and soil; and special provisions on the exploitation of construction materials and alluvial mining. The recent Decree 0472 of 2015 also states that employers must report any labour-related accident or illness both to the Labour Ministry and to the Health and Professional Risk entities, no later than within the following two business days.

11 Administrative Aspects

11.1 Is there a central titles registration office?

Yes. Information about mining properties can be found in:

- (i) The Mining Cadastre: mining applications, mining concessions, environmental restrictions and prohibitions, ethnical minorities' territories and other relevant information that can affect mining areas.
- (ii) The National Mining Registry: gives publicity and makes enforceable the following:
 - a. concession contracts;
 - b. contracts of exploration and exploitation celebrated on the reserved areas, indigenous mining areas, mining areas of Afro-Colombian communities and mixed areas;

- c. titles of private ownership of the mining subsoil;
- d. assignment of mining titles;
- e. liens of any type that might affect the right to explore and exploit or the future production of the minerals “*in situ*”;
- f. expropriation on the right to explore and exploit, emanated from the mining titles;
- g. areas of provisional reserve and of national security;
- h. temporary authorisations for the public roads;
- i. indian mining areas, or of Afro-Colombian and mixed communities; and
- j. subcontracts for formalisation purposes.

11.2 Is there a system of appeals against administrative decisions in terms of the relevant mining legislation?

Appeals are governed by general administrative law rules. Any administrative decision is subject to a reconsideration remedy before the same authority issuing it. Thereafter, there is the possibility to start contentious-administrative proceedings. The Mining Code also includes certain remedies against particular acts or contracts namely: nullity of the contract, environmental actions for annulment; and actions to modify or add, entirely or in part, the conditions, terms and modalities of an environmental licence.

12 Constitutional Law

12.1 Is there a constitution which has an impact upon rights to conduct reconnaissance, exploration and mining?

The Colombian Constitution establishes several provisions that impact mining activities. Declarations regarding State property of the subsoil being part of the nation's territory, obligation of paying royalties and compensations for the exploitation of mineral resources, the investment of revenues produced by mining activities with the purpose of achieving an improved quality of life for the inhabitants, the equitable distribution of opportunities, and the benefits of development and conservation of a healthy environment. On the other hand, this gives special protection to the minorities' rights to territory, to obtain protection over their culture and ways of production, and also to collective rights such as a healthy environment, access to water and conservation of water supply means and the obligation to apply sustainable development principles to all private economic activities.

12.2 Are there any State investment treaties which are applicable?

Colombia has implemented a policy of negotiation and ratification of international investment agreements (IIAs), which include bilateral investment treaties (BITs) as well as free trade agreements (FTAs) with chapters on investment and double taxation agreements (DTAs).

In order to protect foreign investment, Colombia has joined various international agreements: Multilateral Investment Guarantee Agency (MIGA); International Centre for Settlement of Investment Disputes (ICSID); Overseas Private Investment Corporation (OPIC); and Agreement of Cooperation for Emerging Markets (PSOM).

Other important agreement in which Colombia is a member is the Extractive Industry Transparency Initiative (EITI).

13 Taxes and Royalties

13.1 Are there any special rules applicable to taxation of exploration and mining entities?

No, there are no special rules in taxation for exploration and mining entities.

13.2 Are there royalties payable to the State over and above any taxes?

Yes. Royalties are part of the Government Take in addition to other taxes. Royalties are paid based on mine-head production.

14 Regional and Local Rules and Laws

14.1 Are there any local provincial or municipal laws that need to be taken account of by a mining company over and above National Legislation?

Only Congress can issue laws to be applicable to the nation in all its territory. Provinces and Municipalities may enact some regulations applicable in their jurisdictions.

Regarding mining, the legal framework is national. With respect to the environment, this is also national. Although the Autonomous Regional Corporations can issue special environmental regulations, based on particular conditions of the environment, to be applied on their jurisdiction only.

Local authorities have some mining competencies related to control of illegal mining, mining easements and granting protection for disturbances to the exercise of mining rights. Local authorities also have some environmental competencies, and may declare protected areas within their jurisdiction. In any case, these areas are not part of the national system of protected areas that affect mining activity. The same authorities are also in charge of territorial ordinance, and may indirectly affect mining activity, due to lack of information on the subsoil, by appointing different usages to land.

14.2 Are there any regional rules, protocols, policies or laws relating to several countries in the particular region that need to be taken account of by an exploration or mining company?

The Andean Community adopted Resolution No. 774/2012 by which all country members should combat illegal mining. Colombia is a member of the Andean Community of Nations.

15 Cancellation, Abandonment and Relinquishment

15.1 Are there any provisions in mining laws entitling the holder of a right to abandon it either totally or partially?

The concessionaire can relinquish freely to the concession and withdraw all goods and installations that could have built or installed, for the execution of the contract and the exercise of easements.

The goods and installations destined to preserve or handle adequately the mining pits and for the exercise of easements and

other works of prevention, mitigation, correction, compensation, handling and environmental substitution, are excepted. In order to be able to relinquish, it is necessary to be updated in the obligations' fulfilment at the time of the application.

The authority has 30 days to decide on the relinquishment application. If the term ends without a decision, the application will be deemed accepted.

15.2 Are there obligations upon the holder of an exploration right or a mining right to relinquish a part thereof after a certain period of time?

Once the exploration is completed the concessionaire submits the Works and Installation Program. Within this Program, the definite delimitation of the zone of the contracted area that will be linked to the installations and works of exploitation should be presented, plus the works strictly necessary for the beneficiation, internal transportation, services of support and works of environmental nature for which the values, site and estimate of the existent reserves, should be taken in consideration, as well as the expected production indicated in the Plan of Works and Installations for exploitation. With the opportunity of this delimitation, the concessionaire will be in the obligation to return, in contiguous or discontinuous lots, the parts of the area that are not occupied by the mentioned installations and works. The withhold area should be constituted as a continuous extension.

15.3 Are there any entitlements in the law for the State to cancel an exploration or mining right on the basis of failure to comply with conditions?

Yes. The contract can terminate by a statement of its lapse made exclusively due to the following reasons: (a) the dissolution of the legal person, except the in cases in which it takes place due to a merger, by absorption; (b) financial inability that hinders the performance of contractual obligations and that is presumed when an action has taken place against the concessionaire for an obligatory corporation liquidation, according to the Law; (c) the non-realisation of works and installations within the terms established or its non-authorized suspension for more than six (6) continuous months;

(d) the non payment of complete economic considerations on time; (e) the omission of a previous notice to the authority that the assignment of contract is going to take place; (f) the non payment of fines or the non-reinstatement of the guarantee that endorses it; (g) the grave and repeated breach of regulations of technical order on mining exploration and exploitation, or of hygiene, security or labour provisions, or the annulment of necessary environmental authorisations for works and installations; (h) the infringement of provisions on excluded and restricted areas for mining; (i) the grave and repeated breach of any other obligation derived from the concession contract; and (j) when the source of the exploited minerals comes from a place different from that of their extraction, producing a situation where the financial proceeds are destined to a different municipality of that of its origin.



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Congo – D.R.

Matthieu Le Roux



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1 Relevant Authorities and Legislation

1.1 What regulates mining law?

The main national legislations governing the mining industry in the DRC are (i) Law no. 007/2002 of 11 July 2002 (the “**2002 Mining Code**”), which is currently under revision, and (ii) the Mining Regulation enacted by Decree no. 038/2003, of 26 March 2003 (the “**2003 Mining Regulation**”). In addition, there are a set of Decrees and Ministerial Orders to be considered.

1.2 Which Government body/ies administer the mining industry?

The mining industry is administered by the following public representatives/bodies:

- The President of the Republic, who notably exercises classification and declassification authority in relation to minerals and prohibited areas for mining activities.
- The Minister of Mines, who has, *inter alia*, powers and jurisdiction over the granting, refusal and cancellation of mining rights.
- The Mining Registry, supervised by the Minister of Mines and the Minister of Finance, which has the main goal of conducting administrative proceedings in relation to the application for and registration of mining rights, as well as their cancellation and expiry.
- The Department in charge of Protection of the Mining Environment, which has the main role of handling the definition and implementation of mining regulations concerning environmental protection, as well as the technical evaluation of the mitigation and rehabilitation plan, the environmental impact study and the environmental management plan.
- The Directorate of Mines, which is responsible for inspecting and supervising mining activities with regard to health and safety, work practices, production, transport, sale and social matters.
- The Provincial Governor, who has the authority for issuing trading cards with respect to artisanal mining production.

1.3 Describe any other sources of law affecting the mining industry.

In addition to the 2002 Mining Code, the mining industry is also regulated by the country’s Tax legislation, notably regarding VAT,

the Customs Code, the Labour and Immigration legislations, Law no. 11/009 of 9 July 2011, establishing the basic environmental protection principles, and various other laws dealing with contractual and corporate matters (i.e., the OHADA Uniform Acts).

2 Mechanics of Acquisition of Rights

2.1 What rights are required to conduct reconnaissance?

The carrying out of reconnaissance (*prospection* in French) is not attached to any specific right. However, any person or entity planning to engage in a reconnaissance process must submit a prior declaration to the Mining Registry. A Reconnaissance Certificate (*attestation de prospection* in French) is subsequently granted by the Mining Registry within five days and valid for a non-renewable period of two years.

2.2 What rights are required to conduct exploration?

An exploration permit (*permis de recherche* in French) is required in order to conduct exploration in the DRC.

2.3 What rights are required to conduct mining?

To conduct mining operations, a particular permit category is required, depending on the nature of the operations envisioned and may be a production permit (*permis d’exploitation* in French), a small mine permit (*permis d’exploitation de petite mine* in French), or a waste management licence (*permis d’exploitation des rejets* in French).

2.4 Are different procedures applicable to different minerals and on different types of land?

Specific procedures apply to minerals formally declared and classified as “reserved substances”.

2.5 Are different procedures applicable to natural oil and gas?

Yes, different procedures are applicable to natural oil and gas, as set out in Law no. 15/012, of 1 August 2015, establishing a general legal framework for hydrocarbons, and Decree no. 16/010, of 19 April 2016, establishing the hydrocarbons regulations.

3 Foreign Ownership and Indigenous Ownership Requirements and Restrictions

3.1 What types of entity can own reconnaissance, exploration and mining rights?

Please see the answer to question 3.2.

3.2 Can the entity owning the rights be a foreign entity or owned (directly or indirectly) by a foreign entity and are there special rules for foreign applicants?

Under the 2002 Mining Code, no distinction is made between mineral rights that may be acquired by (i) Congolese individuals (over the age of majority, i.e. 18 years old) or legal persons, and (ii) foreigners. However, artisanal digging and trading can only be performed by nationals. Furthermore, before engaging in the DRC's mining industry, foreign companies must fulfil a few administrative obligations (e.g. elect domicile with an authorised Congolese mining agent, acting as such company's intermediary).

3.3 Are there any change of control restrictions applicable?

As a general rule and to the best of our knowledge, no specific change of control restrictions are applicable to mining companies' shareholders. Restrictions may, however, be imposed depending on the provisions of the Articles of Association of the company affected by the change of control. Mineral right transfers are subject to a number of restrictions (see the answer to question 5.1).

3.4 Are there requirements for ownership by indigenous persons or entities?

The 2002 Mining Code does not establish ownership requirements by indigenous persons or entities for mineral permit holders.

3.5 Does the State have free carry rights or options to acquire shareholdings?

The State has free carry rights and mining companies, wishing to acquire a production permit must, transfer 5% of their share capital for free.

4 Processing, Refining, Beneficiation and Export

4.1 Are there special regulatory provisions relating to processing, refining and further beneficiation of mined minerals?

Yes, there are special regulatory provisions relating to processing and refining performed not by a mineral permit holder, but by another entity dedicated to those activities. Additionally, the construction and operation of processing plants are subject to environmental regulatory provisions.

4.2 Are there restrictions on the export of minerals and levies payable in respect thereof?

The export of raw minerals is closely controlled and can only be performed under strict conditions. The export of tradable mining commodities (i.e., processed minerals) must also comply with several legal requirements (e.g., minimum humidity rate, full traceability and certification). The export of certain concentrates may be restricted or prohibited. As a final note, the export of minerals is subject to 10% taxation, pursuant to the Customs Code.

5 Transfer and Encumbrance

5.1 Are there restrictions on the transfer of rights to conduct reconnaissance, exploration and mining?

Authorisation for conducting reconnaissance (*prospection* in French) cannot be exclusive and, strictly speaking, under the 2002 Mining Code, it does not provide any assignable mineral right. By contrast, exploration and production permits can be wholly or partially assigned, subject to the conditions attached to the assignment, such as the transferee's obligation to assume all of the permit holder's obligations to the State, and also the obligation to register any transfer at the Mining Registry, among others.

5.2 Are the rights to conduct reconnaissance, exploration and mining capable of being mortgaged or otherwise secured to raise finance?

Production permits can be mortgaged, once a positive cadastral and technical evaluation has been issued by the Directorate of Mines, followed by the approval of the Ministry of Mines.

6 Dealing in Rights by Means of Transferring Subdivisions, Ceding Undivided Shares and Mining of Mixed Minerals

6.1 Are rights to conduct reconnaissance, exploration and mining capable of being subdivided?

As explained above, the 2002 Mining Code provides for authorisations to conduct reconnaissance, but these do not give rise to any formal mineral rights for their beneficiaries. Exploration permits are automatically subdivided when renewed. Production permits may be subdivided when partially waived or assigned by their holders.

6.2 Are rights to conduct reconnaissance, exploration and mining capable of being held in undivided shares?

The 2002 Mining Code does not provide for jointly-owned exploration and production permits.

6.3 Is the holder of rights to explore for or mine a primary mineral entitled to explore or mine for secondary minerals?

The holder of rights to explore for or mine a primary mineral is entitled to explore or mine for secondary minerals, provided that

such permit holders, when applying for an extension of their initial rights, also include secondary minerals in the application form.

6.4 Is the holder of a right to conduct reconnaissance, exploration and mining entitled to exercise rights also over residue deposits on the land concerned?

The holder of a right to conduct mining operations is entitled to also exercise rights over any residue deposits on the land concerned, provided that this is not explicitly prohibited in the respective production permit, and subject to the holder having specifically applied for such additional right.

6.5 Are there any special rules relating to offshore exploration and mining?

To the best of our knowledge, there are no such special rules in force, except in relation to operations regarding mine waste.

7 Rights to Use Surface of Land

7.1 Does the holder of a right to conduct reconnaissance, exploration or mining automatically own the right to use the surface of land?

Exploration or production permits do not grant their holders an automatic right to use the surface of the land. However, the Governor of the relevant province, further to an opinion issued by the Mines Administration, may grant the right to the permit holders to occupy the land necessary for their activities within their mining perimeter. Under specific circumstances, the consent of the respective landowner or lawful occupier may also be required.

7.2 What obligations does the holder of a reconnaissance right, exploration right or mining right have vis-à-vis the landowner or lawful occupier?

Pursuant to Article 279 of the 2002 Mining Code (*Restrictions on the occupation of the land*), the holder of an exploration or production permit must obtain the authorisation of the landowner or lawful occupier in order to occupy land located less than 180 metres from houses, 45 metres from tilled lands, or 90 metres from farms with cattle, a water tank, dam or private water reserve. Furthermore, any land occupation by the holder of exploration or production permit, preventing its use by those entitled to enjoy said land, gives the latter the right to receive compensation.

7.3 What rights of expropriation exist?

Expropriation rights can only be granted by the State under exceptional circumstances and for reasons of public interest, but always subject to fair compensation.

8 Environmental

8.1 What environmental authorisations are required in order to conduct reconnaissance, exploration and mining operations?

Many environmental requirements apply to exploration and

production operations, as outlined in the numerous annexes of the 2003 Mining Regulation dedicated to environmental issues. In addition, although no environmental authorisation is required at the reconnaissance stage, reconnaissance must comply with the Code of Conduct set forth in the 2003 Mining Regulation.

With respect to exploration, we highlight the need to submit for the approval of the relevant authorities a mitigation and rehabilitation plan describing the measures taken to limit and remedy any environmental damage caused by exploration works.

Furthermore, anyone applying for a production permit is required to submit an environmental impact study and a draft environmental management plan, which must contain a description of the “greenfield” ecosystem and of the measures envisioned to limit and remedy any damage caused to the environment throughout the duration of the project.

Also, the right holder must declare any archaeological discoveries and publish safety warnings. Furthermore, the importation, marketing, transportation, storage and use of explosives are all subject to special rules.

8.2 What provisions need to be made for storage of tailings and other waste products and for the closure of mines?

In order to close and remediate a mining project, production permit applicants are requested, when applying, to submit to the relevant authorities a draft rehabilitation plan for the site post-closure, alongside the application form. Later, the decision to close a mining site must be promptly notified to the relevant authorities.

8.3 What are the closure obligations of the holder of a reconnaissance right, exploration right or mining right?

Holders of exploration or production permits are required to provide a financial guarantee in an amount sufficient to cover any necessary environmental rehabilitation. The terms and conditions according to which this guarantee must be set up are detailed in Annex II to the Mining Regulation.

8.4 Are there any zoning or planning requirements applicable to the exercise of a reconnaissance, exploration or mining right?

To the best of our knowledge, and assuming that an exploration or production permit has been duly issued with respect to third parties’ rights, permit holders who have complied with their duties arising under said permits may not be ousted, except in cases of expropriation (see the answer to question 7.3 above).

9 Native Title and Land Rights

9.1 Does the holding of native title or other statutory surface use rights have an impact upon reconnaissance, exploration or mining operations?

Subject to the answers to question 7.2, the holding of native title or other statutory surface use rights does not have any direct impact on the rights granted under an exploration or production permit. That being said, we emphasise that artisanal mining production is reserved solely to Congolese individuals by law.

10 Health and Safety

10.1 What legislation governs health and safety in mining?

The 2002 Mining Code establishes that mining operations are subject to hygiene, security and protection measures enacted by special regulations.

Mineral permit holders must also comply with all measures ordered by the Administration to prevent or eliminate the causes of dangers to public health and safety.

10.2 Are there obligations imposed upon owners, employers, managers and employees in relation to health and safety?

The Mining Code provides that mineral permit holders must publish safety regulations with regard to their mining operations. These regulations are disclosed to the relevant authorities, as well as to all employees. Any other persons having access to the site must also be duly informed. Moreover, as previously mentioned under the answer to question 8.1 above, activities related to explosives are subject to special regulations.

11 Administrative Aspects

11.1 Is there a central titles registration office?

The Mining Registry is the central office in charge of registering mineral permits. It notably processes the applications for such titles, grants the related rights and keeps records thereof.

11.2 Is there a system of appeals against administrative decisions in terms of the relevant mining legislation?

To challenge administrative decisions relating to mining activities, the 2002 Mining Code makes reference to the resources provided by the ordinary laws governing the judicial system and court proceedings, except for the applicable time limits, which are reduced.

12 Constitutional Law

12.1 Is there a constitution which has an impact upon rights to conduct reconnaissance, exploration and mining?

The DRC's constitution expressly provides that the State has unlimited sovereign powers over its soils and subsoil.

12.2 Are there any State investment treaties which are applicable?

The DRC has entered into bilateral investment treaties with several countries and also ratified treaties for the avoidance of double taxation, namely with the Kingdom of Belgium and the Republic of South Africa.

13 Taxes and Royalties

13.1 Are there any special rules applicable to taxation of exploration and mining entities?

The 2002 Mining Code provides for an exhaustive tax and customs regime applicable to mineral permit holders' activities. This regime is exclusive of any other present or future taxation, except more favourable ones.

13.2 Are there royalties payable to the State over and above any taxes?

The 2002 Mining Code sets a mining royalty which is owed from the date on which the mining operations effectively start and is calculated based on the value of the sales made. The rate of the mining royalty varies according to the mineral substances in question (e.g., 0.5% for iron or ferrous metals, 2% for non-ferrous metals, 2.5% for precious metals, 4% for precious stones, 1% for industrial minerals, etc.).

14 Regional and Local Rules and Laws

14.1 Are there any local provincial or municipal laws that need to be taken account of by a mining company over and above National Legislation?

Yes, depending on the province and, without prejudice to the stabilisation clause provided by the 2002 Mining Code regarding taxes and customs duties, this is applicable to permit holders.

14.2 Are there any regional rules, protocols, policies or laws relating to several countries in the particular region that need to be taken account of by an exploration or mining company?

The DRC has been implementing the EITI Standard since 2007 and became a full member in 2014. The DRC is also a State Party to the Kimberley Process, as well as to the Pact on Security, Stability and Development in the Great Lakes, which includes its Protocol against the Illegal Exploitation of Natural Resources.

15 Cancellation, Abandonment and Relinquishment

15.1 Are there any provisions in mining laws entitling the holder of a right to abandon it either totally or partially?

The 2002 Mining Code provides for the total or partial abandonment of mining exploration or production permits, performed by means of a declaration sent to the competent Minister. The permit holder does not have any right to compensation and remains liable to the local community for any environmental damage and/or any breach of its obligations.

15.2 Are there obligations upon the holder of an exploration right or a mining right to relinquish a part thereof after a certain period of time?

When the holder of an exploration right applies for the renewal of the respective permit, the holder automatically relinquishes 50% of the territory covered by said permit.

15.3 Are there any entitlements in the law for the State to cancel an exploration or mining right on the basis of failure to comply with conditions?

Subject to compliance with the formal procedures established by the 2002 Mining Code, the State is empowered to cancel an exploration

or production permit if the holder does not fulfil its obligation to start exploration within six months (in the case of exploration permits) or of starting construction within three years (for production permits) from the date on which the permit was issued, and also when the permit holder fails to pay timely the applicable surface duty (*droit superficiaire par carré* in French) on time.

Acknowledgment

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VdA is an independent Portuguese law firm with 350-plus staff and a strong experience in various industries, such as Aerospace, Distribution, Economy of the Sea, Energy, Finance, Real Estate, Industry, Infrastructure, Healthcare Sector, Public Sector, Professional Services, Information Technology, Emerging Technologies, Telecoms, Third Sector, Transports and Tourism.

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The recognition of VdA's work is shared with our team and clients and is reflected in the awards achieved, such as:

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- The “Most Active Law Firm” awarded to VdA by *Euronext* for six consecutive years, including 2017.
- The “Portuguese Law Firm of the Year 2015 and 2016” awarded by the *IFLR*.
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VdA is the most international Portuguese law firm and, through VdA Legal Partners (which encompasses all lawyers and independent law firms associated with VdA for the provision of integrated legal services), is actively present in 11 jurisdictions, including all African members of the Community of Portuguese-speaking Countries (CPLP), as well as Timor-Leste and some of the Francophone African countries.

Angola – Cape Verde – Congo – Democratic Republic of the Congo – Equatorial Guinea – Gabon – Guinea Bissau – Mozambique – Portugal – São Tome and Principe – Timor-Leste

Ethiopia

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1 Relevant Authorities and Legislation

1.1 What regulates mining law?

The mining sector in Ethiopia is principally regulated by the following legal texts:

- the 1995 Constitution of the Federal Republic of Ethiopia (which places the ownership of all natural resources in the State and people of Ethiopia);
- the Federal Income Tax Proclamation n°979/2016;
- Proclamation n°678-2010 to promote sustainable development of mineral resources dated 4th August 2010, amended by the Mining Operation (Amendment) Proclamation n°816/2013 (“**Proclamation n°678-2010**”); and
- the Council of Ministers’ Regulations on Mining Operations n°182-1994 amended by Regulation n°27/1998 and Regulation n°124-2006 (“**Regulation n°182/1994**”).

1.2 Which Government body/ies administer the mining industry?

The principal body that administers the mining industry is the Ministry of Mines and Energy.

1.3 Describe any other sources of law affecting the mining industry.

Other sources of law affecting the mining industry include the Environmental Impact Assessment Proclamation n°299/2002 (which provides that an environmental impact assessment has to be carried out for activities that may have adverse consequences on the environment – i.e. including mining), the Labour Proclamation n°377/2003 (which, *inter alia*, obliges employers to take health and safety measures in work places and employees to comply with health and safety rules), and the Commercial Registration and Business Licensing Proclamation n°686/2010 (which is applicable to any person who intends to engage in the mining sector).

2 Mechanics of Acquisition of Rights

2.1 What rights are required to conduct reconnaissance?

In order to conduct reconnaissance, a reconnaissance licence is

required. The Licensing Authority may grant a reconnaissance licence, which is not renewable, for a period that shall not exceed eighteen (18) months (article 16 of the Proclamation n°678-2010).

Procedure:

An application must be submitted to the Licensing Authority. Where the latter is satisfied with the application, it registers the application and gives a receipt to the applicant. The Licensing Authority, after registering the application, publishes it to third parties through widely accessible mass media:

- If a person objects to the granting of the licence within seven (7) days as from the date of publicity, the Licensing Authority initiates negotiations between the parties concerned in order to resolve the objection. If the parties fail to resolve the objection, the Licensing Authority hears the presentations of both parties and decides on the upholding or rejection of the objection within fifteen (15) working days.
- If no objection to the application has been filed at its office, the Licensing Authority, following verification of all information submitted in connection with the application, and upon payment of the fees and rentals, grants the licence to the applicant.

2.2 What rights are required to conduct exploration?

The Licensing Authority may grant an exploration licence to an applicant (i) who has demonstrated that it has the financial resources and technical ability to conduct the exploration operations in question in accordance with the work programme, (ii) whose estimated exploration expenditure is in accordance with the prescribed minimum exploration expenditure and the exploration work programme, (iii) whose environmental impact plan has been approved, and (iv) who is not in breach of any obligation in the reconnaissance licence (article 17 of the Proclamation n°678-2010).

An exploration licence is granted for a period that cannot exceed three (3) years, renewable twice for a period not exceeding one year each. It is to be noted that the Licensing Authority may allow further extensions of renewal if the licensee proves the necessity to undertake exploration activity beyond the initial work programme. However, such period shall not exceed five (5) years.

Procedure:

The applicable procedure is the same as that described in question 2.1 above.

2.3 What rights are required to conduct mining?

In order to conduct mining, the holder of an exploration licence must

apply for a mining licence. There are two types of mining licence: the large-scale mining licence; and the small-scale mining licence.

■ **Large-scale mining licence:**

The large-scale mining licence regime applies to any mining operation for which the annual run-of-mine ore exceeds, *inter alia*, the following limits:

For gold, platinum, silver and other precious and semi-precious minerals:

- 100,000m³ for placer operation; and
- 75,000 tonnes for primary deposit mining.

For metallic minerals such as iron, lead, copper and nickel:

- 150,000 tonnes for open pit mining; and
- 75,000 tonnes for underground mining operation.

A large-scale mining licence shall not exceed twenty (20) years, and is renewable provided that the new period does not exceed ten (10) years (article 27 of the Proclamation n°678-2010).

Procedure:

The applicable procedure is the same as that described in question 2.1 above.

■ **Small-scale mining licence:**

The small-scale mining licence regime applies to any mining operation of which the annual run-of-mine ore does not exceed the above-mentioned limits.

The small-scale mining licence shall not exceed ten (10) years, and is renewable provided that the new period does not exceed five (5) years (article 29 of the Proclamation n°678-2010).

Procedure:

The applicable proceeding is the same as that described in section 2.1 above.

Rights and obligations:

The holder of a small-scale or large-scale mining licence shall have, *inter alia*, the following rights and obligations:

- the right to market and sell minerals produced;
- to commence mining operations within two (2) years as from the date of the licence; and
- to comply with the terms and conditions of the licence.

■ **Artisanal mining licence:**

The artisanal mining regime applies to any mining operation carried out by individuals or small and micro enterprises that is mostly of a manual nature and does not involve the engagement of employed workers.

The licence is granted for a period specified in the licence that shall not exceed two (2) years and may not be renewed.

Procedure:

The applicable proceeding is that described in question 2.1 above.

Rights and obligations:

The holder of an artisanal mining licence shall have, *inter alia*, the following rights and obligations:

- to undertake mining operations in accordance with environment, health and safety standards;
- to comply with the terms and obligations of the licensee; and
- to have a preferential treatment regarding the licensee where the latter shows that it has the necessary technical and financial resources to engage in advanced exploration and mining.

■ **Retention licence:**

The Licensing Authority can grant an exclusive retention licence to the applicant if:

- the latter has demonstrated that the discovery of a mineral deposit within the exploration area is potentially of commercial significance; and
- the mineral deposit cannot be developed immediately because of adverse market conditions, other economic factors, or unavailable processing technologies, which are of a temporary character.

The retention licence is granted for the period specified in the licence but cannot exceed three (3) years. The licence can be renewed once for a period not exceeding three (3) years where the licensee demonstrates that the above-mentioned conditions still prevail.

Procedure:

The applicable procedure is the same as that described in question 2.1 above.

Rights and obligations:

The holder of a retention licence shall have, *inter alia*, the following rights and obligations:

- the right to be granted a mining licence in respect of the retention area a mineral in question prior to expiry of the licence;
- to submit an annual progress report to the Licensing Authority indicating:
 - the prevailing market conditions and technical factors, the effect thereof and the need to hold such retention licence over the mineral and land in question; and
 - efforts undertaken by it to ensure that mining operations commence before the expiry of the duration of the licence.

2.4 Are different procedures applicable to different minerals and on different types of land?

Please see question 2.3 above.

2.5 Are different procedures applicable to natural oil and gas?

Procedures regarding natural oil and gas are not covered by the Proclamation n°678-2010 and Regulation n°182/1994 but are overseen by the same governmental body, namely, the Ministry of Mines.

3 Foreign Ownership and Indigenous Ownership Requirements and Restrictions

3.1 What types of entity can own reconnaissance, exploration and mining rights?

Reconnaissance operations may only be conducted by Ethiopians who have a licence, whereas foreigners are not permitted to conduct reconnaissance operations at all. Further, only Ethiopian nationals can apply for, and obtain, artisanal mining licences.

3.2 Can the entity owning the rights be a foreign entity or owned (directly or indirectly) by a foreign entity and are there special rules for foreign applicants?

Article 40 of Proclamation n°678-2010 provides that in order to transfer a large-scale mining licence, the prior consent of the Licensing Authority is required. The application to transfer or assign a large-scale mining licence must include specific information and documents listed under article 40 as, for example, the nature, nationality, legal form, and capital of the proposed transferee, etc.

Other than that, there is no change of restriction control applicable under the mining laws.

3.3 Are there requirements for ownership by indigenous persons or entities?

As indicated above, Ethiopian nationality is required for obtaining artisanal mining licences. In addition (and as stated in the answer to question 3.4 below) the government is entitled to a 5% equity participation.

3.4 Does the State have free carry rights or options to acquire shareholdings?

It is to be noted that the government may acquire a free participation interest of 5% of any large-scale or small-scale mining investment. An additional equity participation of the government may also be provided by agreement. The latter will specify the percentage, the timing, the financing, the resulting rights and obligation, and any other details of the government participation.

3.5 Are there restrictions on the nature of a legal entity holding rights?

It is to be noted that there is no restriction on the type of legal entity that may hold rights in the mining sector. In this way, mining activities may be carried out by a legal entity in the form of a sole ownership, partnership or company (whether share or private limited company).

4 Processing and Beneficiation

4.1 Are there special regulatory provisions relating to processing, refining and further beneficiation of mined minerals?

The holder of a small-scale or large-scale mining licence shall have the right to market and sell minerals produced (article 30 of the Proclamation n°678-2010).

It is to be noted that the holder of a mining licence obtains a title to the minerals specified in the licence upon their extraction (article 42 of the Proclamation n°678-2010).

4.2 Are there restrictions on the export of minerals and levies payable in respect thereof?

The holder of an exploration licence must obtain the prior consent of the Ministry of Mines to export samples of minerals for testing, and it is to be noted that such minerals remain the property of the Government of Ethiopia (article 42 of the Proclamation n°678-2010).

The holder of a mining licence has the right to sell locally or to export the minerals in relation to which he obtained a title specified in the licence upon their extraction. In order to export, however, it is necessary to obtain a competency certificate from the Ministry of Mines as well as a business licence from the Ethiopian Ministry of Trade.

5 Transfer and Encumbrance

5.1 Are there restrictions on the transfer of rights to conduct reconnaissance, exploration and mining?

Any licence other than reconnaissance or retention licences may be transferred subject to the prior consent of the Licensing Authority. However, no licence may be transferred to a company in liquidation or insolvency (article 38 of the Proclamation n°678-2010).

5.2 Are the rights to conduct reconnaissance, exploration and mining capable of being mortgaged or otherwise secured to raise finance?

This is not covered under Proclamation n°678-2010 and Regulation n°182/1994. However, as mentioned under question 5.1 above, the transfer of any licence is possible, subject to the prior consent of the Licensing Authority. We are therefore of the view that these rights may be mortgaged, subject to the prior consent of the Licensing Authority, except for a reconnaissance licence which may not be mortgaged.

6 Dealing in Rights by Means of Transferring Subdivisions, Ceding Undivided Shares and Mining of Mixed Minerals

6.1 Are rights to conduct reconnaissance, exploration and mining capable of being subdivided?

These rights may be subdivided except for reconnaissance or retention licences, and provided that this is approved and registered by the competent government authority.

6.2 Are rights to conduct reconnaissance, exploration and mining capable of being held in undivided shares?

It is to be noted that reconnaissance, exploration and mining shares can be held by companies through a joint venture agreement, a private limited company or share company.

6.3 Is the holder of rights to explore for or mine a primary mineral entitled to explore or mine for secondary minerals?

The holder of a mining licence can amend his licence to include other minerals that are not specified in the licence, or to include other areas outside his licenced area where he believes that the licenced area does not include the entire deposit of minerals (article 33 of the Proclamation n°678-2010).

6.4 Is the holder of a right to conduct reconnaissance, exploration and mining entitled to exercise rights also over residue deposits on the land concerned?

It is to be noted that before being able to conduct reconnaissance, exploration or mining over residue deposits, a new licence will be required (and following the termination, revocation or expiry of the previous licence over the land in question).

6.5 Are there any special rules relating to offshore exploration and mining?

Ethiopia is a landlocked country and there is therefore no specific legislation governing offshore exploration and mining.

7 Rights to Use Surface of Land

7.1 Does the holder of a right to conduct reconnaissance, exploration or mining automatically own the right to use the surface of land?

The holder of a licence has the right to (i) bring into the licensed area any plant, machinery or equipment and build and construct any surface or underground infrastructure required for the purposes of the envisaged mining operations, (ii) use, subject to the relevant water laws, water from any water body, situated on, or flowing through, such land or sink a well or borehole required for mining operations, and (iii) subject to the applicable law regarding the cutting of timber and reforestation, cut and use, within the licenced area and the area of lease, timber which is necessary for mining operations (article 33 of the Proclamation n°678-2010).

7.2 What obligations does the holder of a reconnaissance right, exploration right or mining right have vis-à-vis the landowner or lawful occupier?

The holder of a mining licence must take proper precautions not to interfere with other legitimate occupants of the licenced area, the land covered by a lease and the adjacent land (article 34 of the Proclamation n°678-2010).

7.3 What rights of expropriation exist?

Article 59 of Proclamation n°678-2010, as amended, provides that the Licensing Authority may expropriate any immovable property on any land. However, in return for this expropriation, the licence holder will be entitled to receive fair compensation.

8 Environmental

8.1 What environmental authorisations are required in order to conduct reconnaissance, exploration and mining operations?

In order to conduct reconnaissance, exploration and mining operations, the applicant must: (i) obtain, from the Environmental Protection Authority, a permit regarding the management of waste (article 3 of Proclamation n°300-2002); (ii) have an the environmental impact study report approved by the Environmental Protection Authority; and (iii) have authorisation from the concerned body of an urban administration engaging in collection, transportation, use or disposal of solid waste (article 4 of Proclamation n°513/2007).

8.2 What provisions need to be made for storage of tailings and other waste products and for the closure of mines?

The holder of a small-scale or large-scale mining licence must apply

to the Licencing Authority for a mine closure certificate within one hundred and eighty (180) days prior to revocation of the licence, termination of the mining operations, relinquishment of the whole or any portion of the licence area or abandonment of the mine (article 61 of the Proclamation n°678-2010).

8.3 What are the closure obligations of the holder of a reconnaissance right, exploration right or mining right?

The owner of any solid waste disposal shall be liable for any damage caused to the environment, human health or property in the course of its operation and after its closure within two years as from the date on which the damage was known. An exemption from this liability is granted when it is either the victim himself, or a third party for whom the owner of the solid waste disposal site is not responsible who has caused the damage (article 16 of the Proclamation n°678-2010).

8.4 Are there any zoning or planning requirements applicable to the exercise of a reconnaissance, exploration or mining right?

Whilst, in principle, any land in Ethiopia is available for mining, and unless the national interest is not served, it is to be noted that exploration, retention and mining licences will not be issued for certain areas that are specifically reserved, such as religious sites and cemeteries, or national parks.

9 Native Title and Land Rights

9.1 Does the holding of native title or other statutory surface use rights have an impact upon reconnaissance, exploration or mining operations?

No it does not, except with regards to the issue of property located on the area that is required for the mining activities (where procedures for expropriation and the payment of consideration will apply).

10 Health and Safety

10.1 What legislation governs health and safety in mining?

There is no specific legislation which governs health and safety in mining. That being said, however, it is to be noted that Labour Proclamation n°377/2003 obliges employers to take measures to ensure occupational health and safety in the workplace. See the answer to question 10.2 below.

10.2 Are there obligations imposed upon owners, employers, managers and employees in relation to health and safety?

As a general obligation, the holder of a mining licence must conduct mining operations in such manner as to ensure the health and safety of his agents, employees and other persons, and comply with the applicable laws pertaining to environmental protection (article 34 of the Proclamation n°678-2010).

11 Administrative Aspects

11.1 Is there a central titles registration office?

The Licensing Authority establishes and maintains a Registry of Licences and Leases (article 15 of the Proclamation n°678-2010).

11.2 Is there a system of appeals against administrative decisions in terms of the relevant mining legislation?

In accordance with Proclamation n°678/2010, administrative remedies are to be used up first before applying to a competent court for a review of the decision that has been made. In addition, Proclamation n°678/2010 provides that any disputes are first to be referred to negotiation. If that fails, the matter will then go to arbitration and, from there, an appeal against the decision of the arbitrators may be submitted before the competent court.

12 Constitutional Law

12.1 Is there a constitution which has an impact upon rights to conduct reconnaissance, exploration and mining?

The 1995 Constitution does not restrict the right to carry out mining provided that the exercise of such right does not bring into operation the expropriation and compensation provisions of the Constitution.

12.2 Are there any State investment treaties which are applicable?

It is to be noted that Ethiopia has signed Bilateral Investment Treaties ("BITs") with 29 countries: Algeria; Austria; Belgium-Luxembourg Economic Union; China; Denmark; Egypt; Equatorial Guinea; Finland; France; Germany; India; Iran; Israel; Italy; Kuwait; Libya; Malaysia; the Netherlands; Nigeria; Russian Federation; South Africa; Spain; Sudan; Sweden; Switzerland; Tunisia; Turkey; the United Kingdom; and Yemen. Investors that come to Ethiopia from one of the aforementioned countries will have favourable treatment in accordance with the terms of their respective BITs.

13 Taxes and Royalties

13.1 Are there any special rules applicable to taxation of exploration and mining entities?

It is to be noted that the Federal Income Tax Proclamation n°979/2016, provides, *inter alia*, that a business income tax rate of 25% is applicable to licensees (article 37). Further, a licensee effecting payment to a non-resident subcontractor shall withhold and transfer to the tax authority ten (10%) of the payment.

13.2 Are there royalties payable to the State over and above any taxes?

Yes. The rate depends on the different kind of minerals. Thus, for precious minerals the rate is 8%, for semi-precious minerals 6%, for metallic minerals 5%, for industrial minerals 4%, for construction minerals 3%, for salt 4%, and for geothermal 2%.

14 Regional and Local Rules and Laws

14.1 Are there any local provincial or municipal laws that need to be taken account of by a mining company over and above National Legislation?

Yes. It is to be noted that regional state governments are empowered to administer the land and natural resources in accordance with the federal laws of the country. Artisanal and small-scale mining are usually governed by regional laws.

14.2 Are there any regional rules, protocols, policies or laws relating to several countries in the particular region that need to be taken account of by an exploration or mining company?

No, there are not.

15 Cancellation, Abandonment and Relinquishment

15.1 Are there any provisions in mining laws entitling the holder of a right to abandon it either totally or partially?

The holder of a mining licence may relinquish all or part of the licence area by giving prior written notice (of at least 12 months) to the Licensing Authority and upon fulfilment of all obligations of the licence (article 33 of the Proclamation n°678-2010).

15.2 Are there obligations upon the holder of an exploration right or a mining right to relinquish a part thereof after a certain period of time?

Upon the renewal of an exploration licence, it is to be noted that the holder is obliged to relinquish a portion of not less than one quarter of the licenced area.

15.3 Are there any entitlements in the law for the State to cancel an exploration or mining right on the basis of failure to comply with conditions?

The Licensing Authority may partially or fully suspend mineral rights where it believes that the activity of the licensee is likely to become an imminent danger to the local community, the environment or its employees (provided that such suspension is the only remedy under the prevailing circumstances), and it may revoke the licence altogether in the following circumstances:

- the licensee fails to comply with the financial obligations prescribed in the Proclamation n°678-2010, regulations or directives;
- the licensee conducts mining operations in a grossly negligent or wilfully improper manner;
- the licensee breaches any material term or condition of his licence;
- the licensee is not conducting his mining operations in accordance with the work programme;
- the licensee is in breach of the approved environmental impact assessment, and safety and health standards;
- the licensee has submitted false or fraudulent information in connection with any matter required to be submitted under the proclamation, regulations or directives;

- the licensee fails to maintain complete, accurate and current books and records or other documents or materials required or fails to file reports or other documents or fails to give notices required; or
- the licensee fails to grant a duly authorised official of the Licensing Authority access into the licenced area, the area covered by a lease or to any other site or premises of the mining operations or to his books, records, other documents or materials, or fails to carry out a lawful order or instruction of such official (article 44 of Proclamation n°678-2010).



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The firm was founded in 1995. It is an independent French business law firm that covers all areas of French law with a domestic and international clientele. The firm has an entrepreneurial style and seeks to build long-term relationships with its clients through an in-depth understanding of their needs and objectives. The firm has expanded over recent years and continues to do so in order to meet the needs of its clients.

Gabon

Project Lawyers

Jean-Pierre Bozec



1 Relevant Authorities and Legislation

1.1 What regulates mining law?

Since 29 May 2015, mining law in Gabon has been regulated by a 2015 Mining Code enacted by Law No. 17/2014 of 30 January 2015, replacing the former 2000 Mining Code. This new law provides for the legal, institutional, technical, economic, customs and tax regimes of the Gabonese mining sector; such a Mining Code is due to be amended in 2017 to notably accommodate the current market conditions and develop the attractiveness of the code to foreign investors.

The 2015 Mining Code applies to all mining activities and operations, in particular prospecting, exploration, appraisal, exploitation, development, construction, operation, extraction, storage, treatment, processing, cargo, transportation and marketing of mineral substances (mines and quarries), save for liquid or gaseous hydrocarbons or gaseous and underground waters which are regulated by other specific Gabonese legislation.

This new Code is aimed at, notably:

- ensuring automatic State participation in the share capital of mining companies in production;
- promoting industrial responsibility;
- promoting social responsibility;
- ensuring compliance with health, safety and environment rules;
- ensuring compliance with human rights;
- promoting local SMEs and national preference;
- giving priority to local employment satisfying mining needs;
- developing local communities of surrounding areas of mining operations;
- requiring good governance and transparency in the operation and management of mining activities;
- ensuring non-discrimination between operators;
- promoting and protecting mining investments; and
- providing incentives for mining investments.

This 2015 Mining Code will be completed by implementation decrees yet to be adopted, but some of its provisions are sufficiently detailed to be already implemented with thanks to, in particular, a mining convention to be negotiated with the State.

1.2 Which Government body/ies administer the mining industry?

Under the 2015 Mining Code, several State actors may be involved in the mining industry:

■ The Ministry of Mines

The mining industry is placed under the supervision of the Ministry of Mines which is in charge of the conception and the implementation of the Government policy regarding exploration and exploitation of mines and quarries, optimisation and valuation of the mining potential, the application of the mining regulations and the control of the conduct of the mining activities by mining operators. The Ministry of Mines is also in charge of the acquisition and sale of movable and immovable assets of the State mining portfolio.

■ The regulatory authority

The regulatory authority is notably aimed at:

- ensuring independent, transparent and non-discriminatory measures in the mining industry;
- ensuring safe competition between operators;
- contributing to the implementation of tariffs regulations and free access of third parties to transportation, storage and loading facilities;
- receiving and instructing claims in the mining sectors and applying penalties;
- ensuring validity of the tendering process;
- analysing costs of mineral substances of operators to preserve State interests and equal treatment of operators;
- ensuring compliance with QHSE rules;
- collecting any economic, legal and tax information of the mining sector; and
- auditing.

■ The national operator, *Société Equatoriale des Mines (SEM)*

The national operator is the State-owned company named *Société Equatoriale des Mines*, acting in the name of the State in the competitive sector of mines but according to the national mining strategy.

■ Industrial liability fund

The industrial liability fund is aimed at:

- covering damages linked to mining activities faced by persons, assets and the environment;
- organising expertise and studies relating to risks and damages linked to the exploitation of mines; and

- in the event of default of an operator or in the event of public order emergencies, managing closure and restoration of sites.
- **The stabilisation funds for the revenue of the extractive industries**
The resources of the stabilisation funds are aimed at attenuating the impact of the instability of the raw material's prices on the international market.
- **Consulting bodies**
Special commissions and committees to be established by regulatory texts may also assist the State in the implementation of its mining policy.

1.3 Describe any other sources of law affecting the mining industry.

Obviously, other additional sets of Gabonese legislation will have to be combined with the 2015 Mining Code when dealing with a mining project, such as environmental law, sustainable development law, land law, general business law, labour law, companies law, foreign exchange regulations and administrative law.

2 Mechanics of Acquisition of Rights

2.1 What rights are required to conduct reconnaissance?

According to article 8 of the 2015 Mining Code, in the Gabonese Republic, nobody can begin prospecting, exploration, promotion, exploitation, transformation, holding, detention, transportation, storage or marketing of mineral substances if he has not been authorised beforehand by the State.

Each step of mining (mines and quarries) activities is therefore subject to the prior authorisation or the granting of appropriate mining permits from the State to a person who has shown to have sufficient technical and financial capabilities.

Reconnaissance rights over mines correspond under Gabonese law to prospection authorisation, which is granted by the Minister in Charge of Mines for one year, non-renewable.

This authorisation is not considered a mining title and cannot be assigned and transferred. No priority rights benefit a holder, save if he applied for an exploration permit before the end of his prospecting authorisation.

2.2 What rights are required to conduct exploration?

Exploration of mines is allowed in Gabon by any legal entity holding an exploration permit granted by Order of the Minister in Charge of Mines for a three-year period, renewable twice for further three-year periods.

Any exploration permit holder can only hold three exploration permits, save for in the case of diamonds where it is limited to two diamond exploration permits.

Exploration permits are limited to a surface of 1,500 km² each, but can be up to 5,000 km² for diamonds.

If some deposits are known, the State may decide that the granting of the exploration permit will be after a tendering process.

The exploration permit has to be completed within three months of its granting by a mining convention, providing for, notably: technical, legal, tax, economic, customs and financial conditions; commitments of parties regarding in particular minimum work; and

budget commitments and restoration of sites, according to a model of the mining convention complying with the 2015 Mining Code.

In the event of commercial discovery of mineral substances within the scope of the exploration permit, only its holder can be granted an exploitation permit or a concession.

2.3 What rights are required to conduct mining?

The exploitation of mines in Gabon is done according to a mining title, which differs according to the size of the mines discovered and the expected duration of the mine's operation:

- exploitation permit for 10 years of exploitation, renewable for a period of five years; and
- concession for 25 years of exploitation, renewable for a period of 10 years.

Each of these exploitation titles is granted by a Presidential Decree for maximum surface areas of 1,500 km² in conditions to be detailed within implementation decrees (yet to be adopted) and in any case after feasibility and environmental impact studies.

The exploitation permit and the concession have to be completed within three months of their granting by a mining convention providing for, notably: technical, legal, tax, economic, customs and financial conditions; commitments of parties regarding in particular minimum work and budgets commitments; and restoration of sites, according to a model of mining convention complying with the 2015 Mining Code.

Effective exploitation of the mine has to begin within five years following the signature of the mining convention, save if an extension is granted by the Mines Administration.

2.4 Are different procedures applicable to different minerals and on different types of land?

The above process may be completed by additional modalities for exploration and exploitation when mineral substances are qualified as precious, radioactive or strategic resources according to the Mining Code.

2.5 Are different procedures applicable to natural oil and gas?

Natural oil and gas is out of the scope of the 2015 Mining Code and is regulated by a new law No. 11/2014 of 28 August 2014 (please refer to the Gabon chapter of *The ICLG to: Oil & Gas Regulation 2016* and 2017).

3 Foreign Ownership and Indigenous Ownership Requirements and Restrictions

3.1 What types of entity can own reconnaissance, exploration and mining rights?

Any person who can demonstrate his technical and financial capabilities is entitled to apply for mining authorisation and titles. However, an applicant for a mining title (exploration permit, exploitation permit or concession) needs to incorporate a local subsidiary in Gabon, but the law (or implementation decrees to be adopted) does not yet impose any type of legal entity. However, it is likely that private and public companies by shares will be preferred.

3.2 Can the entity owning the rights be a foreign entity or owned (directly or indirectly) by a foreign entity and are there special rules for foreign applicants?

Small mines are reserved to national companies and companies which are controlled by Gabonese persons, while others are offered to any applicant who can demonstrate his technical and financial capabilities. There is, however, a requirement for any applicant to a mining title to incorporate a local subsidiary in Gabon and any foreign investor controlling a mining company is requested to apply for an investment authorisation to be granted by the Gabonese Minister in Charge of Finances, as well as submit a prior declaration for foreign investment according to foreign exchange regulations applicable in Gabon.

3.3 Are there any change of control restrictions applicable?

There is no explicit provision within the Mining Code providing for restrictions on change of control of a mining operator. However, based on the general requirement for a prior authorisation from the Ministry of Mines for any agreement, protocol or contract whereby the holder of a mining title undertakes to merge, transform, lease, farm, transfer or sell totally or partially its rights and obligations, we would not be surprised that the implementation decree to be adopted to complete the 2015 Mining Code will provide for some conditions for any change of control of a mining holder.

Regulations on foreign investment provide in any case that the direct or indirect change of control of a mining company for the benefit of a foreign investor is subject to a prior authorisation from the Minister in Charge of Finances.

3.4 Are there requirements for ownership by indigenous persons or entities?

Requirements for ownership by indigenous persons or entities only apply for small mines.

3.5 Does the State have free carry rights or options to acquire shareholdings?

According to article 6 of the 2015 Mining Code, natural resources, in particular any mineral substances contained in the ground, the continental waters and in the marine domain of the national territory, remain the property of the State. As such, the State benefits from a free automatic participation of 10% in the share capital, free from all encumbrances and which cannot be diluted, of any mining company in the exploitation phase, save for the State's right to waive its rights for marginal projects or depending on the economic environment.

The State also benefits from an optional participation for cash consideration in the share capital up to 25%.

In the event of transfer of mining titles to a third party, the State has also a pre-emptive right for a period of 60 days. Failure to reply is deemed to be approval by the State.

4 Processing and Beneficiation

4.1 Are there special regulatory provisions relating to processing, refining and further beneficiation of mined minerals?

In order to develop local content, the 2015 Mining Code provides

that mining conventions to be signed with the State have to provide for a plan for local processing of extracted mineral substances as well as using, as a priority, local SMEs in order to further the industrialisation of the mining sector. Some specific tax and customs advantages may be granted to incentivise local content.

4.2 Are there restrictions on the export of minerals and levies payable in respect thereof?

The 2015 Mining Code provides that, in order to promote local content and processing of mineral substances, export of some mineral resources is liable for exit duties at a rate of between 0 and 5% on a reverse sliding scale basis, depending on the level of local processing.

The list of mineral resources which have to be processed locally and which may face the above-mentioned exit duties have to be provided by an implementation decree (not yet adopted).

5 Transfer and Encumbrance

5.1 Are there restrictions on the transfer of rights to conduct reconnaissance, exploration and mining?

Reconnaissance/prospection authorisations are not transferable.

Exploration, production permits and concessions may be assigned. While conditions of assignment of an exploration permit are not explicitly provided within the Mining Code but need to be provided within the exploration mining convention (likely with the prior authorisation from the Ministry of Mines), the Mining Code provides that exploitation permits, as well as concessions can be assigned with the prior authorisation from the Minister in Charge of Mines, according notably to the legal, financial and technical capabilities of the proposed assignee.

5.2 Are the rights to conduct reconnaissance, exploration and mining capable of being mortgaged or otherwise secured to raise finance?

According to the 2015 Mining Code, exploitation permits and concessions are considered a real estate property, as well as any assets used for the mining exploitation. They can therefore be mortgaged.

Residue deposits and products coming from the processing of mineral resources can also be pledged.

6 Dealing in Rights by Means of Transferring Subdivisions, Ceding Undivided Shares and Mining of Mixed Minerals

6.1 Are rights to conduct reconnaissance, exploration and mining capable of being subdivided?

Reconnaissance/prospection authorisations, exploration and exploitation permits, as well as concessions, are granted for specific mineral resources provided within the relevant authorisation or the mining title in question.

They cannot be legally subdivided and the superposition of mining titles is prohibited. However, as there is a general requirement for a prior authorisation from the Ministry of Mines for any agreement, protocol or contract whereby the holder of a mining title undertakes

to merge, transform, lease, farm, transfer or sell totally or partially its rights and obligations, we could imagine that certain lease and/or farm-out agreements of certain areas and/or substances could theoretically be allowed by the Minister in Charge of Mines.

6.2 Are rights to conduct reconnaissance, exploration and mining capable of being held in undivided shares?

As any exploration permit is granted to a legal entity or several legal entities forming an incorporated entity, the direct undivided holding of a mining title by several entities seems to be prohibited, while the undivided holding of shares of a mining company holding a mining title is not.

6.3 Is the holder of rights to explore for or mine a primary mineral entitled to explore or mine for secondary minerals?

Reconnaissance/prospection authorisations, exploration and exploitation permits, as well as concessions, are granted for specific mineral resources provided within the relevant authorisation or the mining title in question. If some secondary minerals not listed in the authorisation or the mining title are found during exploration and/or exploitation, they need to be declared to the Mining Administration and a new application for such substances may be submitted by the person who found them.

6.4 Is the holder of a right to conduct reconnaissance, exploration and mining entitled to exercise rights also over residue deposits on the land concerned?

Only the holder of an exploitation mining title can also exploit residue deposits. If he does not want to exploit them, he needs to waive the right on such exploitation by notifying such a waiver to the Minister in Charge of Mines. Exploitation of such residue deposits will be possible by signing an exploitation of residue deposits convention between the holder of the exploitation mining title and the interested person for the exploitation of residue deposits. This convention is subject to authorisation by the Minister in Charge of Mines.

If residue deposits exist outside of an exploitation area, the right of exploiting such deposits is subject to an authorisation granted by the Minister in Charge of Mines.

The exploitation authorisation for residue deposits is granted for the life of the exploitation mining title, or for five years, renewable as long as necessary and as long as the exploitation mining title is valid.

6.5 Are there any special rules relating to offshore exploration and mining?

The 2015 Mining Code remains silent on specific rules regarding offshore exploration and mining.

7 Rights to Use Surface of Land

7.1 Does the holder of a right to conduct reconnaissance, exploration or mining automatically own the right to use the surface of land?

Under the Mining Code, the holder of an exploration or mining

title is authorised to use the surface of lands for the purpose of its mining operations by using forestry products, raw materials he found on land and constructing facilities, bridges and roads, subject to applicable law.

7.2 What obligations does the holder of a reconnaissance right, exploration right or mining right have vis-à-vis the landowner or lawful occupier?

When the holder of an exploration or mining title is using products or infrastructures or facilities of a landowner or lawful occupier, it needs to negotiate with him conditions of use and inform the Minister in Charge of Mines if specific rights of way are necessary. If he creates damages to a lawful occupier, he needs to indemnify it. A specific mediation commission is provided within the Mining Code to solve such types of disputes.

7.3 What rights of expropriation exist?

As some facilities to be erected by a mining title holder may be declared of public utility according to the 2015 Mining Code, expropriation could be facilitated under Gabonese expropriation rules, if needs be.

8 Environmental

8.1 What environmental authorisations are required in order to conduct reconnaissance, exploration and mining operations?

Prior to undertaking a mining activity, the investor must draft an environmental impact assessment (E.I.A.) of the project (exploration or mining of a mineral deposit) and wait for the technical approval of the Environmental Committee. The E.I.A. shall present the main aspects of the project and its impact on the environment and local population. It may also be considered a classified installation which needs to be authorised, in particular during the mining phase.

8.2 What provisions need to be made for storage of tailings and other waste products and for the closure of mines?

Under the Mining Code, an environmental management plan needs to be established by any holder of a mining authorisation or title. We assume therefore, in the absence of implementations decrees issued as of today, that it is such a management plan which should provide for terms and conditions of the storage of tailings and other waste products.

Under the Mining Code and the legislation on classified installations, mines need to be dismantled.

In order to take account of obligations resulting from the rehabilitation of sites and the protection of the environment, mining companies are allowed to deduct from their net operating income as a result of the balance sheet a provision for environmental protection.

Procedures for the establishment of this provision, not subject to time restriction, are specified in the Mining Convention.

8.3 What are the closure obligations of the holder of a reconnaissance right, exploration right or mining right?

The holder of a mining licence may undertake early rehabilitation

and development site security. General rehabilitation of the operating site must intervene progressively during the production phase or immediately after the end of mining according to the initial closure programme established for the application of the production mining title.

The holder of a mining title also has to prepare a plan for the follow-up and the control of quality of rehabilitation of the production site.

8.4 Are there any zoning or planning requirements applicable to the exercise of a reconnaissance, exploration or mining right?

When the public interest requires, a Decree of the President of the Republic, upon proposal of the Minister in Charge of Mines, may prohibit or authorise exploration or mining within and around certain specific areas under such mining titles.

Exploration or mining in any form whatsoever, whether on the surface or deeper, within a radius of 100 metres from a dependency of the State, can be performed after authorisation by joint order of the Minister in Charge of Mines and the Minister responsible for that dependency.

However, it is prohibited to undertake, within a 100-yard radius of the dwelling, places of burial, sacred places and religious buildings, an exploration, mining gallery or surface work without the consent of the holder of the property or occupant in good faith.

If the mining area is within a national park, specific requirements may also apply.

9 Native Title and Land Rights

9.1 Does the holding of native title or other statutory surface use rights have an impact upon reconnaissance, exploration or mining operations?

The holder of a mining title who, by mining activities, causes damage to the holder of title to land is required to compensate. However, the Constitution provides that property is an inviolable and sacred right and, therefore, no-one can be deprived except where public necessity, legally ascertained, obviously requires it, and with the condition of a just and prior indemnity.

To comply with this requirement, the Government has instituted several laws governing expropriation for public utility and a mediation commission to solve any dispute regarding damages made to neighbours.

10 Health and Safety

10.1 What legislation governs health and safety in mining?

The Mining Code provides for general principles of QHSE and also refers to international practices. It is also supplemented by the Labour Code and the Decree establishing general rules of health and safety in the workplace and other regulations, such as protection against ionising radiation.

10.2 Are there obligations imposed upon owners, employers, managers and employees in relation to health and safety?

Every holder of a mining licence shall continue research diligently

and according to the rules of the art used in the international mining industry. The mining agreement also lays down specific duties and obligations of the holder of the mining title and determines which steps must be taken to protect the environment during and after completion of the development of the mining title.

11 Administrative Aspects

11.1 Is there a central titles registration office?

The 2015 Mining Code provides for a centralised mining title registration office (“*cadaastre minier*”) to which any authorisation and mining titles regularly granted have to be transmitted and registered.

11.2 Is there a system of appeals against administrative decisions in terms of the relevant mining legislation?

Appeal against mining administrative decisions follows the general rules of filing claims against any administrative decision: a prior claims needs to be filed in front of the issuing administration or its upper authority before any claims can be made in front of the competent administrative court.

12 Constitutional Law

12.1 Is there a constitution which has an impact upon rights to conduct reconnaissance, exploration and mining?

Under the Constitution, mining is an activity which needs to be regulated by an Act of Parliament; this is how mining codes are adopted and amended from time to time in Gabon.

12.2 Are there any State investment treaties which are applicable?

The CEMAC Investment Charter regulates direct foreign investment and direct investment abroad in the CEMAC zone.

Through the Gabonese Investment Charter, the Gabonese Government guarantees to every person, whose investment is presented or performed in accordance with current legislation, the protection of investments.

Depending on the origin of the investor, some bilateral investment treaties may also be applicable.

13 Taxes and Royalties

13.1 Are there any special rules applicable to taxation of exploration and mining entities?

Mining companies carrying on mining activities in Gabon are subject to both specific mining fixed rate fees and royalties and duties which may vary in accordance with the mining activity phase and types of mineral resources in question.

Mining companies are also liable to the common tax regime (corporate income tax, withholding tax, distribution tax, VAT, land contributions, tax on wages, stamp and registration duties, harbour fees, etc.), although the Mining Code may provide specific rules and may provide for certain tax holiday periods.

Some specific mining taxes apply to both exploration and mining titles (fixed fees and surface royalty payments), while others apply only to mining titles (proportional mining tax) according to rates which vary with the substances in question and the period in question.

13.2 Are there royalties payable to the State over and above any taxes?

As part of social responsibility and local content requirements, the 2015 Mining Code also requires a mining title holder to contribute to certain funds:

- mines support fund financed by the provision for mining investments;
- training fund for the personnel of the Mining Administration;
- provisions for social responsibility (local content, protection of environment, promotion of SMEs, etc.); and
- provision for diversified investments,

which need to be completed by implementation decrees (to be adopted).

14 Regional and Local Rules and Laws

14.1 Are there any local provincial or municipal laws that need to be taken account of by a mining company over and above National Legislation?

Usually, some municipal taxes may apply in certain mining areas, provided they are listed in the Finance Act of the year in question.

14.2 Are there any regional rules, protocols, policies or laws relating to several countries in the particular region that need to be taken account of by an exploration or mining company?

For the purpose of their mining activities, mining companies may import some equipment unavailable in the local market and benefit from the special customs regime provided by the regional CEMAC Customs Code applicable in Gabon.

The customs regime applicable under the exploration title refers to the normal temporary admission customs regime (*Admission Temporaire Normale* – ATN) that applies to duty-free importations of plant, material, supplies, machinery and equipment, and commercial vehicles (except vehicles used for staff transportation) imported by the mining company and its subcontractors, subject to be re-exported at the end of their local utilisation.

The customs regime applicable under the mining title provides that companies carrying out activities under the exploitation phase may benefit from (i) the Special Temporary Admission Regime (ATS), allowing partial payment of customs duties for the machinery,

equipment and commercial vehicles (except for vehicles used for staff transportation) used for the implementation of the exploitation until the first sale, which are used and imported into Gabon, and (ii) the 5% reduced customs duty applicable to definite imports of goods, equipment and their spare parts destined for the exploitation of the deposit while this is no longer reminded within the 2015 Mining Code.

Some goods and consumables needed for local processing may be fully exempted from customs duties. Other material and equipment, including those used directly and definitely for the mining exploitation and consumables destined for exportation, are subject to the common customs duties.

The CEMAC Act on foreign exchange regulations also needs to be considered for any financial flux and investment within and towards Gabon, in particular when it provides for certain restrictions on the opening of a local foreign currencies account, borrowings outside Gabon and repatriation of export proceeds through local bank account(s).

15 Cancellation, Abandonment and Relinquishment

15.1 Are there any provisions in mining laws entitling the holder of a right to abandon it either totally or partially?

The holder of an exploration permit, an exploitation permit or a concession is entitled to totally or partially abandon his rights, provided it is done before the end of the term of the title in question and is notified to the State at least three months before the end of the activities.

15.2 Are there obligations upon the holder of an exploration right or a mining right to relinquish a part thereof after a certain period of time?

The 2015 Mining Code does not provide for any minimum period of time of activities before a holder of a mining title may decide to relinquish his rights.

15.3 Are there any entitlements in the law for the State to cancel an exploration or mining right on the basis of failure to comply with conditions?

Non-compliance by a mining title holder with his obligations may lead to sanctions which vary from mere penalties to withdrawal of the title in question, in conditions listed in the 2015 Mining Code.

The withdrawal is, however, effective only after the failure of the mining title holder to comply with obligations in question in a one-month period as far as exploration permits are concerned, and two months as far as exploitation permits and concessions are concerned.

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Jean-Pierre has extensive experience of projects and project financing throughout North, West and Central Africa, in particular as far as energy and mineral resources are concerned. Over the course of his career, he has developed a strong expertise in negotiation and drafting State contracts (production sharing contracts, establishment convention, mining conventions, BOT and concession agreements), in legal and tax structuring of projects in Africa, in particular for utilities, transportation infrastructures, mines and oil and gas. He graduated from Exeter University (UK) with an LL.M. in international business transactions and from Rennes University (France) with a postgraduate degree in business law.

The leading experience of Jean-Pierre Bozec in Gabon has been consistently recognised by *Chambers Global*, the *World's Leading Lawyers*, the *International Who's Who of Mining Lawyers*, and the *International Who's Who of Business Lawyers*.

PROJECT LAWYERS

Project Lawyers is an independent and registered Gabonese law firm, established in 2011 by Jean-Pierre Bozec, a legal advisor registered in Gabon for more than 10 years.

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Ghana

Reindorf Chambers

Fui S. Tsikata



Dominic Dziewornu Quashigah



1 Relevant Authorities and Legislation

1.1 What regulates mining law?

The Minerals and Mining Act, 2006 (Act 703) (as amended by the Minerals and Mining (Amendment) Act, 2015 (Act 900) and the Minerals Commission Act are the principal enactments setting out the framework of mining law. They express the basic position that minerals in their natural state are owned by the state. They also outline the licensing scheme for mineral operations, the incidents of the various mineral rights and the powers of the principal regulatory institutions. The following pieces of subordinate legislation add detail in specific areas to the regime set out in the principal legislation: (a) Minerals and Mining (General) Regulations, 2012 (L.I. 2173); (b) Minerals and Mining (Support Services) Regulations, 2012 (L.I. 2174); (c) Minerals and Mining (Compensation and Settlement) Regulations (L.I. 2175); (d) Minerals and Mining (Licensing) Regulations, 2012 (L.I. 2176); (e) Minerals and Mining (Explosives) Regulations, 2012 (L.I. 2177); and (f) Minerals and Mining (Health, Safety and Technical) Regulations, 2012 (L.I. 2182).

1.2 Which Government body/ies administer the mining industry?

The sector Minister, currently the Minister for Lands and Natural Resources and the Minerals Commission are the government bodies with primary responsibility for administering the mining industry.

1.3 Describe any other sources of law affecting the mining industry.

Environmental legislation, including that relating to forest protection, water bodies and water use, tax legislation, customary law relating to land tenure, the law of corporations, contract law and administrative law principles concerning the exercise of governmental power are all relevant to the mining industry.

2 Mechanics of Acquisition of Rights

2.1 What rights are required to conduct reconnaissance?

(a) A reconnaissance licence; and (b) a restricted reconnaissance licence to engage in reconnaissance in relation to an “industrial

mineral”, i.e. “basalt, clay, granite, gravel, gypsum, laterite, limestone, marble, rock, sand, sandstone, slate talc, salt and other minerals as the Minister may from time to time declare, by notice published in the Gazette, to be industrial minerals”.

2.2 What rights are required to conduct exploration?

Rights required are: (a) a prospecting licence; and (b) a restricted prospecting licence to engage in prospecting for industrial minerals.

2.3 What rights are required to conduct mining?

The rights required to conduct mining are: (a) a mining lease; (b) a restricted mining lease to engage in mining for an industrial mineral; and (c) a small-scale mining licence for the conduct of small-scale mining. The mining lease permits its holder to engage in reconnaissance and prospecting.

2.4 Are different procedures applicable to different minerals and on different types of land?

No, although there are different eligibility criteria for different rights. In particular, non-Ghanaians are prohibited from engaging in small-scale mining. The threshold for engaging in industrial mineral operations is higher for non-Ghanaians than for Ghanaians.

2.5 Are different procedures applicable to natural oil and gas?

Yes, there are.

3 Foreign Ownership and Indigenous Ownership Requirements and Restrictions

3.1 What types of entity can own reconnaissance, exploration and mining rights?

Save for small-scale mining rights which can be granted to individual Ghanaians, only corporate bodies incorporated in Ghana under Ghanaian law can hold mineral rights.

3.2 Can the entity owning the rights be a foreign entity or owned (directly or indirectly) by a foreign entity and are there special rules for foreign applicants?

Foreign entities cannot directly hold mineral rights, though entities they incorporate in Ghana can hold mineral rights. The Ghana Investment Promotion Centre Act, 2013 (Act 865) has minimum investment requirements for non-Ghanaians. Where the foreign investor has a Ghanaian partner, the foreign investor is required to contribute at least US\$200,000 to the equity of the entity and the Ghanaian partner must hold not less than 10% of the equity. A foreign investor in a business that it solely owns is required under Act 865 to invest a minimum of US\$500,000. The minimum capital requirement may be met in cash or capital goods relevant to the investment. A foreign investor cannot engage in operations relating to industrial minerals unless it commits in its proposed programme to invest at least US\$10 million in the operations.

3.3 Are there any change of control restrictions applicable?

A person who intends to become the controller of an entity which directly or indirectly holds mineral rights is required to obtain a “no objection” notice from the Minister of Lands and Natural Resources before becoming such controller. A controller is defined to mean “a person who, either alone or with an associate or associates, is entitled to exercise, or control the exercise of more than twenty per cent of the voting power at any general meeting of the mining company or of another company of which it is a subsidiary”. The entity and the exiting shareholder are also required to notify the Minister, respectively, of the change in control of the company or of ceasing to be controller.

3.4 Are there requirements for ownership by indigenous persons or entities?

A small-scale mining licence may only be granted to a citizen of Ghana who is at least 18 years old, and is registered by the office of the Minerals Commission in an area designated as a small-scale mining area.

A person who is not a citizen may not apply for a mineral right in respect of industrial mineral unless the proposed investment in the mineral operations is 10 million United States dollars or above.

3.5 Does the State have free carry rights or options to acquire shareholdings?

The State is entitled to 10% free carried interest in an entity engaged in mining. This does not preclude the Government from any other or further participation in mineral operations that may be agreed with the holder of the mineral.

Additionally, the Minister may by notice in writing to a mining company require the company to issue to the State a ‘special share’ in the company for no consideration. The special share is meant to give the Government, *inter alia*, the power to veto decisions relating to the liquidation of the company or disposal of the whole or a material part of its assets. To the best of our knowledge, since this provision was first introduced, the special share has only been taken on one occasion in the context of the state reducing its interest in a company in which it previously held majority shares.

4 Processing, Refining, Beneficiation and Export

4.1 Are there special regulatory provisions relating to processing, refining and further beneficiation of mined minerals?

The Minerals and Mining Act requires a licence from the Minister for the sale, export or other disposal of a mineral. Under the Minerals and Mining (General) Regulations, 2012 (L.I. 2173), an application by a holder of a mining lease for a licence to export, sell or dispose of gold or other precious minerals produced by the holder must be accompanied by a refining contract and a sales and marketing agreement.

Holders of small-scale licences for mining precious minerals are required to export their minerals through the Precious Minerals Marketing Company (PMMC) or any other licensed exporter.

An application by a person other than a holder of a mining lease to purchase and export, sell or dispose of gold or other precious minerals requires the applicant to satisfy the Minister that the minerals will be refined or polished in Ghana or that only refined or polished minerals will be purchased for export, or that a percentage of the minerals will be supplied to local users. In practice, as there is very little refinery capacity in Ghana, this requirement is hardly enforced.

4.2 Are there restrictions on the export of minerals and levies payable in respect thereof?

Shipment of diamonds is subject to certification under the Kimberley Process Certificate Act, 2003 (Act 652).

5 Transfer and Encumbrance

5.1 Are there restrictions on the transfer of rights to conduct reconnaissance, exploration and mining?

A transfer, assignment, mortgage, or encumbrance of a mineral right or any dealing in relation to a mineral right requires the prior written approval of the Minister. The approval should not be unreasonably withheld or given subject to unreasonable conditions. Further, the Minister is required to communicate a decision on the application within 30 days of receipt of the application, otherwise, the Minister upon request from the applicant must give reasons for failing to do so.

5.2 Are the rights to conduct reconnaissance, exploration and mining capable of being mortgaged or otherwise secured to raise finance?

A reconnaissance, prospecting or mining right may be mortgaged or secured, subject to the approval of the Minister. If the mortgagor defaults and the mortgagee forecloses, the mortgagee acquires the mineral rights subject to the approval of the Minister.

6 Dealing in Rights by Means of Transferring Subdivisions, Ceding Undivided Shares and Mining of Mixed Minerals

6.1 Are rights to conduct reconnaissance, exploration and mining capable of being subdivided?

Reconnaissance, prospecting and mining rights may be subdivided with the approval of the Minister.

6.2 Are rights to conduct reconnaissance, exploration and mining capable of being held in undivided shares?

Mineral rights may be held in undivided shares. However, given the requirement of local incorporation referred to in response to question 3.1 above, the general practice is for those jointly involved in the venture to be allotted shares in the corporate entity which holds the mineral rights.

6.3 Is the holder of rights to explore for or mine a primary mineral entitled to explore or mine for secondary minerals?

A holder of a mineral right cannot explore for or mine a mineral that is not the subject of the mineral right. If the holder desires to explore for or mine any other mineral, the person must apply to the Minister to amend the right to include such other mineral.

6.4 Is the holder of a right to conduct reconnaissance, exploration and mining entitled to exercise rights also over residue deposits on the land concerned?

A mineral right holder is only entitled to exercise rights in respect of the minerals to which its licence relates. To exercise rights over residue deposits (tailings), additional rights are required.

6.5 Are there any special rules relating to offshore exploration and mining?

No, there are not.

7 Rights to Use Surface of Land

7.1 Does the holder of a right to conduct reconnaissance, exploration or mining automatically own the right to use the surface of land?

The holder of a mineral right is entitled to enter onto the land for the conduct of the mineral operations. However, it is required to exercise its rights subject to the surface rights of the owner or occupier of the land.

7.2 What obligations does the holder of a reconnaissance right, exploration right or mining right have vis-à-vis the landowner or lawful occupier?

The holder of a mineral right is required to exercise the rights granted subject to the surface rights of the owner or occupier of the land. The owner or lawful occupier of land retains the right to graze

livestock upon or to cultivate the surface of the land if the grazing or cultivation does not interfere with the mineral operations in the area.

The holder of a mineral right is also required to compensate the owner or lawful occupier for the disturbance of the surface rights of the owner or lawful occupier. The compensation may be monetary or by way of resettlement, the cost of which shall be borne by the minerals right holder. Where people have to be displaced, there is a constitutional obligation to resettle them.

7.3 What rights of expropriation exist?

Where land is required to secure the development or utilisation of a mineral resource, the President may acquire the land or authorise its occupation and use subject to the prompt payment of fair and adequate compensation.

Act 703 also gives the Minister a power of pre-emption in respect of all minerals raised, won or obtained in Ghana. The exercise of this power is subject to the constitutional provisions regulating expropriation and to the terms of agreements entered into with mineral rights holders. In any case that power has not, to the best of our knowledge, been exercised in more than 30 years.

8 Environmental

8.1 What environmental authorisations are required in order to conduct reconnaissance, exploration and mining operations?

An environmental permit is required in order to undertake reconnaissance, exploration and mineral operations.

8.2 What provisions need to be made for storage of tailings and other waste products and for the closure of mines?

The manager of a mine is required to comply with the provisions of L.I. 2182. These contain obligations relating to the construction and location of tailings and waste product storage facilities.

L.I. 2182 contains provisions relating to mine closure. These include obligations to ensure that tailings storage facilities are stabilised in the long term.

The Environmental Assessment Regulations, 1999 (L.I. 1652) require that there be (a) a reclamation plan, and (b) a bond to secure implementation of the work plan approved by the Environmental Protection Agency.

8.3 What are the closure obligations of the holder of a reconnaissance right, exploration right or mining right?

A reconnaissance or prospecting licence requires the holder to comply with terms which typically include an obligation to rehabilitate the land. In respect of a mining lease, the holder is required, before closing a mine site, to satisfy the Chief Inspector of Mines that each source of potential pollution and component of the mining operation that is to be closed is designed to be stable in the long term.

The holder of a mining lease is required to: (a) ensure that discharge/ emission of polluted water, air or dust does not occur from the closed mine site; (b) submit a mine closure plan to the Inspectorate Division of the Minerals Commission for approval; and (c) within 12 months after the closure of the mine rehabilitate mining areas which are no longer required for the mining operations.

8.4 Are there any zoning or planning requirements applicable to the exercise of a reconnaissance, exploration or mining right?

In respect of mining, the Local Governance Act, 2016 (Act 936) prohibits the carrying out of any physical development without a permit granted by the District Planning Authority. A “physical development” is defined under Act 4936 as “carrying out of building, engineering, mining or other operations on, in, under or over land, or the material change in the existing use of land or building and includes sub-division of land, the disposal of waste on land including the discharge of effluent into a body of still or running water and the erection of advertisement or other hoarding”.

In the standard mineral right agreement, the holder is prohibited from conducting any operations in a sacred area. It further requires the written consent of the Minister to conduct its operation: (a) within 100 metres of any forest reserve, river, stream, building, installation, reservoir or dam, public road, railway or area appropriated for a railway; (b) within 30 metres of a pylon; and (c) in an area occupied by a market, burial ground, cemetery or Government office, or situated within a town or village or set apart for, used, appropriated or dedicated to a public purpose.

9 Native Title and Land Rights

9.1 Does the holding of native title or other statutory surface use rights have an impact upon reconnaissance, exploration or mining operations?

In Ghana, land is mostly owned by individuals, extended families and communities presided over by chiefs who hold the land in trust for their members. These members are entitled to exercise surface rights over and appropriate portions of these lands in accordance with customary law. They must be compensated by the minerals right holder for interference with their rights. The right to compensation includes compensation for: (a) deprivation of the use or particular use of the natural surface of the land or part of the land; (b) loss of or damage to property; (c) loss of earnings or sustenance suffered by the owner or lawful occupier of land under cultivation having due regard to the nature of their interest in the land; (d) loss of expected income, depending on the nature of crops on the land and their life expectancy. But no claim for compensation lies in respect of the value of a mineral.

10 Health and Safety

10.1 What legislation governs health and safety in mining?

The Minerals and Mining (Health, Safety and Technical) Regulations, 2012 (L.I. 2182).

10.2 Are there obligations imposed upon owners, employers, managers and employees in relation to health and safety?

Yes. Some of their obligations are summarised below:

- (1) The owner of a mine, manager of a mine or a holder of a small-scale mining licence, is required to ensure that changing rooms are provided: (a) near to man riding shafts on the surface of an underground mine; (b) at locations near to a work area of a surface mine, with separate provisions

for males and females; and (c) are proportionate in size to the number of persons employed in the mine. The holder of a mining or restricted mining lease is also required to, with the approval of the Chief Inspector and prior to the commencement of mining operations, appoint a certified manager for the mine.

- (2) Persons working in a mine are required to co-operate with the manager of the mine or the holder of a small-scale mining licence in respect of the mine in the discharge of the relevant obligations under L.I. 2182. However, an employee is not liable for a contravention of L.I. 2182 where the employee acts at the direction of a supervisor.
- (3) Employees are also required to remove other persons whom they are aware of having been unknowingly exposed to excessive amounts of toxic gas or fumes, dust or harmful temperatures and immediately inform the manager of the mine of the circumstances of the exposure. The manager is required to take further steps necessary to ensure the safety and health of each person who has been or may subsequently be exposed to the conditions specified and to rectify and prevent a recurrence of those conditions.

11 Administrative Aspects

11.1 Is there a central titles registration office?

The Minerals Commission is required to and does maintain a register of mineral rights in which it records applications, grants, variations and dealings in assignments, transfers, suspensions and cancellations of mineral rights. The register is open to public inspection on payment of a prescribed fee and members of the public may upon request to the Commission and on payment of the prescribed fee, be provided a copy of the records.

Further, the interest in minerals conveyed by a grant is required to be stamped and registered within 21 days of being granted with either the Land Registry or the Land Title Registry (depending on the area in which the mineral right is located). Copies of the stamped and registered documents are required to be provided to the Minerals Commission.

11.2 Is there a system of appeals against administrative decisions in terms of the relevant mining legislation?

The prerogative remedies known to the administrative law of common law jurisdictions are available under Ghanaian law. These are available to enforce constitutional duties of candour and fairness imposed on public officers.

In addition, there are specific statutory appeal mechanisms applicable in defined circumstances.

12 Constitutional Law

12.1 Is there a constitution which has an impact upon rights to conduct reconnaissance, exploration and mining?

Yes. Under the Constitution, 1992, “every mineral in its natural state in, under or upon any land in Ghana, rivers, streams, water courses throughout Ghana, the exclusive economic zone and any area covered by the territorial sea or continental shelf is the property of the Republic of Ghana...” and is vested in the President who holds them on behalf of, and in trust for the people of Ghana.

Grants of rights to exploit minerals are subject to ratification by Parliament.

The Constitution also requires “international business or economic transaction[s] to which the Government is a party” to be approved by Parliament prior to their coming into force. Transactions involving assurances to foreign investors who establish mining ventures in Ghana are affected by this requirement.

12.2 Are there any State investment treaties which are applicable?

Ghana has signed and ratified investment treaties with China, Denmark, Germany, Malaysia, the Netherlands, Switzerland and the United Kingdom. Generally, these provide protection to the investments of persons from the contracting parties.

13 Taxes and Royalties

13.1 Are there any special rules applicable to taxation of exploration and mining entities?

Yes, these rules are provided under sections 77 to 86 of the Income Tax Act, 2015 (Act 896). Act 896 treats income from mineral operations separately from other sources of income and imposes a mineral income tax at the rate of 35% on profits from mineral operations. In ascertaining the assessable income of a person from mineral operations, (a) each separate mineral operation is treated as an independent business, and (b) the tax liability for the business is required to be calculated independently for each year of assessment. For income tax purposes, a mineral operation pertaining to each mine and a mineral operation with a shared processing facility constitute separate mineral operations which are required to be taxed separately.

13.2 Are there royalties payable to the State over and above any taxes?

Yes, royalties are payable at the rate of 5% of gross revenue.

14 Regional and Local Rules and Laws

14.1 Are there any local provincial or municipal laws that need to be taken account of by a mining company over and above National Legislation?

Property rates are chargeable by local government bodies under the Local Governance Act, 2016 (Act 936).

14.2 Are there any regional rules, protocols, policies or laws relating to several countries in the particular region that need to be taken account of by an exploration or mining company?

The ECOWAS Directive on the Harmonisation of Guiding Principles and Policies in the Mining Sector prescribes a set of rules and guiding principles to member states of the Economic Community of West African States. Further, the ECOWAS Common External Tariff which is scheduled to the Customs Act,

2015 (Act 891) as amended by the Customs (Amendment) Act, 2015 (Act 905) exempts machinery, appliances, apparatus designed for use in mining and dredging from the payment of Value Added Tax on importation.

15 Cancellation, Abandonment and Relinquishment

15.1 Are there any provisions in mining laws entitling the holder of a right to abandon it either totally or partially?

There is provision for the surrender (abandonment) of a mineral right whether in whole or in part. A holder of a mineral right who wishes to surrender the land subject to the mineral right is required to apply to the Minister for a certificate of surrender no later than two months before the date on which the holder wishes the surrender to take effect. A certificate will not be granted, *inter alia*, if the holder (a) is in default of its obligations, or (b) does not satisfy the Minister that it will surrender the area in a condition which is “safe and accords with good mining practice”.

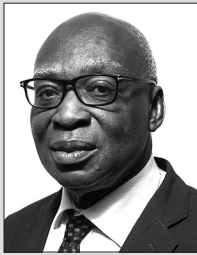
15.2 Are there obligations upon the holder of an exploration right or a mining right to relinquish a part thereof after a certain period of time?

In respect of an exploration or prospecting licence, the holder is required, prior to or at the expiration of the initial term, to surrender no less than half the number of blocks of the prospecting area so long as a minimum of one hundred and twenty-five blocks remain subject to the licence and the blocks form not more than three discrete areas each consisting of (a) a single block, or (b) a number of blocks each having a side in common with at least one other block in that area. Relief may be granted either in whole or in part against this requirement if the holder of the prospecting licence satisfies the Minister that delay by a government institution or agency in the issuance of permits or in carrying out a lawful activity resulted in delay by the holder in the discharge of an obligation under the prospecting licence. The period of the relief shall not exceed 12 months and shall be subject to such other conditions that the Minister thinks fit.

A block is equivalent to 21 hectares or 0.21 square kilometres.

15.3 Are there any entitlements in the law for the State to cancel an exploration or mining right on the basis of failure to comply with conditions?

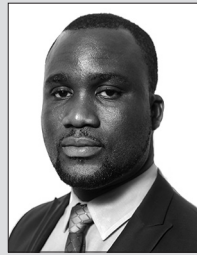
The State has a right to cancel or suspend a mineral right for the holder’s non-compliance with law or obligations under the agreement granting the mineral right. Prior to exercising a right to suspend or cancel a mineral right, the Minister is required to give notice to the holder requiring the holder to remedy the breach complained of within a reasonable period, not being less than 120 days in the case of a mining lease or restricted mining lease or 60 days in the case of another mineral right. Where the breach cannot be remedied, the holder is required to show cause to the reasonable satisfaction of the Minister why the mineral right should not be suspended or cancelled.

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Greenland

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1 Relevant Authorities and Legislation

1.1 What regulates mining law?

Mining law in Greenland is first of all governed by the Mineral Resources Act (MRA) which came into force on 1 January 2010, and which contains rules on ownership of the mineral resources, licensing procedures and terms, requirements for the applicant/licensee, work programme, taxation, environmental protection, public hearings, pre-hearings and public involvement in the approval process for projects and individual activities. The MRA also contains obligations to perform environmental impact assessments (EIAs) and social sustainability assessments (SSAs, or social impact assessments (SIAs)) and enter into impact benefit agreements (IBAs).

The MRA is to a large extent based on the Danish Subsoil Act, but with a number of specific adjustments due to the demands of operating in an Arctic environment. In addition, the Greenland Working Environment Act governs health and safety aspects of mining activities. See also the answer to question 1.3 below.

1.2 Which Government body/ies administer the mining industry?

The Ministry of Mineral Resources is responsible for strategy-making, policy-making, legal and geological issues and marketing of mineral resources in Greenland. The MLSA is the overall administrative authority for licences and mineral resource activities, and is the authority for safety matters including supervision and inspections.

The Ministry of Industry, Labour and Trade is the authority for issues concerning industry and labour policy including SSAs and IBAs for mineral resources and similar related socio-economic issues.

The Environmental Agency for Mineral Resource Activities is the administrative authority for environmental matters relating to mineral resources activities, including protection of the environment and nature, environmental liability and EIAs.

1.3 Describe any other sources of law affecting the mining industry.

Sources of law other than the MRA include the Working Environment Act, the Income Tax Act, and minerals model licences and standard terms that have been issued by the authorities and

which serve as models for mining licences. General Greenlandic law – the penal code, civil procedure, the Competition Act, the Act on Processing of Personal Data, the legal principles for disclosure of misconduct through internal and external corporate whistleblowing in general, etc. – also applies. In addition, for mining operations, a number of special regulations exist regarding the use of explosives, radioactive materials, chemicals, etc.

Also, anti-corruption provisions of Danish and Greenlandic law apply (Greenland Criminal Code), as well as the anti-corruption policy of the Ministry of Mineral Resources and its subordinate institutions.

2 Mechanics of Acquisition of Rights

2.1 What rights are required to conduct reconnaissance?

Reconnaissance (prospecting) can be carried out if the applicant obtains a prospecting licence in accordance with section 15 of the MRA. The licence is granted for periods of up to five years at a time. The granting of the non-exclusive licence does not exclude that a similar licence may be granted to others for the same area. The authorities may stipulate terms for the licence, including terms on payment of consideration. Standard terms for prospecting licences have been issued by the authorities, including fees for application, granting and transfer.

2.2 What rights are required to conduct exploration?

Under section 16 of the MRA, the authorities may, for a specific area and on specific terms, in particular a work programme, grant an exclusive licence for exploration and exploitation of one or more mineral resources. Licences may be granted separately for exploration and exploitation, respectively. Under section 29(1) of the MRA, exploration licences under section 16 are granted for a period of up to 10 years or, if special circumstances exist, for a period of up to 16 years.

A licence may be extended with a view to exploration by up to three years at a time. An extension for more than 10 years may also be granted under special circumstances. Standard terms for exploration licences have been issued by the authorities, including the condition for transitioning from exploration to exploitation/mining and the payment of fees on the basis of, among others, the size of the exploration licence acreage.

2.3 What rights are required to conduct mining?

Under section 29(2) of the MRA, a licensee who, under a licence under section 29(1), has discovered and delimited commercially exploitable deposits that the licensee intends to exploit, and who has otherwise met the terms of the licence, is entitled to be granted an exploitation licence. The licence is granted for those parts of the area that contain commercially exploitable deposits, which the licensee intends to exploit.

The licence is granted for a period of 30 years, unless a shorter period has been laid down as a condition for granting the licence. Simultaneously with the application for exploitation licence, a closure plan must be submitted. Under section 16(3) of the MRA, for non-small-scale licences, only a limited company can be granted an exploitation licence, and certain financial conditions apply (taxation, trading, capital, etc.). See also question 3.1 below.

2.4 Are different procedures applicable to different minerals and on different types of land?

As a starting point no; however, the royalty/tax and financial terms are different for rare earth elements, uranium, gemstones, and other minerals, respectively. Specifically for uranium, the Greenlandic and the Danish governments have, in January 2016, signed a number of agreements that will ensure that Greenland can proceed with plans to build its mining industry and prepare future exports of uranium while Denmark can live up to its international obligations and the highest standards in the uranium area on behalf of Greenland. Whenever uranium may be explored for or occur as a by-product to eventual exploitation, the rules and procedures contained therein should be carefully examined.

2.5 Are different procedures applicable to natural oil and gas?

Mining licences do not cover oil or natural gas that is discovered in the area covered by the licence. Exploration and production of oil and natural gas are, however, governed by the MRA under different terms and conditions, which are not detailed here.

3 Foreign Ownership and Indigenous Ownership Requirements and Restrictions

3.1 What types of entity can own reconnaissance, exploration and mining rights?

Under the MRA, an exploitation (mining) licence can only be granted to limited companies. As an exploitation rights holder, the company may only perform activities covered by licences granted under the MRA and must not be taxed jointly with other companies, unless joint taxation is compulsory.

It should be noted that as a main rule, the company must have its registered office in Greenland. There are also financial and operational covenants: the company must not be more thinly capitalised than the group of which the company forms a part of, but the company's loan capital may always exceed the shareholders' equity up to a ratio of 2:1. The company must generally trade at arm's-length prices and on arm's-length terms.

The licensee must have the mining expertise and financial background required for the exploitation activities in question. As a main rule only Greenland domiciled companies will be considered for exploitation licences.

3.2 Can the entity owning the rights be a foreign entity or owned (directly or indirectly) by a foreign entity and are there special rules for foreign applicants?

Yes; however, see the answer to question 3.5 below. In addition, under section 18 of the MRA, a licensee must use Greenlandic labour and use Greenlandic enterprises for its supplies and contract work unless such enterprises are not technically or economically competitive. It is also the main rule that enterprises working under the MRA and which are holders of an exploitation licence must be registered as Greenlandic enterprises.

3.3 Are there any change of control restrictions applicable?

Under section 88 of the MRA, direct or indirect transfer of a licence under the MRA to a third party requires approval by the authorities, and the authorities may set forth conditions for their approval.

3.4 Are there requirements for ownership by indigenous persons or entities?

No, there are no such requirements.

3.5 Does the State have free carry rights or options to acquire shareholdings?

As a starting point no; however, under the MRA, the Greenland Government may require that a government-controlled entity join as a participant in the licence. The Government may specify further terms for such participation. No such government-controlled entity is currently in existence to participate in mining activities.

4 Processing, Refining, Beneficiation and Export

4.1 Are there special regulatory provisions relating to processing, refining and further beneficiation of mined minerals?

A licence holder may expect specific conditions to be set forth in individual licences. Processing and further beneficiation of mined minerals require the approval of the authorities which may set forth conditions for the approval. Specifically, the authorities may require in concrete licences where processing, etc. takes place in Greenland, unless such processing would result in significantly higher costs or will be impractical.

A licence may stipulate the extent to which the licensee must keep exploited mineral resources in Greenland and sell them to natural persons who are permanently residing and fully liable to pay tax in Greenland.

A licence may also determine the extent to which the licensee must conduct surveys and prepare and implement plans to ensure that exploration or exploitation of mineral resources is socially sustainable and the authorities must approve such surveys and plans.

4.2 Are there restrictions on the export of minerals and levies payable in respect thereof?

Export of production may only take place with the approval of the Greenland Government, see the MRA section 2(2). Further terms may be set forth in the individual licence or the individual permit. See also the answer to question 4.1 above.

5 Transfer and Encumbrance

5.1 Are there restrictions on the transfer of rights to conduct reconnaissance, exploration and mining?

Under section 88 of the MRA, direct or indirect transfer of a licence under the MRA to a third party requires approval by the authorities, which may reject or set forth conditions for the approval. Typically, a transfer requires that the new owner can demonstrate technical and financial capability to meet commitments and potential liabilities. As a main rule only Greenland domiciled companies will be considered for exploitation licences.

5.2 Are the rights to conduct reconnaissance, exploration and mining capable of being mortgaged or otherwise secured to raise finance?

Licences granted under the MRA cannot be the subject of prosecution and can therefore principally not be pledged for security according to section 88(2) of the MRA. In any event, any mortgage will require the approval by the authorities.

6 Dealing in Rights by Means of Transferring Subdivisions, Ceding Undivided Shares and Mining of Mixed Minerals

6.1 Are rights to conduct reconnaissance, exploration and mining capable of being subdivided?

Yes, provided a direct or indirect transfer of a licence or a licence right to a third party is carried out and has been approved by the authorities. The authorities may, however, reject a transfer where conditions are not met. A subdivision may also require amendments to other permits and may require additional consultations with the public.

6.2 Are rights to conduct reconnaissance, exploration and mining capable of being held in undivided shares?

As a starting point, the answer is yes. The concept of undivided shares is considered a common law concept which does not apply in Greenland; however, under Greenlandic law, rights can be held in undivided shares (a corporation).

6.3 Is the holder of rights to explore for or mine a primary mineral entitled to explore or mine for secondary minerals?

An exploration licence will cover all mineral resources except hydrocarbons and radioactive elements, unless otherwise stipulated in the licence.

6.4 Is the holder of a right to conduct reconnaissance, exploration and mining entitled to exercise rights also over residue deposits on the land concerned?

The MRA or the standard terms do not address the issue of residue ownership directly. Under Greenlandic law, a licensee holding exploration or mining rights will have no rights over residue deposits which existed on the area covered by his licence.

6.5 Are there any special rules relating to offshore exploration and mining?

Offshore exploration and mining for minerals are also governed by the MRA. Offshore activities, however, principally only relate to hydrocarbons, and the rules governing hydrocarbons are different from the mining regulations and are not covered here.

7 Rights to Use Surface of Land

7.1 Does the holder of a right to conduct reconnaissance, exploration or mining automatically own the right to use the surface of land?

Reconnaissance (prospecting) rights are non-exclusive, whereas exploration or mining (exploitation) rights are exclusive to the rights holder. The following activities may be carried out without prior approval from the authorities: geological and geochemical investigations, as well as sampling using handheld equipment, provided samples from each location do not exceed three tonnes and provided the total weight of the samples does not exceed 10 tonnes per year; drilling with handheld equipment; and geophysical investigations carried out without the use of explosive materials.

Activities other than those indicated in the foregoing may be carried out, provided that they have been approved by the authorities. Such activities include use of explosive materials, drilling excluding drilling as indicated previously, sampling exceeding what is indicated previously, use of equipment containing radioactive sources, use of vehicles, bulldozers, etc., levelling of the terrain, construction of installations, buildings, etc., and construction of shafts, drifts, ramps, etc.

7.2 What obligations does the holder of a reconnaissance right, exploration right or mining right have vis-à-vis the landowner or lawful occupier?

Activities other than those indicated in the foregoing may be carried out, provided that they have been approved by the authorities. Such activities include use of explosive materials, drilling excluding drilling as indicated previously, sampling exceeding what is indicated previously, use of equipment containing radioactive sources, use of vehicles, bulldozers, etc., levelling of the terrain, construction of installations, buildings, etc., and construction of shafts, drifts, ramps, etc.

7.3 What rights of expropriation exist?

Under section 93 of the MRA, the authorities have powers of compulsory acquisition of real property with a view to activities under the MRA.

8 Environmental

8.1 What environmental authorisations are required in order to conduct reconnaissance, exploration and mining operations?

The Greenland Government places a large emphasis on environmental protection and environmental requirements are prominent in both the MRA and the standard terms, both in terms of nature protection, the environment and the climate. Best environmental practices (BEP) and best available technologies/techniques (BAT) must be employed. In addition, the licence holder must prepare an EIA and an SSA/SIA. These will contain a baseline study and the expected impact of the activities on the environment and the social sustainability in the areas affected.

8.2 What provisions need to be made for storage of tailings and other waste products and for the closure of mines?

Please see the answer to question 8.3 below.

8.3 What are the closure obligations of the holder of a reconnaissance right, exploration right or mining right?

In the MRA, specific provisions are laid down in licences regarding the licensee's obligations on the termination of activities to remove facilities, etc. established by the licensee and to clean up, monitor, etc. the affected areas. More detailed rules are contained in the standard terms, according to which all facilities, etc. must be removed unless non-removal has been approved by the authorities. A dedicated closure plan and special provisions for financial security may also be required. In the event of non-compliance, the authorities may clean up the site, etc. at the licensee's cost, e.g. by drawing on the financial security provided.

8.4 Are there any zoning or planning requirements applicable to the exercise of a reconnaissance, exploration or mining right?

Zoning plans must be observed and special zoning permits may apply depending on where the mining activities are carried out.

9 Native Title and Land Rights

9.1 Does the holding of native title or other statutory surface use rights have an impact upon reconnaissance, exploration or mining operations?

The MRA contains rules on the pre-hearing of projects as well as other public hearings as described under question 7.2 above. In addition, small-scale mining of surface materials and collection of loose minerals are allowed for the local population and others within certain thresholds. Otherwise, there are no special native title or statutory surface use rights.

10 Health and Safety

10.1 What legislation governs health and safety in mining?

The Greenland Working Environment Act governs health and safety in minerals prospecting, exploration and mining activities. The act contains rules on the health and safety aspects of planning and execution of work in Greenland, including workplace layout, bringing the level of risk at work to a level as low as reasonably practicable, the protection against noise, emissions and hazardous substances and the use of personal protective equipment.

10.2 Are there obligations imposed upon owners, employers, managers and employees in relation to health and safety?

The Working Environment Act imposes health and safety obligations on owners, employers, managers and employees. For owners and employers, there are strict requirements for planning and supervision, whereas employees' obligations are reporting and the implementation of management's plans in the health and safety area.

11 Administrative Aspects

11.1 Is there a central titles registration office?

A list of all valid licences can be obtained from the authorities at www.govmin.gl. This website is generally a good source of information regarding Greenland's mining sector and contains copies of all applicable legislation, standards and guidelines for mining in Greenland.

11.2 Is there a system of appeals against administrative decisions in terms of the relevant mining legislation?

There is no special system of appeals in terms of the relevant mining legislation. Beyond the normal administrative recourse through the Ministries, a party will, as in other mining jurisdictions, have to resort to the Greenlandic courts and ultimately the Danish Supreme Court.

12 Constitutional Law

12.1 Is there a constitution which has an impact upon rights to conduct reconnaissance, exploration and mining?

The Danish constitution of 1953 applies in Greenland; however, beyond provisions for the protection of private property, the Danish constitution has no direct bearing on the rights to conduct reconnaissance, exploration and/or mining.

12.2 Are there any State investment treaties which are applicable?

Greenland is a part of the Danish Unity of the Realm and holds only a limited foreign policy capacity. Foreign policy for Greenland is

principally carried out by the Danish Government in consultation with the Greenland Government. As such, a number of treaties and conventions signed and ratified by Denmark also become relevant for, and applicable to, Greenland.

For instance, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) both apply to Greenland. In addition, protocols and recommendations adopted in the Arctic Council, in which Greenland/Denmark is a member, may also apply in Greenland. The Arctic Council is a means for promoting co-operation and interaction among the Arctic states, in particular within sustainable development and environmental protection in the Arctic.

Greenland is not a member of the European Union (EU) but has the status of an associated territory in the EU. Therefore, EU rules do not apply to Greenland apart from the special rules on association of overseas countries and territories (OCT) of the EC Treaty.

13 Taxes and Royalties

13.1 Are there any special rules applicable to taxation of exploration and mining entities?

Taxation of income from minerals exploration and extraction is governed by the Greenlandic Income Tax Act and the minerals model licence which contain rules on royalties, the payment of fees for the granting of licences, etc., and the reimbursement of the Authorities' expenses in connection with the licensee's activities. Taxation of mining companies is 30%, which is slightly lower than other companies. In addition, dividends tax is 36% whereas other companies will pay 42–44%, and mining companies can carry forward losses without the time limit of five years that applies to other companies.

13.2 Are there royalties payable to the State over and above any taxes?

A sales royalty was introduced in 2014 for new licences. For minerals other than rare earth elements (REE), uranium or gemstones, the sales/turnover royalty will be 2.5%. For REE and uranium, the rate is 5%, and for gemstones, 5.5%.

14 Regional and Local Rules and Laws

14.1 Are there any local provincial or municipal laws that need to be taken account of by a mining company over and above National Legislation?

No, except that local zoning regulations may apply. In addition, the MRA's rules on public involvement and consultation will impact exploration and mining activities.

14.2 Are there any regional rules, protocols, policies or laws relating to several countries in the particular region that need to be taken account of by an exploration or mining company?

Generally, in the Arctic – as opposed to Antarctica – there is not a single regulatory treaty, convention or international agreement governing the Arctic, as the Arctic consists of states where national laws apply. International public law, however, applies to the relations between Denmark/Greenland and the other states in the Arctic. Bilateral agreements have been entered into, and as stated under question 12.2 above, co-operation also takes place in international fora such as the Arctic Council and the UN.

15 Cancellation, Abandonment and Relinquishment

15.1 Are there any provisions in mining laws entitling the holder of a right to abandon it either totally or partially?

A licence must stipulate the extent to which the licensee's obligations remain upon termination of the licence, according to section 91 of the MRA, which includes termination by expiry, abandonment and lapse of withdrawal. This section must be read in conjunction with the Minerals Model Licence regarding obligations at termination of the activities and obligations at termination of the licence.

Further, section 88 of the MRA contains a provision for the transfer of a licence. A licence can only be transferred with the approval of the Greenland Government. The approval will in most circumstances not be unreasonably withheld, unless the basis for meeting the obligations under the licence will be weakened by the transfer.

15.2 Are there obligations upon the holder of an exploration right or a mining right to relinquish a part thereof after a certain period of time?

Please see questions 2.2 and 2.3 above for duration and approval of extensions. Further, please see question 15.3 below on revocation.

15.3 Are there any entitlements in the law for the State to cancel an exploration or mining right on the basis of failure to comply with conditions?

Section 89 of the MRA states that licences must stipulate under which circumstances a licence is forfeited or may be revoked by the Greenland Government. This section must be read in conjunction with § 16 in the Minerals Model Licence, which contains regulations regarding revocation. Revocation of a licence will often be the case of failure to fulfil exploration commitments, a breach in the terms of the licence, fraud, or bankruptcy.

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In April 2015, he published the book *The Law and Practice of Oil, Gas and Minerals in Greenland – the Greenland Mineral Resources Act with Comments* (DJØF Publishing 2015), which can be of great service to those interested in gaining further knowledge of Greenlandic Mining Law.

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Freddy Karyadi



1 Relevant Authorities and Legislation

1.1 What regulates mining law?

Mining law in Indonesia is governed by the Law on Mineral and Coal Mining No. 4 of 2009, dated 12 January 2009 (“**Mining Law**”). The Mining Law provides general provisions regarding coal and mineral mining activities in Indonesia. Further, a number of implementing regulations have been subsequently enacted by the Government (both central and regional) as an implementation of the provisions of the Mining Law. The implementing regulations are in the form of, among others, Government Regulations, Minister of Energy and Mineral Resources (“**MEMR**”) Regulations, and Director General of Mineral and Coal (“**DGMC**”) Regulations.

The main implanting regulations of the Mining Law are, among others, as follows:

- a. Government Regulation No. 22 of 2010 regarding Mining Areas (“**GR 22/2010**”);
- b. Government Regulation No. 23 of 2010, as amended by Government Regulation No. 24 of 2012, Government Regulation No. 1 of 2014, Government Regulation No. 77 of 2014 and Government Regulation No. 1 of 2017 regarding the Implementation of Mineral and Coal Business Activity (“**GR 23/2010**”);
- c. Government Regulation No. 55 of 2010 regarding the Fostering and Supervision of Implementation of Mineral and Coal Mining Business Management;
- d. Government Regulation No. 78 of 2010 regarding Reclamation and Mine Closures (“**GR 78/2010**”);
- e. MEMR Regulation No. 34 of 2009 regarding the Domestic Market Obligation;
- f. MEMR Regulation No. 02 of 2013 regarding the Supervision of Management Implementation of Mining Business by Provincial and Regency/Municipality Government (“**MEMR Regulation 02/2013**”);
- g. MEMR Regulation No. 43 of 2015 regarding Procedures to Evaluate the Issuance of Mining Business License (“**MEMR Regulation No. 43/2015**”);
- h. MEMR Regulation No. 5 of 2017 as amended by MEMR Regulation No. 28 of 2017 regarding Increase of Added Value of Minerals through Activities of Processing and Refining/Smelting Domestically (“**MEMR Regulation No. 5/2017**”);
- i. MEMR Regulation No. 6 of 2017 as amended by MEMR Regulation No. 35 of 2017 regarding the Procedures and Requirements for the Export of Processed and Refined Minerals (“**MEMR Regulation No. 6 of 2017**”);

- j. MEMR Regulation No. 9 of 2017 regarding Procedures for Shares Divestment and Mechanism to Determine the Price For Shares Divestment in the Minerals and Coal Business Activity (“**MEMR No. 9 of 2017**”);
- k. MEMR Regulation No. 34 of 2017 regarding Licensing in Minerals and Coal Sector (“**MEMR Regulation No. 34/2017**”); and
- l. Circular Letter No. 10.E/30/DJB/2017 in regards with the Further Implementation of MEMR Regulation No. 34/2017 (“**Letter No. 10/2017**”).

1.2 Which Government body/ies administer the mining industry?

According to the Mining Law, different Government bodies have the authority to administer the mining industry, as follows:

- a. The Regent/Mayor has the authority to issue, among others:
 - (i) a Mining Business Licence (*Izin Usaha Pertambangan* or “**IUP**”), if the mining area is located within one regency/city;
 - (ii) a Mining Services Business Licence (*Izin Usaha Jasa Pertambangan* or “**IUJP**”), if the services are rendered within one regency/city;
 - (iii) a Production Operation IUP specifically for the transportation and sale, if the transportation and sale activities are conducted within one regency/city; and
 - (iv) a Production Operation IUP specifically for processing and refining, if the mining products to be processed are supplied by the holder(s) of a Production Operation IUP issued by the Regent/Mayor, and/or the location of the processing activity is located in one regency/city.
- b. The Governor (head of a province) has the authority to issue, among others:
 - (i) IUPs, if the mining area crosses the boundaries of regencies/cities in one province based on recommendation of the Regent/Mayor pursuant to the relevant laws and regulations;
 - (ii) IUJPs, if the services are rendered within two or more regencies/cities in one province;
 - (iii) Production Operation IUPs specifically for transportation and sale, if the transportation and sale activities are conducted within two or more regencies/cities in one province; and
 - (iv) Production Operation IUPs specifically for processing and refining, if the mining products to be processed are supplied by the holder(s) of a Production Operation IUP issued by the Governor and/or the holder(s) of a Production Operation IUP for which the mining area(s)

- is/are located in different regencies/cities, but within one province, and/or the location of the processing activity crosses two or more regencies/cities in one province.
- c. The MEMR has the authority to issue, among others:
 - (i) IUPs, if the mining permit area crosses the boundaries of provinces based on the recommendation of the Governors and the Regents/Mayors pursuant to the relevant laws and regulations;
 - (ii) IUJPs, if the services are rendered within two or more provinces;
 - (iii) Production Operation IUPs specifically for transportation and sale, if the transportation and sale activities are conducted within the Indonesian territory or for export purposes;
 - (iv) Production Operation IUPs specifically for processing and refining, if the mining products to be processed are imported and supplied by holder(s) of Special Production Operation IUPs, holder(s) of Production Operation IUPs issued by the MEMR, or holder(s) of Production Operation IUPs for which the mining area is located in different provinces; and
 - (v) all the above licences, if the applications are submitted by a foreign investment ("PMA") company (this is an Indonesian entity, the shares of which are owned in whole or in part by foreign shareholders).
 - d. special Mining Business Licences (*Izin Usaha Pertambangan Khusus "IUPK"*) for Exploration and Production Operation for minerals and coal;
 - e. Production Operation IUP if the mining location, the processing and/or refining location and the special terminal location (i) crosses the boundaries of provinces, or (ii) has direct boundary with other countries;
 - f. Production Operation IUP if the applications are submitted by PMAs;
 - g. Production Operation IUPs specifically for processing and refining if:
 - i. the mining commodities are supplied from other areas outside the location of processing and refining;
 - ii. the mining commodities are imported;
 - iii. the location of processing and refining crosses the boundaries of province; and
 - iv. is applied by PMA.
 - h. IUJPs (i) if the services are rendered throughout Indonesian territory and for (i) PMAs.

The Governor has the authority to issue:

- a. an Exploration IUP for metal minerals and coal in the WIUP which is located within one province, including on a seabed more than 12 miles from the coastline;
- b. a Production Operation IUP if the location of the mining activity, processing and/or refinery activity and the special terminal located within one province;
- c. Production Operation IUPs specifically for processing and refining, if (i) the mining products are supplied from the same provinces of the processing and refining facility; and/or (ii) if the processing and refining facility are located within the same province; and
- d. IUJPs if the services are rendered within one province.

The old Mining Law has inherited the form of Coal Contract of Works ("CCOW") from coals and Contract of Works ("COW") for minerals. CCOWs and COWs are different from IUPs. An IUP is a licence issued by the relevant Government. CCOWs and COWs provide rights to mine coal and minerals granted to mining companies based on mining contracts entered into by (central) Government with the mining companies for a certain period. Pursuant to the Mining Law, all CCOWs and COWs will continue to be valid until their respective expiration, subject to adjustment pursuant to the Mining Law within one year as of the enactment of the Mining Law. MEMR Regulation No. 34/2017 further provides that the mining stages of the CCOW and COW must be adjusted to become: (i) the exploration stage which consist of general survey, exploration and feasibility study; and (ii) the production operation stage which consist of construction, mining, processing and/or refining and the transport and sale.

As per April 2017, there are 34 COW and 70 CCOW companies which have conducted negotiation for amendment with the Government, and out of that 12 COWs and 15 CCOWs have reached agreements for the amendment of the COWs and CCOWs with the MEMR.

However, pursuant to MEMR Regulation No. 34/2017, the authority of the Regent/Mayor to issue the IUP has been completely removed and only given to the MEMR and the Governor with the following details:

The MEMR has the authority to issue:

- a. Exploration IUP for mineral and coal, in the following Mining Business Licence Area (*Wilayah Izin Usaha Pertambangan* or "WIUP"):
 - i. a WIUP which crosses the boundaries of provinces;
 - ii. a WIUP which has direct boundary with other countries; or
 - iii. a WIUP which is located on the seabed more than 12 miles from a coastline.
- b. Exploration IUP for PMAs;
- c. Exploration IUP and Production Operation IUP for public business entities who own more than one IUP for metal minerals or coal and the WIUP is located in more than one province;

1.3 Describe any other sources of law affecting the mining industry.

The source of law affecting the mining industry in Indonesia consists of the following:

- a. the Indonesian 1945 Constitution, as amended ("Constitution");
- b. the Law (*Undang-Undang*)/Government Regulation in Substitution of Law;
- c. Government Regulations;
- d. Presidential Regulations;
- e. Ministerial (and its sub-divisions) Regulations; and
- f. Regional Regulations (*Peraturan Daerah*).

In theory, some other legal sources may also affect the mining industry, such as decisions of the Constitutional Court and other court decisions.

2 Mechanics of Acquisition of Rights

2.1 What rights are required to conduct reconnaissance?

An Exploration IUP is required to be obtained for a mining company to conduct the reconnaissance phase activity. The Exploration IUP is required not only to conduct the exploration activities, but also the general survey and feasibility study or other reconnaissance activities.

2.2 What rights are required to conduct exploration?

As mentioned in question 2.1 above, an Exploration IUP is required to be obtained for a mining company to conduct exploration activities. An application to obtain an Exploration IUP may only be submitted by legal entities or individuals who have obtained the WIUP through a tender process for metal minerals and coal WIUP conducted by, and through, submission of an application for non-metal minerals and rock WIUP to the MEMR, Governor or Regent/Mayor (based on its authority) (see question 1.2 above).

Metal Minerals and Coal WIUP

Before the Government opens the tender process, the Government has to firstly determine the mining area in consultation with Parliament and the regional Governments. The mining area is an area which potentially has minerals and/or coal, which is not restricted by the Government's administration and constitutes part of the national zoning. Part of the Mining Area will be granted as a Mining Business Area (*Wilayah Usaha Pertambangan* or "WUP"), which has the data, potential and/or geological information available. Currently, the Government is still in the process of determining the mining area throughout the Indonesian territory. Therefore, to date, the Government has not yet opened any tender process and, consequently, no new IUP under the Mining Law has been issued to date.

Once the winner of the WIUP tender is selected, the Government (depending on its authority) will then issue the Exploration IUP to the winner of WIUP tender for the specific mineral and coal upon application by the tender winner. Further, a mining company which has completed the feasibility study in the exploration stage can apply for a Production Operation IUP. The holder of a Production Operation IUP is permitted to conduct activities of construction, mining, processing and refining/smeltering, as well as hauling/transportation and sale.

Non-metal and Rock WIUPs

The application for obtaining non-metal minerals and rock WIUPs is not conducted through a tender process, but through a direct application from the applicant to the Government (depending on its authority) as follows:

- the MEMR, with a prior recommendation from the Governor and the Regent/Mayor for the application for a WIUP which crosses boundaries of provinces and/or a seabed which is more than 12 miles from the coastline;
- the Governor, with a prior recommendation from the Regent/Mayor for the application for a WIUP which crosses boundaries of regencies/cities within one province and/or a seabed of between four and 12 miles from the coastline; and
- the Regent/Mayor for the application for a WIUP which is located within one regency/city and/or a seabed up to four miles from the coastline.

However, pursuant to Law No. 23 of 2014 regarding the Regional Government as amended by Law No. 2 of 2015 and No. 9 of 2015 on Stipulation of Government Regulation in Lieu of Law No. 2 of 2014 on Amendment to Law No. 23 of 2014 regarding the Regional Government ("Law 23/2014"), the authority of the Regent/Mayor to issue the WIUP has been completely removed and is only given to the MEMR and the Governor, as follows:

The MEMR has the authority to issue:

- a Mining Area (*Wilayah Pertambangan* "WP") as part of a national spatial plan, which consists of a WUP, People's Mining Business Area (*Wilayah Pertambangan Rakyat* "WPR"), State Reserves Area (*Wilayah Pencadangan Negara* "WPN") and Special Mining Business Area (*Wilayah Usaha Pertambangan Khusus* "WUPK");

- a WIUP for metal minerals, coal and a Special Mining Business Licenses Area (*Wilayah Izin Usaha Pertambangan Khusus* "WIUPK"); and
- WIUP for non-metal minerals and rocks which crosses boundaries of provinces and/or a seabed more than 12 miles from the coastline.

The Governor has the authority to issue a WIUP for non-metal minerals and rocks within one province and/or a seabed more than 12 miles from the coastline.

2.3 What rights are required to conduct mining?

It is required that an IUP is obtained before a mining company can conduct any mining business activity/operation. Please refer to the process described in question 2.2 above for a mining company to obtain a Production Operation IUP

2.4 Are different procedures applicable to different minerals and on different types of land?

Yes, the procedures will be based on the type of minerals. Please refer to the process described in question 2.2.

With respect to the types of land, the procedure for obtaining land rights would be different based on the type of land concerned. For example, if the mining area is located in (i) a forest area (which is not a protected forest area), the mining company must obtain or borrow a used permit from the Ministry of Forestry, (ii) a forest area on which area there is a forest concession, an agreement with the forest concession company is required, (iii) an area which is owned by another party, an agreement with the land owner is required, or (iv) an area which is owned or occupied by another parties or local communities, a land relinquishment must be conducted.

2.5 Are different procedures applicable to natural oil and gas?

Yes. The procedures applicable for natural oil and gas are not within the scope of the Mining Law, and therefore they are different from the procedures for mining.

3 Foreign Ownership and Indigenous Ownership Requirements and Restrictions

3.1 What types of entity can own reconnaissance, exploration and mining rights?

The Mining Law provides three categories of mining licences as follows:

- IUPs, which can be granted to (i) business entities (including State-owned, region-owned companies and PMA companies), (ii) cooperatives (*koperasi*), and (iii) Indonesian individuals;
- IPRs which can be granted to (i) Indonesian individuals for a maximum 1 (one) hectare, (ii) community groups (*kelompok masyarakat*) for a maximum 5 (five) hectares, and (iii) cooperatives (*koperasi*) for a maximum 10 (ten) hectares; and
- Special Mining Business Licences (*Izin Usaha Pertambangan Khusus* or "IUPK"), which can be given to Indonesian legal entities, either in the form of State-owned entities, region-owned entities, or private entities. State-owned entities and region-owned entities shall have priority in obtaining the IUPK.

3.2 Can the entity owning the rights be a foreign entity or owned (directly or indirectly) by a foreign entity and are there special rules for foreign applicants?

Foreign investors must have an Indonesian vehicle to conduct mining business activities in the form of a PMA company pursuant to Law No. 25 of 2007 on Investment.

Shares in a PMA company are subject to divestment requirements with the following progressive divestment:

Years after commencement of production	Minimum divestment (as a percentage of the total shares)
6	20%
7	30%
8	37%
9	44%
10	51%

Based on GR 23/2010, a PMA company holding a Production Operation IUP is required to gradually divest its shares based on the table mentioned above (counted from the date of issuance of the Production Operation IUP). The divestment process will apply to the Indonesian participant(s) in the following sequential order: (i) the Central Government; (ii) the Provincial or the regional/municipality Government; (iii) a State-owned Company (“BUMN”); (iv) a Region-owned Company (“BUMD”); and (v) a national privately-owned company. However, there is an exception in regards with this obligation. MEMR Regulation No. 9 of 2017 provides that a PMA company holding the Production Operation for Processing and Refining is not required to divest its shares.

3.3 Are there any change of control restrictions applicable?

The change of shares ownership, including the change of control (acquisition), can only be conducted with prior approval from the Government (depending on its authority to issue the IUP).

GR 23/2010 provides that any change of shareholding in a PMA company can only be conducted if:

- the foreign share ownership is not more than 75% for a company holding an Exploration IUP and IUPK;
- the foreign share ownership is not more than 49% for a company holding a Production Operation IUP and IUPK but the processing and/or refining activities are conducted by third parties;
- the foreign share ownership is not more than 60% for a company holding a Production Operation IUP and IUPK and conducting the processing and/or refining activities; and
- the foreign share ownership is not more than 70% cent for a company holding a Production Operation IUP and IUPK and conducting underground mining.

3.4 Are there requirements for ownership by indigenous persons or entities?

As elaborated in question 3.1 above, based on GR 23/2010 jo. MEMR Regulation No. 9 of 2015, a PMA company holding a Production Operation IUP (save for the Production Operation for Processing and Refining) is required to gradually divest its shares to be owned by the Indonesian participant(s) (counted from the date of issuance of the Production Operation IUP).

3.5 Does the State have free carry rights or options to acquire shareholdings?

There is no free carry right of the Government to acquire shareholdings in a mining company, including PMA companies.

Please refer to the explanation on options given to the Government or Government-related entities in question 3.2 above in shares divestment stages. The shares of a PMA company to be divested will be offered to the Government, where the central Government has a priority to acquire the offered shares. If the Government indicated that it is not interested in the offered shares or fails to respond to the offer within 60 calendar days, the shares will be offered to BUMNs and BUMDs by auction.

The price for the divestment shares offered to an Indonesian participant shall be determined based on the fair market value without calculating the minerals and coal stock when the divestment of shares is conducted. The price for the divestment shares shall be the highest price for the offer of the shares divestment to: (i) the Central Government; and (ii) the Provincial or the regional/municipality Government. This price is the floor price for the offer of the shares divestment to: (i) a BUMN; (ii) a BUMD; and (iii) a national privately-owned company which is conducted through auction.

4 Processing, Refining, Beneficiation and Export

4.1 Are there special regulatory provisions relating to processing, refining and further beneficiation of mined minerals?

The Mining Law and GR 23/2010 provide that mining companies are obligated to conduct processing and refining activities of their (ore) mining products domestically. In other words, mining companies can only export the mining products which have been processed and/or refined in Indonesia:

- GR 23/2010;
- Minister of Trade Regulation No. 01/M-DAG/PER/1/2017 on the Provision for Exporting Mining Products Resulting from Processing and Refining (“MTR No. 01/2017”);
- Minister of Trade Regulation No. 06/M-DAG/PER/2014 as amended by Minister of Trade Regulation No. 10/M-DAG/PER/2/2016 on Procedures for Determining the Export Benchmark Price of Processed Mining Product Subject to Export Duties (“MOT Regulation No. 6/2014”);
- Minister of Trade Regulation No. 39/M-DAG/PER/7/2014 as amended by Minister of Trade Regulation No. 49/M-DAG/PER/8/2014 on the Provisions for Exporting Coal and Coal Products;
- Minister of Trade Regulation No. 04/M-DAG/PER/1/2015 as amended by Minister of Trade Regulation No. 67/M-DAG/PER/8/2015 on Provisions to Use a Letter of Credit for Exporting Certain Commodities (“MOT Regulation No. 4/2015”);
- Minister of Trade Regulation No. 26/M-DAG/PER/3/2015 of 2015 on Specific Provisions on the Implementation of Using a Letter of Credit for Exporting Certain Commodities;
- Minister of Trade No. 26/M-DAG/PER/3/2016 on Special Provisions on the Use of Letter of Credit for the Export of Certain Goods (“MTR NO. 26/2016”);
- Bank Indonesia Regulation No. 16/10/PBI/2014 dated 14 May 2014 as amended by Bank Indonesia Regulation No.

- 17/23/PBI/2015 dated 23 December 2015 on the Receipt of Export Proceeds and Withdrawal of Foreign Exchange from External Debt (Offshore Borrowings) (“**BI Regulation No. 16/2014**”);
- i. MEMR Regulation No. 5/2017;
 - j. MEMR Regulation No. 6/2017;
 - k. DGMC Regulation No. 714.K/30/DJB/2014 Tahun 2014 on Procedures and Requirements to Grant a Recommendation as a Registered Exporter of Coal;
 - l. Minister of Finance Regulation No. 75/PMK.011/2012 as amended by the Minister of Finance Regulation No. 128/PMK.011/2013, No. 6/PMK/011/2014, No. 153/PMK.011/2014 and No. 136/PMK.010/2015 on the Stipulation of Export Goods that Are Subject to Export Duty and its Tariff (“**MOF Regulation No. 75/2012**”); and
 - m. Ministry of Energy and Mineral Resources Circular Letter No. 03.E/30/DJB/2015 of 2015 on the Requirement to Obtain Technical Consideration for the Exemption of Payment Using L/C.

4.2 Are there restrictions on the export of minerals and levies payable in respect thereof?

In brief, the regulations referred to in question 4.1 provide the following provisions:

- a. Ferrous mining companies (holders of Contract of Work/ Production Operation IUPs) which have conducted ferrous mining activities can export in certain quantities upon fulfillment of the minimum processing and refining/smeltering specifications, as provided in Attachment 1 of MEMR Regulation No. 5/2017.
- b. It is not permitted to export raw materials/ores or unprocessed minerals.
- c. Certain minerals (i.e. nickel, bauxite, ore, gold, silver, and chromium) can only be exported after they have been purified with the minimum content, as specified in Attachment 1 of MEMR Regulation No. 5/2017. The minimum content of these minerals is high (95% or above). However, based on MTR No. 01/2017 for the nickel with the content of <1.7% and bauxite with the content of $\geq 42\%$ are excluded from the obligation to satisfy the minimum requirement of processing and refining, prior to be exported if (i) the owner of the IUP or IUPK nickel has utilised nickel with the content of <1.7%, at maximum of 30% from the total input capacity of its processing and refining facility, and (ii) the owner of the IUP or IUPK nickel or bauxite has or is in the process of constructing the refining facility independently or working together with other parties.
- d. Certain other minerals (e.g. copper, iron sand, iron ore, zinc, lead, and manganese) can only be exported after they have been processed or purified with the minimum content, as specified in Attachment 1 of MEMR Regulation No. 5/2017.
- e. MOT Regulation No. 6/2014 set out the procedures for determining Export Benchmark Prices (*Harga Patokan Ekspor* or “**HPE**”) for processed mining products. HPE is the basis for the Minister of Finance to calculate and impose export duties.
- f. MOT Regulation No. 4/2015 requires the exporter to use a Letter of Credit (“**L/C**”) as a mandatory payment instrument when exporting certain commodities (i.e. mining products), for which the price stated on the L/C must at least be equivalent to the global market price for the relevant exported commodities. Pursuant to Article 3 of MOT Regulation 4/2015, payment under an L/C must be made to a domestic foreign exchange bank (*bank devisa*) or to an export financing institution formed by the Government. However, based on MTR NO. 26/2016, in case the exporter is not yet able use the

L/C, the exporter is allowed to request for a postponement of the use of L/C to the MEMR.

- g. Under BI Regulation No. 16/2014, the receipt of the Export Exchange (*Devisa Hasil Eksport* or “**DHE**”) is obligated to be reported at the latest by the end of the third month after the registration month of the Export Declaration (*Pemberitahuan Eksport Barang* or “**PEB**”).
- h. Based on MOF Regulation No. 75/2012, mining companies which export minerals, as referred to in point b., above are subject to a progressive export duty tariff. The export duty tariff will gradually increase per semester, starting at 20% (or 25% for copper) in the first half of 2014 and rising to 60% in the second half of 2016.
- i. MOF Regulation No. 75/2012 also stipulates that export tariffs on processed mineral products for exporters that are involved in construction of refining/smeltering facilities or cooperate in the construction of refining/smeltering facilities shall be grouped by the progress level of mineral refining/smeltering facility construction on an absorption costing percentage basis.

Further, in order to conduct export activities, exporters of mineral products must obtain a Recommendation from the DGMC and/or an acknowledgment as a Registered Exporter of Mining Products (*ET–Produk Pertambangan*), and/or Export Approval from the Ministry of Trade. However, pursuant to MTR No. 01/2017, there are a few mining products which have satisfied the requirement content after being processed and refined are allowed to be exported without the Export Approval and only required to undergo the verification and the technical search. The lists of the mining products are attached as Schedule 1 of this regulation.

5 Transfer and Encumbrance

5.1 Are there restrictions on the transfer of rights to conduct reconnaissance, exploration and mining?

GR 23/2010 jo. MEMR Regulation No. 34 of 2017 provides that the holder of an IUP and IUPK is not permitted to transfer its IUP and IUPK to another party, except to a legal entity where 51% or more of the shares are owned by such holder of the IUP and IUPK.

5.2 Are the rights to conduct reconnaissance, exploration and mining capable of being mortgaged or otherwise secured to raise finance?

The IUP cannot be imposed with a security right to secure finance. Security rights can, however, be created over the assets of the IUP holder, such as land, building, equipment, stocks, receivables, as well as other contractual security rights, to secure finance. In addition, a security right can also be created over shares of a mining company to secure finance. However, please note that the holder of Production Operation IUP and Production Operation IUPK are not allowed to encumber the shares which are subject to divestment.

6 Dealing in Rights by Means of Transferring Subdivisions, Ceding Undivided Shares and Mining of Mixed Minerals

6.1 Are rights to conduct reconnaissance, exploration and mining capable of being subdivided?

The rights to conduct the mining activities stated in the IUP are not

separable or transferable. An IUP holder may, however, assign a mining services company which holds an IUP to perform certain mining activities, among others (i) exploration (in the framework of consultation, plan, execution, and/or equipment testing), and (ii) mining but limited to stripping overburden (including excavation, loading and overburden removal).

6.2 Are rights to conduct reconnaissance, exploration and mining capable of being held in undivided shares?

The rights to conduct reconnaissance, exploration and mining under the IUP are attached to the IUP holder. The IUP holder can be in the form of a PMA (joint venture) company. Indonesian law only recognises the IUP holder as the party that has rights to conduct reconnaissance, exploration and mining.

6.3 Is the holder of rights to explore for or mine a primary mineral entitled to explore or mine for secondary minerals?

Pursuant to Article 40 of the Mining Law, the IUP shall only be granted for 1 (one) type of mineral. However, an IUP holder that discovers other minerals within its mining area shall be given a priority right to mine such discovered mineral(s). The IUP holder that wishes to mine such minerals must file an application for a new IUP to the relevant Government authority.

6.4 Is the holder of a right to conduct reconnaissance, exploration and mining entitled to exercise rights also over residue deposits on the land concerned?

The law is silent on the rights over residue deposits on the land used for mining activities. However, the IUP holder is still entitled to exercise rights over such residue deposits during the period of the IUP. In the event that the period of the IUP has lapsed, the IUP holder shall no longer be entitled to exercise rights over such residue deposits.

6.5 Are there any special rules relating to offshore exploration and mining?

The prevailing law and regulations on mining do not provide different rules or procedures for offshore exploration and mining. The Regional Government Law and Regulation of Minister of Energy and Mineral Resources No. 43 of 2015 concerning Evaluation Procedure of the Issuance of Mineral and Coal Mining Business License (“MEMR Regulation No. 43/2015”) only provide a division of authorities issuing IUPs and determining mining area. For mining areas located on the seabed (i) which exceed 12 (twelve) miles from the coastline, the MEMR will issue the IUP and stipulate the IUP area of non-metal mineral and stone, and (ii) up to 12 (twelve) miles from the coastline, the Governor will issue the IUP and stipulate the IUP area of non-metal and stone. These provisions are further regulated under Regulation of the Minister of Energy and Mineral Resources No. 34 of 2017 concerning Licensing in the Field of mineral and Coal Mining (“MEMR Regulation No. 34/2017”). The MEMR Regulation No. 34/2017 also stipulates that in the event that a mining area is located on the seabed between 2 (two) provinces less than 24 (twenty four) miles from the coastline, the governance of such seabed shall be divided equally.

To date, the Mining Law and GR 23/2010 still regulate the authority of Regent/Mayor to issue the IUPs. With reference to the Regional Government Law as well as the MEMR Regulation No. 43/2015 and 34/2017, hence the Mining Law and GR 23/2010 should be adjusted to be in line with those regulations.

In addition to the above, the operation and ownership of vessels (including vessels used for offshore mining activities) must comply with the requirement of Law No. 17 of 2008 on Shipping, which stipulates, among others, that the vessel operation must be based on a specific shipping licence issued by the Minister of Transportation. The majority foreign share ownership of a PMA company holding a vessel is restricted, as the shares in this company must be majority (51% or more) owned by local shareholder(s).

7 Rights to Use Surface of Land

7.1 Does the holder of a right to conduct reconnaissance, exploration or mining automatically own the right to use the surface of land?

Unlike in other jurisdictions, Indonesian land titles do not extend beneath the surface of the land and therefore the land title holder has no right to conduct mining activities on the land in the absence of an IUP. On the other hand, Article 134 of the Mining Law states that the right of IUP holders does not include the surface of land.

On the right of an IUP holder over the surface of land, the Mining Law does not stipulate a requirement for the IUP holder to acquire ownership of the land over which the mining will be conducted under the valid IUP. The Mining Law imposes an obligation on IUP holders to enter into a “settlement” with people holding land titles within the mining area. The purpose of this “settlement” is to compensate the land title holders for the disruption to their utilisation of the surface of land caused by the mining activities. A settlement only needs to be reached with land title holders in the mining areas which are actually to be affected by mining activities. Settlement of land titles may be conducted in stages based on the needs for land by the IUP holder. There is no requirement to compensate every land title holder whose land is overlapping with the mining area under the IUP.

Although it is not a requirement, mining companies sometimes choose to acquire land title ownership of the underlying land, particularly for strategic land areas. This is to avoid any dispute in the future in respect of whether compensations have been adequately provided and to provide legal certainty on the right to conduct activities in such land areas.

7.2 What obligations does the holder of a reconnaissance right, exploration right or mining right have vis-à-vis the landowner or lawful occupier?

Please refer to our explanation in question 7.1 above.

7.3 What rights of expropriation exist?

IUP holder and the State do not have the right of expropriation for mining activities. The IUP holder using the land for mining activities must conduct a settlement with the land title holders as explained in question 7.1 above.

8 Environmental

8.1 What environmental authorisations are required in order to conduct reconnaissance, exploration and mining operations?

The prevailing Environmental Law (Law No. 32 of 2009 on Environmental Protection and Management) stipulates the following

criteria of business/activities which may have a substantial environmental impact:

- the change of form of land and landscape;
- the exploitation of natural resources, whether renewable or non-renewable;
- the processes and activities which may potentially cause environmental pollution, and/or damage, and squandering and degradation of natural resources in their utilisation;
- the processes and activities which may result in an effect on the natural environment, artificial environment and socio-cultural environment;
- the processes and activities which will affect the preservation of natural resources conservation areas and/or cultural heritage protection;
- the introduction of types of plantations, animals and micro-organisms;
- the production and utilisation of biological and non-biological resources;
- the activities which are high-risk, and/or affect national defence; and/or
- the application of technology which may potentially affect the environment.

Any business/activity which meets the above criteria must prepare AMDAL documents (*Analisis Mengenai Dampak Lingkungan* or Environmental Impact Analysis) which consist of:

- a. Term of Reference (*Kerangka Acuan*). This Term of Reference shall be the basis on drafting ANDAL and RKL-RPL;
- b. an Environmental Impact Assessment (*Analisis Dampak Lingkungan* or “ANDAL”);
- c. an Environment Management Plan (*Rencana Pengelolaan Lingkungan Hidup* or “RKL”); and
- d. an Environmental Monitoring Plan (*Rencana Pemantauan Lingkungan* or “RPL”).

In relation to the mining activities, the Mining Law stipulates that every mining company that applies for an IUP must attach AMDAL documents as one of the requirements.

Furthermore, Government Regulation No. 27 of 2012 regarding Environmental Permits also provides that every business and/or activities that are required to have AMDAL documents are required to have an Environmental Permit from the relevant Government Institutions.

8.2 What provisions need to be made for storage of tailings and other waste products and for the closure of mines?

Pursuant to GR 78/2010 which further regulated under MEMR Regulation No. 7 of 2014 concerning Implementation of Reclamation and Post-Mining in the field of Mineral and Coal Mining Business Activities, the IUP holder is required to conduct reclamation and post-mining activities. The IUP holder must: (i) formulate a reclamation plan on the basis of environmental documents in accordance with the provisions of laws and regulations in the field of environmental protection and management; and (ii) complete a feasibility study prior to the submission of the application for approval of reclamation and post-mining from the relevant mining authority.

In addition, the holder of a Production Operation IUP is required to provide: (i) a reclamation plan for five years; (ii) a post-mining plan; (iii) a reclamation guarantee in the form of a joint account or deposit in a State bank, a bank guarantee or accounting's reservation; and (iv) a post-mining guarantee in the form of a deposit in a State bank. The guarantee provided will not, however, waive the obligation of

the holder of a Production Operation IUP to conduct reclamation and post-mining activities.

8.3 What are the closure obligations of the holder of a reconnaissance right, exploration right or mining right?

As mentioned above, every IUP holder is obligated to conduct reclamation and post-mining activities. Upon the closure of mining operations, the mining company must immediately conduct the reclamation and post-mining activities based on the reclamation and post-mining plans which have been approved by the mining authority.

8.4 Are there any zoning or planning requirements applicable to the exercise of a reconnaissance, exploration or mining right?

Yes, there is a zoning requirement which is regulated under Law No. 26 of 2007 concerning the Spatial Plan. In general, the Spatial Plan is divided based on the system, main function of the area, administrative territory, the area's activity and the strategic value of such area. The national Spatial Plan is issued by the Government and shall be applicable for a period of 20 years but it may be evaluated every five years.

In relation to the Mining Area, the Spatial Plan is stipulated by the MEMR after coordinating with the Governor and Regent/Mayor, and after consulting with the Parliament. GR 22/2010 stipulates that the mining area is an area which has mineral and/or coal potentials, either on the surface land or underground, which is located inside the mainland or on the seabed, for the need of mining activities. GR 22/2010 also provides the main criteria to be fulfilled for an area to be categorised as a mining area, as follows:

- a. having an indication of mineral, and/or coal bearing formations; and
- b. having potential of mineral resources in solid and/or liquid form.

Please refer to our explanation on WIUP above.

9 Native Title and Land Rights

9.1 Does the holding of native title or other statutory surface use rights have an impact upon reconnaissance, exploration or mining operations?

As explained in section 7 above, the IUP holder is required to resolve the agreement to relinquish and settle the land that will be used for mining operations with the land title holders. In practice, however, the settlement process will need to be made not only with the land title holders, but also with those occupants or (local) people holding certain “un-certificated” land or community land title.

In practice, most mining companies will only relinquish the land (*pembebasan tanah*) for parts of the mining area that will be used for the actual mining and related activities. For example, a mining company may have an area of 1,000 hectares under its IUP, but the area where it actually conducts mining operations and other activities (roads, housing, etc.) may only be for an area of 500 hectares; the mining company will then only process the land relinquishment for such 500 hectares. There is no obligation of the mining company to relinquish the remaining 500 hectares that will not be used for mining activities.

As explained, a mining company is not required to relinquish the whole area under the IUP, and the relinquishment process can be done in stages, depending on the needs of the company.

10 Health and Safety

10.1 What legislation governs health and safety in mining?

In general, provisions of health and safety in mining are regulated as follows:

- a. the Mining Law and its implementing regulations;
- b. Law No.1 of 1970 regarding Safety;
- c. *Staatsblad* No. 341 of 1930 regarding Mining Occupational Safety Regulations;
- d. Government Regulation No. 19 of 1973 regarding Admission and Supervision of Occupational Safety in the Field of Mining;
- e. Ministry of Mining and Energy (now MEMR) Decree No. 555.K/26/M.PE/1995 regarding Occupational Safety and Health in General Mining;
- f. MEMR Regulation No. 38 of 2014 on Implementation of Safety Management System in Mineral and Coal Mining; and
- g. Head of Nuclear Supervision Board Decree No.12/Ka-BAPETEN/VI-99 regarding Provisions of Mining Occupational Safety and Purifying of Radioactive Extractives.

10.2 Are there obligations imposed upon owners, employers, managers and employees in relation to health and safety?

There are some obligations imposed upon employers, employees and people close to the mining area in relation to health and safety, among others:

- a. Mining companies shall comply with the occupational safety and health requirements.
- b. Mining companies are obligated to provide mining equipment and appliances, self-protection devices, facilities and costs needed for the implementation of this regulation.
- c. Mining companies shall appoint a Head of Mining Technical (“*Kepala teknik Tambang*”).
- d. Mining companies shall provide proper accommodation close to the mining area (site).
- e. Mining companies are required to provide mining books.
- f. The Head of Mining Technical is required to provide: (i) a situation map; (ii) a mining plan map; (iii) a geological map; and (iv) a map of the mining area.
- g. The Head of Mining Technical shall conduct mining inspections.
- h. The Head of Mining Technical shall provide training for its employees.
- i. Employees are obligated to obey the regulations on occupational health and safety provided.
- j. Employees shall carry out their work in accordance with the guidelines.
- k. Employees shall immediately report to his/her supervisor, in a situation that potentially cannot be handled by him/her.
- l. Mining companies shall implement the Safety Management System of Mineral and Coal Mining (*Sistem Manajemen Keselamatan Pertambangan Mineral dan Batubara* or “*SMKP Minerba*”), which includes the following elements:
 - policy;
 - planning;
 - organisation and personnel;
 - implementation;
 - evaluation and follow-up;

- documentation; and
- management review.

People close to the mining area are prohibited from entering the mining area, unless approval has been granted.

11 Administrative Aspects

11.1 Is there a central titles registration office?

The Mining Law does not recognise a “central title registration office”. However, article 4 of MEMR Regulation No. 43/2015 stipulates the DGM or Governor of relevant Province is authorised to conduct evaluation on the issued IUP. In case of incompliance, the DGM or the Governor has the authority to revoke or amend such IUP. The result of the evaluation will be reported to the DGM and will be used as recommendation for a Clear and Clean IUP. Further, the DGM as mandated by Article 11 of MEMR Regulation No. 02/2013 will announce a Clear and Clean IUP List and issue a Clear and Clean Certificate for the relevant IUP holders.

11.2 Is there a system of appeals against administrative decisions in terms of the relevant mining legislation?

Yes there is. The appeal system towards administrative decisions must follow the judicial proceedings of the State Administrative Court (*Pengadilan Tata Usaha Negara*) as stipulated under Law No. 5 of 1986 concerning the State Administrative Judicial System, as lastly amended by Law No. 51 of 2009. A State Administrative Decision that can be appealed to the State Administrative Court must complete the following 4 (four) elements, as follows:

- a. a written decision;
- b. issued by a State administrative institution;
- c. issued based on specific provisions in the prevailing laws and regulations; and
- d. the decision is valid, final and caused a legal implication to a specific person or entity.

If the decision falls under the above elements (examples: licences, permits, etc.), the appeal of an administrative dispute can be taken at the State Administrative Court and State Administrative High Court. The highest judicial power, within the sphere of the State Administrative Judicial System, is vested in the Supreme Court as the highest State court. If the claim is upheld by the court, the court may invalidate and instruct the Government to revoke the decision concerned.

12 Constitutional Law

12.1 Is there a constitution which has an impact upon rights to conduct reconnaissance, exploration and mining?

There is no specific clause in the Constitution which has a direct impact upon the right to conduct reconnaissance, exploration and mining. The Constitution does however state, in Article 33(3), as a general provision that the land and waters as well as the natural riches therein are controlled by the State and exploited for the greatest benefit of the people.

12.2 Are there any State investment treaties which are applicable?

Yes there are. In an endeavour to attract foreign investment,

Indonesia has concluded a number of bilateral and regional investment treaties, both with developed and developing countries. The agreements contained in the treaties in general contain similar provisions for the purpose of investment protection. The treaties usually provide general investment protections, such as issues on nationalisation, capital repatriation, subrogation, dispute settlement, etc. However, there are treaties that expressly cover investment protection for specific business sectors. For example: in the agreement between the Government of the Republic of Indonesia and the Government of the Republic of Singapore on the Promotion and Protection of Investments, dated 16 February 2005, which has been ratified by Presidential Regulation of No. 6 of 2006, dated 1 February 2006, the term ‘investments’ shall mean any kind of assets invested by investors of one Contracting Party in the territory of the other Contracting Party, in conformity with the laws and regulations of the latter, including, though not exclusively:

- a. movable and immovable property as well as other property rights, such as mortgages, liens or pledges;
- b. shares, stocks, debentures and similar interest in companies;
- c. claims to money or to any performance under contract which has an economic value;
- d. intellectual property rights (including, but not limited to, copyrights and neighbouring rights, trademarks, patents, industrial design, layout design of integrated circuit and right in plants varieties) know how, trade secrets, trade names and goodwill; and
- e. business concession conferred by law or under contract, including concessions to search for, or exploit, natural resources.

In the Investment Support Agreement between the Government of the Republic of Indonesia and the Government of the United States of America, dated 13 April 2010, which has been ratified by Presidential Regulation of No. 48 of 2010, dated 19 July 2010, there is no specific sector referred in the Agreement. The term ‘Investment Support’ refers to any debt of equity investment, any investment guarantee and any investment insurance, reinsurance or coinsurance which is provided by the issuer (or, in the case of coinsurance, is provided by the issuer and commercial insurance companies (“**Coinsurers**”) under coinsurance arrangements under which the issuer acts both for itself and for such Coinsurers) in connection with a project in the territory of the Republic of Indonesia.

13 Taxes and Royalties

13.1 Are there any special rules applicable to taxation of exploration and mining entities?

Pursuant to the Mining Law, there is no special rule applicable to taxation of exploration and mining companies. Every Indonesian mining company shall pay the taxes within the authority of the Government under the general laws and regulation on taxation. The taxes imposed on mining companies are among others (i) Income Tax, which is governed under Law No. 7 of 1983, which has been last amended by Law No. 36 of 2008 (“**Law 36/2008**”), and (ii) Value-Added Tax, which is governed under Law No. 8 of 1983, which has been last amended by Law No. 42 of 2009.

However, there are still various mining companies which are subject to a certain tax regime governed by CCOW and COW. The type of CCOW and COW are differentiated based on the year of execution of such CCOW. The tax provisions in CCOW and COW generally overrule the normal tax regulations.

The table below sets out information on the income tax that is imposed for services provided in every step of the mining activities under Law 36/2008: (i) Ministry of Finance Regulation No. 141/PMK.03.2015 concerning the Type of other Service Referred to in Article 23 Paragraph (1) Letter C Point 2 of Law 36/2008; and (ii) Government Regulation No. 51 of 2008 on Income Tax on Income from Construction Services, which has been amended by Government Regulation No. 40 of 2009:

Mining Phase	Income Tax	Percentage of Tax Imposed
1. General survey	■ Article 23	2%
	■ Article 26	20%
2. Exploration	■ Article 23	2%
	■ Article 26	20%
3. Feasibility study	■ Article 23	2%
4. Construction	■ Article 4 paragraph 2	■ 2% (if construction engineering is executed by service providers having the qualification of small-scale business)
		■ 4% (if construction engineering is executed by service providers not having qualifications)
		■ 3% (if construction engineering is executed by service providers other than those which have the qualifications of a small-scale business or not having qualifications as mentioned above)
		■ 4% (if construction planning or supervision is executed by service providers which have business qualifications)
		■ 6% (if construction planning or supervision is executed by service providers which do not have business qualifications)
5. Exploitation	■ Article 23, or Article 26	2%
		20%
6. Reclamation	■ Article 23	2%

The income tax of Article 23 is imposed if the company which provides the aforementioned services is a resident taxpayer or a permanent establishment in Indonesia. However, if the company which provides the services is a non-resident taxpayer, then it will be responsible for paying income tax under Article 26. The rate of the income tax of Article 26 mentioned above may be affected by a relevant applicable tax treaty.

Pursuant to Law No. 28 of 2009 on Regional Taxes and Retributions, a mining company exploiting non-metal and rock materials is subject to regional tax, the rate of which will depend on the regional Government regulation, but may not exceed 25% of the sale value of the material.

Furthermore, the land where any mining company conducts its business activities is subject to Land and Building Tax. This is governed by Law No. 12 of 1985 on Tax on Land and Buildings, which has been amended by Law No. 12 of 1994 (“**Law 12/1994**”), and the Directorate General of Taxation Regulation No. PER-32/PJ/2012 concerning the Procedure of Imposing Land Building Tax on the Mining Sector for Mineral and Coal Mining. The rate of said Land and Building Tax is 0.5% calculated from the Sale Value of the Tax Object (*Nilai Jual Objek Pajak* or “**NJOP**”). The NJOP is defined as the average price obtained from the sale and purchase transaction reasonably occurring, and in the event there is no sale and purchase transaction, the NJOP shall be determined by comparing other prices and objects of the same type or the new acquisition value, or a replacement NJOP.

13.2 Are there royalties payable to the State over and above any taxes?

Yes, there are royalties payable to the State. In accordance with Article 128 (4) of the Mining Law, mining companies shall pay for: (i) Dead Rents; (ii) Exploration Royalties; (iii) Production Royalties; and (iv) compensation for access to data/information other than taxes. Said royalties are stipulated under Government Regulation No. 9 of 2012 concerning Non-Tax State Revenue under the MEMR (“**GR No. 9/2012**”).

The table below sets out some information on the tariffs:

Non Tax State Revenue	Unit	Tariff
A. Revenue from service for the provision of a mineral and coal information data system:		
1. Service for the provision and issuance of a WIUP:		
a) inquiry into mining area information	Per 15 minutes	Rp. 200,000
b) area reservation and printing of a non-metal mineral WIUP map	Per WIUP	Rp. 10,000,000 – Rp. 50,000,000 (depends on the acreage)
c) area reservation and printing of rock WIUP map	Per WIUP	Rp. 5,000,000 – Rp. 30,000,000 (depends on the acreage)
2. Service for the printing of a mining area information map.	Per sheet	Rp. 1,000,000 – Rp. 3,000,000 (depends on the size and the type)
B. Revenue from dead rent for metal mineral and coal mining business:		
1. IUP and IUPK of metal mineral and coal exploration	Per hectare/annum	US\$ 2
2. IUP and IUPK of metal mineral and coal production operation	Per hectare/annum	US\$ 4
3. Rent for smallholder lighten (“ IPRI ”):		
a) Non-metal minerals and rocks	Per hectare/annum	US\$ 1

Non Tax State Revenue	Unit	Tariff
b) Metal minerals and coal	Per hectare/annum	US\$ 2
C. Revenue from Royalties. (Please note that the royalty percentage depends on the commodity)		
1. Coal (open pit) with calorific value (Kkal/kg, air dried basis):		
a) ≤ 5,100	Per tonne	3% of the selling price
b) 5,100–6,100	Per tonne	5% of the selling price
c) > 6,100	Per tonne	7% of the selling price
2. Coal (underground) with calorific value (Kkal/kg, air dried basis):		
a) ≤ 5,100	Per tonne	2% of the selling price
b) 5,100–6,100	Per tonne	4% of the selling price
c) > 6,100	Per tonne	6% of the selling price
3. Gold	Per kilogram	3.75% of the selling price
4. Nickel Ore	Per tonne	5% of the selling price
5. Diamonds	Per carat	6.50% of the selling price

The tariffs for royalties and their calculation depend on the type of minerals. However, specifically for CCOW, GR No. 9/2012 stipulates that the royalty payable by the CCOW companies to the Government will be based on the provision in CCOW, i.e.: 13.5% of the selling price.

14 Regional and Local Rules and Laws

14.1 Are there any local provincial or municipal laws that need to be taken account of by a mining company over and above National Legislation?

The Mining Law stipulates that the provincial and regency/municipality Governments are allowed to make their own regional regulations. However, such regional regulations shall be made in accordance with the prevailing laws and regulations.

14.2 Are there any regional rules, protocols, policies or laws relating to several countries in the particular region that need to be taken account of by an exploration or mining company?

To our knowledge, there are no regional rules, protocols, policies or laws relating to several countries, in the particular ASEAN region that need to be taken into account by an exploration or mining company.

15 Cancellation, Abandonment and Relinquishment

15.1 Are there any provisions in mining laws entitling the holder of a right to abandon it either totally or partially?

No, there are no specific provisions in the Mining Law which entitles the holder of a mining right to abandon the mining right. However, under GR No. 23/2010, an IUP holder may at any time submit an application to the relevant authority for partial reduction of the mining area. For the CCoW and CoW, usually there is a provision in the contract which gives the contractor the rights to relinquish all or part of Mining Area at any time and from time to time during the term of the contract, subject to a written application to the MEMR.

15.2 Are there obligations upon the holder of an exploration right or a mining right to relinquish a part thereof after a certain period of time?

Yes. Based on GR No. 23/2010, the IUP holder of exploration rights have obligation to relinquish their mining area on the following conditions:

Metal minerals

- a. in the fourth year retain an exploration area of not exceeding 50,000 (fifty thousand) hectares; and
- b. in the eighth year or at the final stage of an exploration, at the time of upgrade to a Production Operation IUP or Special Production Operation IUP, retain an area of not exceeding 25,000 (twenty-five thousand) hectares.

Coal

- a. in the fourth year retain an exploration area of not exceeding 25,000 (twenty-five thousand) hectares; and
- b. in the seventh year or at the final stage of an exploration, at the time of upgrade to a Production Operation IUP or a Special Production Operation IUP, retain an area of not exceeding 15,000 (fifteen thousand) hectares.

Non-metal minerals

- a. in the second year retain an exploration area of not exceeding 12,500 (twelve thousand five hundred) hectares; and
- b. in the third year or at the final stage of an exploration, at the time of upgrade to a Production Operation IUP, retain an area of not exceeding 5,000 (five thousand) hectares.

Certain-typed non-metal minerals

- a. in the third year retain an exploration area of not exceeding 12,500 (twelve thousand five hundred) hectares; and
- b. in the seventh year or at the final stage of an exploration, at the time of upgrade to a Production Operation IUP, retain an area of not exceeding 5,000 (five thousand) hectares.

Rock

- a. in the second year retain an exploration area of not exceeding 2,500 (two thousand five hundred) hectares; and
- b. in the third year or at the final stage of exploration at the time of upgrade to a Production Operation IUP, retain an area of not exceeding 1,000 (one thousand) hectares.

In the event the maximum required area of the retained area as mentioned above has been met, then the IUP holder or Special IUP holder or shall no longer be required to reduce the area.

15.3 Are there any entitlements in the law for the State to cancel an exploration or mining right on the basis of failure to comply with conditions?

Yes, the Mining Law gives the relevant authority (the issuer of the mining licence) the right to revoke the mining rights or licences in the event of non-compliance with any of the provisions stipulated in the Mining Law and/or obligations stated in the mining licence. In practice, the Government will not automatically revoke the mining licence if there in the event of non-compliance with the Mining Law and/or obligations stated in the mining licence, the imposition of sanction usually will be conducted gradually from the lightest sanction to the most severe. The sanctions generally begin with a warning letter issued by the relevant authority to the holder of the mining licence, which will be followed up with their mining licence being suspended; and if after the foregoing sanctions have been imposed the violation or non-compliance still continues, then as a last resort the authority will revoke the mining licence.



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Ivory Coast

Joachim Bilé-Aka



Moussa Traoré



Bilé-Aka, Brizoua-Bi et Associés

1 Relevant Authorities and Legislation

1.1 What regulates mining law?

There are three main laws, namely Law No.2014-138 dated 24 March 2014, relating to the Mining Code, Decree No.2014-397 dated 25 June 2014, which implements the Mining Code, Order No.2014-148 dated 26 March 2014, which provides for the fees, royalties and mining taxes and the ministerial decree No.002/MIM/CAB of 11 January 2016 relating to the granting and the renewal procedures of mining titles.

1.2 Which Government body/ies administer the mining industry?

Policy direction is given by the Ministry of Mines and Industry with operational and administrative affairs handled by the SODEMI.

1.3 Describe any other sources of law affecting the mining industry.

- Uniform Act Relating to General Commercial Law dated 15 December 2011.
- Law No.2003-206 dated 7 July 2003 enacting the Tax Code.
- The Law No.96-766 of 3 October 1996 enacting the Environmental Code.
- The Law No.2015-532 of 20 July 2015 enacting the Labor Code.
- The Order No. 18/2003/CM/UEMOA amended by the Order No.02/2009/CM/UEMOA of 27 March 2009.

In addition, the Kimberley Process, which has applied since 2003, is a joint government, industry and civil society initiative to prevent “conflict diamonds” from entering the mainstream rough diamond market. Please note that Côte D’Ivoire has been a member of the Extractive Industries Transparency Initiative (EITI) since 2013.

The EITI is an international organisation which promotes and maintains a global standard, assessing the levels of transparency around countries’ oil, gas and mineral resources. The EITI Standard consists of a set of requirements that governments and companies have to adhere to in order to become recognised as ‘EITI Compliant’. Countries implement the EITI Standard to ensure full disclosure of taxes and other payments made by oil, gas and mining companies to governments.

2 Mechanics of Acquisition of Rights

2.1 What rights are required to conduct reconnaissance?

The right to conduct reconnaissance is granted by a decree of the Minister in charge of Mines and Industry, to any person or entity which has filed an application which is in line with the legal requirements set under the legislation mentioned above.

2.2 What rights are required to conduct exploration?

An exploration permit is required to conduct exploration. It is granted for four years upon a surface of up to 98,842 acres, by a Presidential decree during the Council of Ministers upon proposal of the Minister in charge of Mines and Industry, to any person or entity that submitted an application which is in line with legal requirements. This permit is renewable twice for a period of three years.

2.3 What rights are required to conduct mining?

An exploitation permit is required to conduct mining.

Pursuant to article 67 of Decree No.2014-397 dated 25 June 2014, the artisanal mining permit is granted by the Minister of Mines and Industry.

Under article 58 of the Decree No.2014-397 dated 25 June 2014, the semi-industrial permit to conduct mining is delivered by the Minister of Mines and Industry for four years.

Finally, the industrial mining permit is granted by a presidential decree during the Council of Ministers upon proposal by the Minister of Mines and Industry, after the provision of suitable evidence of the existence of relevant mineral deposits, as previously indicated in the exploration licence. An investigation as to the convenience or otherwise of the exploitation of the resources – whether it is in “*commodo*” or “*incommodo*” – under Ivorian law, is required prior to the granting of the authorisation.

A person does not need to own or acquire an interest in the land in order to apply for, or hold, a mining permit.

Once this investigation is completed, the entity or the individual is entitled to an exploration permit.

2.4 Are different procedures applicable to different minerals and on different types of land?

The procedure applicable is the same for different minerals and different types of land, except for the following:

- rough diamond;
- raw gold;
- radioactive minerals;
- mineral water; and
- prohibited and protected areas.

2.5 Are different procedures applicable to natural oil and gas?

Yes, the Mining Code does not apply to natural oil and gas. Oil and Gas activities are governed by the Petroleum Code and its implementation decree.

3 Foreign Ownership and Indigenous Ownership Requirements and Restrictions

3.1 What types of entity can own reconnaissance, exploration and mining rights?

Any type of company, whether foreign or local may apply for and be granted a mining title.

3.2 Can the entity owning the rights be a foreign entity or owned (directly or indirectly) by a foreign entity and are there special rules for foreign applicants?

A foreign entity may apply for a mining title. But upon granting of an exploitation permit, the foreign entity must set up a local entity in order to conduct the mining activities.

3.3 Are there any change of control restrictions applicable?

Yes, changes of control restrictions are applicable. Under Order R09/10/CM/UEMOA, funds may be freely transferred abroad by the Central bank, the post administration and authorised intermediaries i.e. banks upon provision of the relevant supporting documents.

3.4 Are there requirements for ownership by indigenous persons or entities?

No such requirements exist under the Law, it is merely provided that the Government may promote indigenous ownership.

Nevertheless, in addition of the State ownership right in the share capital of a mining company stated in questions 3.1 and 3.4 above, the holder of a mining permit must set up development funds for the local communities.

3.5 Does the State have free carry rights or options to acquire shareholdings?

The State does have free carry rights. It must have 10 per cent of the share capital of a mining company. This State participation cannot be diluted by any increase of the share capital of the company.

Please note that an additional shareholding of the State (up to 15 per cent) can be negotiated between the mining company and the State. Any additional shareholding is contributory.

4 Processing, Refining, Beneficiation and Export

4.1 Are there special regulatory provisions relating to processing, refining and further beneficiation of mined minerals?

Yes. Under article 9 of the Decree No.2014-397 of 25 June 2014, the holder of a mining permit who would like to analyse mine samples in a foreign country must first be granted a non-trading exportation licence.

4.2 Are there restrictions on the export of minerals and levies payable in respect thereof?

Any individuals or legal entity exporting or importing mineral substances must submit a declaration to the Ministry in charge of Mines and Industry.

On 22 May 2013, the Ivory Coast joined the Extractive Industries Transparency Initiative (EITI), which was created by several bodies in 2003, including countries, companies, civil society organisations and investors, to increase development and to use income derived from mining exploitation in poverty reduction plans in countries that have potential in oil, gas and mining products.

The Mining Code was amended to require permit holders to comply with the requirements imposed by the EITI, as well as the Kimberley Process (since 2003) in relation to illegal diamond trafficking.

The right to export mining products is granted by the mining permit. However, the export of gold and diamonds should only be performed by:

- the mining permit holder;
- import and export buying offices;
- the holders of authorisations to purchase and sell; and
- the recipients of artisanal mining authorisation and semi-industrial authorisations.

For the levies, please note that the holder of an exploitation permit, his affiliated companies and his sub-contractors are exempted from any taxes on the exportation of the mining products.

5 Transfer and Encumbrance

5.1 Are there restrictions on the transfer of rights to conduct reconnaissance, exploration and mining?

Under Ivorian law, mining permits (reconnaissance, exploration and exploitation) can be transferred wholly with the prior consent of the Government.

5.2 Are the rights to conduct reconnaissance, exploration and mining capable of being mortgaged or otherwise secured to raise finance?

While it is not permitted to mortgage the reconnaissance and the exploration permits, an exploitation permit may be mortgaged.

6 Dealing in Rights by Means of Transferring Subdivisions, Ceding Undivided Shares and Mining of Mixed Minerals

6.1 Are rights to conduct reconnaissance, exploration and mining capable of being subdivided?

No, these rights cannot be subdivided.

6.2 Are rights to conduct reconnaissance, exploration and mining capable of being held in undivided shares?

Yes, these rights can only be held in undivided shares.

6.3 Is the holder of rights to explore for or mine a primary mineral entitled to explore or mine for secondary minerals?

The holder of a primary mineral may be entitled to explore for secondary minerals if he applies for an extension of its mining permit to other substances.

6.4 Is the holder of a right to conduct reconnaissance, exploration and mining entitled to exercise rights also over residue deposits on the land concerned?

Yes, but it is subject to the prior authorisation of the mining administration.

6.5 Are there any special rules relating to offshore exploration and mining?

Under article 4 of the Mining Code, the prospecting, exploration, exploitation, possession, processing, transportation, transformation and marketing of minerals, water mineral and geothermal deposits on all the national territory, in the territorial waters, the exclusive economic zone and on the continental shelf and its extension beyond two hundred nautical miles to the internationally recognised conventional limits of the Republic of Côte d'Ivoire, are subject to the provisions of this Act and decrees that implement it.

7 Rights to Use Surface of Land

7.1 Does the holder of a right to conduct reconnaissance, exploration or mining automatically own the right to use the surface of land?

Reconnaissance and exploration permit: This permit enables the permit holder to conduct exploration activities in connection with the substance for which the permit is granted. Also, the permit allows the holder of an exclusive right to apply for an exploitation permit at any time during the permit's validity period, in the case of discovery of one or more deposits of the specified substance, within the geographical perimeter covered by the permit.

Nevertheless, he cannot conduct exploration on crop fields or hamper the irrigation of those fields.

Mining permit: This permit grants the permit holder an exclusive right to conduct exploitation and marketing activities in connection with the substances for which the permit is granted. This permit

includes the authorisation to transport extracted, concentrated substances or their derivatives, as well as the processing of the same substances in addition to their export. This permit also enables the holder to build processing and refining plants for treatment purposes.

The occupation of the surface of land by the holder is subject to mining regulations.

7.2 What obligations does the holder of a reconnaissance right, exploration right or mining right have *vis-à-vis* the landowner or lawful occupier?

The occupation of the surface of the land is subject to indemnification to the landowner or the lawful occupier. For this purpose, the holder has to conclude an agreement with the landowner or the lawful occupier. Such agreement contains, *inter alia*, the amount of the indemnity payable by the holder to the landowner or the lawful occupier. The Mining Administration is in charge of monitoring the process.

7.3 What rights of expropriation exist?

The Government could perform an expropriation for reasons of public utility. The expropriation is subject to payment of compensation by the Government to the holder.

8 Environmental

8.1 What environmental authorisations are required in order to conduct reconnaissance, exploration and mining operations?

Before starting any activities, the permit holder must perform an Environmental Impact Assessment (EIA). The permit holder can use the service of an independent expert whose staff shall be composed of a maximum of 33 per cent of foreign employees. The EIA report must be filed with the Ministry of Mines and with the Bureau of Environmental Impact Assessment. The Bureau of Environmental Impact Assessment and the Ministry of Environment have two months from the reception of the EIA report to give their authorisation to the project. If no response is received after a two-month silence, the proposal is deemed to be approved.

8.2 What provisions need to be made for storage of tailings and other waste products and for the closure of mines?

Any applicant for a mining title must provide along with the environment impact study a programme for the closure of the mining site.

This program must clearly provide for the actions to be carried out to deal with waste products and other products rejected by the mine.

8.3 What are the closure obligations of the holder of a reconnaissance right, exploration right or mining right?

The closure of mining operations must be declared first to the Ministry of Mines. There are other obligations such as: the cleaning and rehabilitation of the site, the removal of any mining infrastructures, and the monitoring of the post rehabilitation programme.

To this end, the holder of a mining title must open an escrow account before starting the activities. These obligations are set out in the closure plan, which is drafted on a case-by-case basis depending on the site and the type of exploitation.

8.4 Are there any zoning or planning requirements applicable to the exercise of a reconnaissance, exploration or mining right?

Yes. No exploration or mining operation can be undertaken within a protected zone.

9 Native Title and Land Rights

9.1 Does the holding of native title or other statutory surface use rights have an impact upon reconnaissance, exploration or mining operations?

No. A person does not need to own or acquire an interest in the land in order to apply for, or hold, a mining permit on it.

A native title holder may not oppose to the rights of a permit holder. However, as indicated above, he will be entitled to a fair indemnity should he be obliged to abandon his land because of the mining activities.

10 Health and Safety

10.1 What legislation governs health and safety in mining?

Apart from the relevant provisions of the Mining Code, the Environment Code and the Medical Code and its implementation decree, there is no specific legislation as such.

10.2 Are there obligations imposed upon owners, employers, managers and employees in relation to health and safety?

Before undertaking mining work, the permit holder has to develop relevant regulations related to safety and hygiene in relation to the proposed works. This regulation will be subject to the approval of the Mining Administration. Once approved, the permit holder will be required to comply with this regulation.

11 Administrative Aspects

11.1 Is there a central titles registration office?

The State-owned company SODEMI is the Registrar of mining titles. It keeps a register and records all mining permits and the identity of their holders.

11.2 Is there a system of appeals against administrative decisions in terms of the relevant mining legislation?

Any administrative sanction such as the cancellation of the mining title or the closure of the mine can be subject to an appeal before the administrative courts.

(Article 188 of the Mining Law)

A transaction is possible between the Administration and the holder of the mining title. However, the transaction cannot override a criminal court decision.

12 Constitutional Law

12.1 Is there a constitution which has an impact upon rights to conduct reconnaissance, exploration and mining?

No, there is none.

12.2 Are there any State investment treaties which are applicable?

There is no State Investment Treaty specifically applicable to the mining sector as such. However, it is worth pointing that Côte D'Ivoire is party to various International conventions, notably the 1957 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and, by extension, to the International Centre for Settlement of Investment Disputes (ICSID), the Multilateral Investment Guarantee Agency (MIGA), the Organization for the Harmonization of Business Law in Africa (OHADA from its French acronym).

Finally, Côte D'Ivoire is member of the Extractive Industry Transparency Initiative since 2008 and has been certified in 2013.

13 Taxes and Royalties

13.1 Are there any special rules applicable to taxation of exploration and mining entities?

The permit holder is entitled among others to the following tax advantages and incentives:

- (i) exemption of payment of up to 50 per cent of the registration fees for capital increase in a mining company;
- (ii) exemption of import duties including value added tax on import of materials, machinery and equipment for mining activities; and
- (iii) exemption of taxes on exportation of the mining products.

13.2 Are there royalties payable to the State over and above any taxes?

An *ad valorem* tax is payable per trimester on the company's turnover minus transports and refining costs.

The rate(s):

- varies from 3 to 6 per cent for gold, and such rate depends on the price per ounce of gold (from USD 1,000 to beyond USD 2,000);
- 4 per cent for precious metals;
- 3 per cent for precious and semi-precious stones;
- 3.5 per cent for base and non-ferrous metals;
- varies from 1.5 per cent to 3.5 per cent for iron and minerals;
- varies from 1.5 per cent to 3.5 per cent for manganese;
- 4 per cent for solid energetic substances and industrial minerals;
- 3 per cent for phosphate and mineral salts;
- 5 per cent for radioactive minerals; and

- 1 per cent for mineral water.

Furthermore, the Mining Law provides for different taxes depending on the type of the permit granted. Indeed, the holder of a reconnaissance permit, will pay a 1\$ tax per hectare per year whereas the holder of an exploration permit will pay a tax that varies from \$6 to \$30 per hectare per year.

Finally, when it comes to the mining permit the tax varies from \$2 to \$500 per hectare per year.

14 Regional and Local Rules and Laws

14.1 Are there any local provincial or municipal laws that need to be taken account of by a mining company over and above National Legislation?

No, there are not.

14.2 Are there any regional rules, protocols, policies or laws relating to several countries in the particular region that need to be taken account of by an exploration or mining company?

Yes. The Directive No.18/2003/CM/UEMOA modified by Order No.02/2009/CM/UEMOA of 27 March 2009 of the West African Economic and Monetary Union (UEMOA) on the mining sector.

15 Cancellation, Abandonment and Relinquishment

15.1 Are there any provisions in mining laws entitling the holder of a right to abandon it either totally or partially?

Yes. Article 83 allows the holder of quarries to abandon its right.

15.2 Are there obligations upon the holder of an exploration right or a mining right to relinquish a part thereof after a certain period of time?

Yes. The perimeter of an exploration permit is reduced by a quarter at each renewal of such permit.

15.3 Are there any entitlements in the law for the State to cancel an exploration or mining right on the basis of failure to comply with conditions?

Yes, cancellation is one of the administrative sanctions provided by the Mining Code in the case of failure of the permit holder to comply with its obligations.

Pursuant to article 43 of the Mining Code, the holder of an exploration permit who did not provide his feasibility study on time or does not pay the taxes he is supposed to, can have his mining rights cancelled.

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- Arbitrator of the Common Court of Justice and Arbitration of OHADA.

Substitute teacher at the National School of Magistrates of Côte d'Ivoire.

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After 15 years of practice, Moussa Traoré has acquired significant experience in advising foreign companies in various sectors of business law. He has notably advised major foreign entities in the acquisitions of stocks/shares in local companies.

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A holder of a Master's degree in English Language, Moussa Traoré is bilingual and regularly advises English-speaking clients of the firm without the assistance of an interpreter.



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Constituted on 1 April 2000 by Mr. Michel Kizito Brizoua-Bi and Mr. Joachim Bilé-Aka, the international law firm Bilé-Aka Brizoua-Bi & Associés is based in Abidjan whose principal mission, outside the judicial activity, is to optimise the legal and tax security of the projects or transactions of its customers.

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Kazakhstan

Yerbolat Yerkebulanov



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Note

In mid-2015, the concept of a new *Code on Subsoil and Subsoil Use* (the “**Code**”) was approved in the Republic of Kazakhstan (“**RoK**” or the “**State**”). The Code shall enter into force and replace the currently acting *Law on Subsoil and Subsoil Use* dated 24 June 2010 No. 291-IV (the “**Subsoil Law**”) six months after the official publication of the Code. It is planned that the RoK Parliament will finalise the Code by 31 December 2017, however, it may last longer. If the Code enters into force in 2018, this chapter will be updated accordingly; the updated version will be available online at www.iclg.com.

1 Relevant Authorities and Legislation

1.1 What regulates mining law?

The principal legislative act governing mining activities in Kazakhstan is the Subsoil Law.

There are also numerous Decrees of the RoK Government and orders of the RoK Minister of Investment and Development (the “**MID**”) which regulate specific issues in the mining sphere.

Mining activities are regulated through the award of mining contracts (until August 1999 this was through the award of a licence with the further conclusion of a mining contract), which are obtained either through competitive procedures or through direct negotiations for:

- (i) certain RoK national companies (depending on the type of mineral according to established allocation of responsibilities);
- (ii) holders of the exploration right that made the commercial discovery and assessed it as confirmed by state expertise; or
- (iii) exploration right obtained under the simplified order with regard to understudied subsoil plots. (Under such order, any individual or company may choose a certain area from the approved list of subsoil plots (on an electronic map) and file an application with the MID. The MID registers the application and discloses information about such individual or company on its website. If within five business days there is no other application for the subsoil plots under the first application, the applicant is entitled to direct negotiations. If another application has been submitted, the exploration right is obtained through an auction.)

Broadly, regulation for mining can be categorised by reference to specific minerals as follows:

- (i) solid minerals (gold, silver, coal, etc.); and
- (ii) commonly occurring minerals (sand, clay, etc.).

Please note that the Subsoil Law, in addition to above minerals, also regulates relations related to oil and gas. Unless otherwise stated, we have not addressed issues of oil and gas and commonly occurring minerals in this chapter.

1.2 Which Government body/ies administer the mining industry?

Depending on the category of minerals, there are three so-called competent authorities (the “**Competent Authority**”), specifically:

- 1) the MID regulates solid minerals contracts (f/k/a the Ministry of Industry and New Technologies from 12 March 2010 to 6 August 2014; before 12 March 2010 known as the Ministry of Energy and Mineral Resources);
- 2) the Ministry of Energy regulates oil and gas, coal and uranium (f/k/a the Ministry of Oil and Gas from 12 March 2010 to 6 August 2014; before 12 March 2010 known as the Ministry of Energy and Mineral Resources); and
- 3) the local executive bodies (*i.e.* akimats of regions/Astana/Almaty (“**Akimat**”)) regulate commonly occurring minerals.

The MID also supervises the mining industry through its subordinate, the Committee on Geology and Subsoil Use (the “**Geology Committee**”). The Geology Committee has regional departments called *TsentrKazNedra* (for central territories), *ZapKazNedra* (for western territories), *SevKazNedra* (for northern territories), *VostKazNedra* (for eastern territories) and *YuzhKazNedra* (for southern territories).

The issues of (i) local content in goods, works, services and staff, and (ii) procurement of solid minerals subsoil users are resolved by the MID taking into consideration the view of the National Agency on Development of Local Content JSC.

1.3 Describe any other sources of law affecting the mining industry.

Depending on the sphere of activities, the mining industry is affected by the following legislative acts:

- (1) the *RoK Tax Code* dated 10 December 2008 (the “**Tax Code**”);
- (2) the *RoK Land Code* dated 20 June 2003 (the “**Land Code**”);
- (3) the *RoK Environmental Code* dated 9 January 2007;
- (4) the *RoK Labour Code* dated 15 May 2007;
- (5) the *RoK Water Code* dated 9 July 2003;
- (6) the *RoK Law on Precious Metals and Precious Stones* dated 14 January 2016 (the “**Precious Metals Law**”);

- (7) the *RoK Law on Architecture, Town-Shipping and Construction Activities* dated 16 July 2001;
- (8) the *RoK Law on Permits and Notifications* dated 16 May 2014;
- (9) the *RoK Custom Code* dated 30 June 2010 and the *Customs Code of the Customs Union*; and
- (10) the *Rules of Procurement of Goods, Works and Services at Performance of Subsoil Use Operations* approved by the Order of the MID dated 30 January 2015 No. 96, and so on.

2 Mechanics of Acquisition of Rights

2.1 What rights are required to conduct reconnaissance?

There is no notion of “reconnaissance” in Kazakhstan law; instead the term “exploration” is used, which includes (i) prospecting works, and (ii) assessment of commercial discovery. See our response to question 2.2.

There is also a notion of state geological survey, which is undertaken by the authorities either by themselves or through contractors. Please note that even if a contractor performs a state geological survey at its own expenses and not at the expenses of the state budget, the Subsoil Law does not provide such contractor with any preferences to conclude a subsoil use contract for the territory surveyed.

2.2 What rights are required to conduct exploration?

(i) Subsoil use and land plot lease contracts

First of all, to conduct exploration, an individual or an entity must have a subsoil use right. Such rights are deemed to be granted upon the Competent Authority’s signing of a contract (“**Subsoil Use Contract**”) for the right of (i) exploration (either ordinary or simplified), (ii) production, or (iii) combined exploration and production.

During the preparation of the subsoil use contract, the Geology Committee issues a geological allotment for the territory to be explored.

Also, a relevant project on exploration works or on assessment of commercial discovery shall be elaborated by a relevant licensed organisation and be considered and approved by the ecological authority (if the project on assessment of commercial discovery includes pilot production, approvals of sanitary-epidemiological and industrial safety authorities are also required), as well as by the Geology Committee.

If the exploration right is granted under a simplified order, the subsoil user approves the exploration project by itself and sends it to the Geology Committee.

Further, execution of a subsoil use contract is an unconditional ground for granting the land use right by Akimats. Such land use right is confirmed by signing a land plot lease agreement with the land authorities.

(ii) Licences

To carry out exploration works, depending on the method, the following licences may be required:

- a licence on drilling works;
- a licence on handling explosives;
- a construction licence (for construction of a mine, a processing plant, infrastructure, etc.); or
- a licence on the application of chemicals and other agents, etc.

A holder of a subsoil use right can either obtain such licences on its own or hire contractors which have the relevant licences.

2.3 What rights are required to conduct mining?

Please note that there is no legal notion of “mining” in Kazakh law; instead, the terms “production” or “extraction” are used for determining the commercial development of the deposits and extraction of the minerals.

In general, the requirements are the same as mentioned in our response to question 2.2, except for the following:

- 1) the subsoil use contract for (i) production, or (ii) combined exploration and production with a relevant amendment thereto allows the holder of the subsoil use right to conduct production;
- 2) instead of the geological allotment, a mining allotment must be obtained;
- 3) instead of an exploration project, a production project must be elaborated and approved by the authorities (please note that there is no need to elaborate a production project for production of technogenic mineral formations (the “**TMF**”)); and
- 4) the holder of the subsoil use right must obtain a licence for the exploitation of mining activities.

Mining of solid minerals can also be performed under a test mining stage, which is part of the assessment of commercial discovery (*i.e.* at exploration stage).

2.4 Are different procedures applicable to different minerals and on different types of land?

No, generally the procedures are the same, save for a number of special licences required for carrying out activities with the production, storage or processing of radioactive ores.

2.5 Are different procedures applicable to natural oil and gas?

Generally, the same procedures are applicable to the exploration and production of natural gas and oil.

3 Foreign Ownership and Indigenous Ownership Requirements and Restrictions

3.1 What types of entity can own reconnaissance, exploration and mining rights?

Under the Subsoil Law, any individual or legal entity can own exploration, production (mining) or combined exploration and production rights.

3.2 Can the entity owning the rights be a foreign entity or owned (directly or indirectly) by a foreign entity and are there special rules for foreign applicants?

Yes, the entity owning the rights can be a foreign entity or owned (directly or indirectly) by a foreign entity. The order of filing an application is the same for national and foreign applicants.

Exception: if a contract for exploration or production in the Caspian Sea is concluded, at least 50 per cent of shares in charter capital of the subsoil user shall belong to the quasi-state national company (National Company KazMunaiGas JSC).

3.3 Are there any change of control restrictions applicable?

The Subsoil Law contains the definition of objects connected to the subsoil use right (the “**Objects**”), which are:

- (i) shares in subsoil users;
- (ii) shares in parent companies of the subsoil users, provided that the principal activity of such parent companies is connected to subsoil use in Kazakhstan; or
- (iii) securities confirming the ownership rights to the abovementioned shares or securities convertible into the above-stated shares (including when issuing for IPO for issues (i)–(iii)).

Under Article 12.2 of the Subsoil Law, with regard to deposits of strategic significance (the list of such deposits is approved by the RoK Government Decree dated 4 October 2011 No. 1137), the State has the priority right to acquire (i) subsoil use right (in full or in part), or (ii) the Objects.

Save for limited exceptions, any transaction that alienates the subsoil use right (in full or in part) or Objects is subject to the prior obtaining of (i) a waiver of the State’s priority right (the “**Waiver**”) with regard to deposits of strategic importance only, and/or (ii) consent of the Competent Authority (the “**Consent**”) as set out by Article 36 of the Subsoil Law.

Failure to obtain the Consent results in acknowledgment of the relevant transaction as being void *ab initio* from a Kazakh law perspective and entitles the Competent Authority to unilateral termination of the subsoil use contract under Article 72.3.2 of the Subsoil Law.

Under the Subsoil Law, the Consent is obtained during 20 business days and the Waiver, if applicable, is obtained during additional 50 business days. However, as the authorities are entitled to request additional information, in practice it can take a longer period of time.

Within five business days after execution of the transaction, the acquirer of the subsoil use right (or its part) or the Objects shall notify the Competent Authority.

If the subsoil use right or the Objects are planned to be pledged, a prior Consent shall be obtained; otherwise, a pledge transaction is treated as being void *ab initio*.

Furthermore, if, as a result of the transaction, the acquirer will hold more than 50 per cent of shares of a Kazakh entity, and the aggregate balance cost of assets of such Kazakh entity and the acquirer exceeds 10,000,000 monthly calculation indexes (about USD 70 million, rate KZT 330/USD 1), the transaction is subject to prior antimonopoly approval.

3.4 Are there requirements for ownership by indigenous persons or entities?

No, there are no requirements for ownership by indigenous persons or entities of subsoil use rights in Kazakhstan, except for oil and gas projects in the Caspian Sea, where the share of National Company KazMunaiGas JSC shall be not less than 50 per cent (Article 93.3 of the Subsoil Law).

3.5 Does the State have free carry rights or options to acquire shareholdings?

See our response to question 3.3 above regarding the State’s priority right.

If a mining asset is included in the *List of Deposits of Strategic Importance* approved by RoK Government Decree dated 4 October 2011 No. 1137, the State is entitled under Article 71.3 of the Subsoil Law to require the introduction of amendments into the subsoil use contract if actions of the subsoil user lead to a change of the State’s economic interests, and constitute a threat to national security. If the subsoil user does not agree to amend its contract, the State is entitled, under Article 72.4-5 of the Subsoil Law, to unilaterally terminate such contract.

4 Processing, Refining, Beneficiation and Export

4.1 Are there special regulatory provisions relating to processing, refining and further beneficiation of mined minerals?

The Subsoil Law differentiates between (i) primary processing (beneficiation) of raw minerals, and (ii) processing of raw minerals.

The primary processing (beneficiation) of raw minerals is acknowledged as a type of mining production activity, which comprises gathering on the site, breaking or crushing, separation (sorting), briquetting, agglomeration and enrichment by physical-chemical methods (without qualitative changes of the mineral forms of useful minerals, their aggregative-phase conditions or crystal-chemical structure). It may also comprise processing technologies which are special types of work related to the production of useful minerals (underground gasification and melting, chemical and bacterial leaching, dredging and hydraulic development of placers). The list of works related to the primary processing (beneficiation) of raw minerals shall be determined in each subsoil contract, except for subsoil use contracts concluded before the enactment of the Subsoil Law (i.e. before 7 July 2010), and for amendments to subsoil contracts.

On the other hand, the processing of raw minerals is acknowledged as works (i) related to the extraction of a useful mineral(s) from raw mineral materials, as well as (ii) following the primary processing of raw minerals.

4.2 Are there restrictions on the export of minerals and levies payable in respect thereof?

In general, there are no restrictions on the export of minerals, except for the below.

First, according to the Precious Metals Law, the owner of mineral raw material containing precious metals (e.g. gold) is obliged to propose to the RoK National Bank (which has the priority right to buy-out fine gold) fine gold refined at foreign gold refining plants. Moreover, a Kazakh subsoil user, before exporting gold from Kazakhstan to a foreign refinery, shall obtain the waiver of local refining plants.

Second, in some cases the authorities establish temporary limitations (e.g. bans with regard to the export of gold, etc.).

Last, in certain cases, exporters must preliminarily obtain export licences (e.g. for the export of natural crude stones, non-ferrous metals, precious metals and precious stones and diamonds).

5 Transfer and Encumbrance

5.1 Are there restrictions on the transfer of rights to conduct reconnaissance, exploration and mining?

Please see the requirements for the transfer of exploration and mining rights in our response to question 3.2 above.

Additionally, we note that the Subsoil Law envisages such a notion as the “concentration of rights on conducting subsoil use operations”, i.e. the owning of such amount of shares in subsoil use contracts in the territory of Kazakhstan or such amount of participatory interest in a charter capital (a number of shares) in Kazakhstani subsoil users by a person or group of persons from one country which can constitute or constitutes a threat to the RoK’s economic interests.

If the Competent Authority, when considering an application for the transfer of rights to exploration or mining, decides that the proposed transaction can cause a concentration of rights, it is entitled to reject to issue its Consent.

5.2 Are the rights to conduct reconnaissance, exploration and mining capable of being mortgaged or otherwise secured to raise finance?

Yes, the rights to conduct exploration and mining can serve as security (pledge), provided that a prior relevant Consent in the form of a pledge certificate is issued by the Competent Authority.

Please note that according to Article 36.4 of the Subsoil Law, funds received against a pledge of the subsoil use right must be used only for the purposes of subsoil use or organisation of subsequent processing on the Kazakhstan territory as set out by the subsoil use contract either (i) by the subsoil user itself, or (ii) by its wholly owned subsidiary organisation.

Pledge of shares in a subsoil user or its parent companies, provided that the principal activity of such parent companies is connected to subsoil use in Kazakhstan, also requires preliminary consent of the Competent Authority.

6 Dealing in Rights by Means of Transferring Subdivisions, Ceding Undivided Shares and Mining of Mixed Minerals

6.1 Are rights to conduct reconnaissance, exploration and mining capable of being subdivided?

As for the subsoil use right itself, it can belong not only to a single individual/entity, but also to several individuals/entities (jointly considered as a single subsoil user).

As for the contract territory, according to Article 70-1 of the Subsoil Law, solid minerals subsoil users carrying out exploration are entitled to transform their contract territory by allocation of a certain land plot. A new exploration contract is concluded for such territory. The term of such contract cannot exceed the term of its “mother” subsoil use contract.

A production contract can also be subdivided in the following two cases:

- (i) According to Article 70-1.8 of the Subsoil Law, a subsoil user that is carrying out production in several fields, which

part is entered in the list of high-viscosity, watered, marginal or exhausted fields approved by the relevant Government Decree, is entitled to make a request to the Competent Authority for the conclusion of a separate production contract in respect of such field(s). Such a contract may be concluded for a period lasting to the end of the initial contract.

- (ii) Subsoil users that have an exploration contract can apply for the conclusion of a production contract for a field(s) with a commercial discovery as confirmed by the relevant conclusion of the State Reserves Committee (the so-called GKZ). Such practice is followed by the Competent Authority in the oil and gas sphere.

6.2 Are rights to conduct reconnaissance, exploration and mining capable of being held in undivided shares?

According to Article 29.3 of the Subsoil Law, a subsoil use right under a subsoil use contract can be jointly held by several individuals/entities, which have joint and several liability for the obligations arising under the contract.

Rights and obligations of the joint holders of subsoil use rights and the procedure for managing the general affairs shall be defined in the contract, as well as in the agreement on joint activities. The participants can choose the operator who would represent them before the Competent Authority.

6.3 Is the holder of rights to explore for or mine a primary mineral entitled to explore or mine for secondary minerals?

Generally, the subsoil use contracts may directly allow subsoil users to mine not only primary minerals, but also “associated minerals” which may be economically recovered along with the primary mineral(s).

Furthermore, according to Article 10.7 of the Subsoil Law, production of “associated minerals” simultaneously with the production of minerals specified by the terms of a subsoil use contract is acknowledged as production within the framework of such contract.

Lastly, please note that, as mentioned above, the Subsoil Law divides the mineral resources into three categories: (i) hydrocarbons (oil and gas); (ii) solid minerals; and (iii) commonly occurring minerals. Accordingly, if the secondary minerals belong to another category, then the conclusion of a separate contract with another Competent Authority is required.

6.4 Is the holder of a right to conduct reconnaissance, exploration and mining entitled to exercise rights also over residue deposits on the land concerned?

The Subsoil Law provides for a notion of TMF, which are aggregations of mineral formations, rocks, liquids and mixtures bearing useful components that are rejects of mining and enrichment, metallurgical and other types of productions (i.e. tailings).

TMF that originated from mineral raw materials imported into Kazakhstan, as well as stored, after 30 May 1992, which contain minerals, and which a tax on the extraction of said minerals and (or) royalty has been paid, are considered as a subsoil user’s property. The subsoil user can own, use and dispose of its mineral raw material at its own discretion.

All other TMF are acknowledged as state property and a separate subsoil use contract shall be concluded with the Competent Authority for carrying out subsoil use operations.

6.5 Are there any special rules relating to offshore exploration and mining?

Offshore exploration and mining in Kazakhstan are understood only as oil and gas operations. There are specific provisions of the Subsoil Law, the Environmental Code and other legislative acts extensively regulating offshore operations. From a practical point of view, it is a rather complicated procedure, requiring numerous permits and authorisations.

7 Rights to Use Surface of Land

7.1 Does the holder of a right to conduct reconnaissance, exploration or mining automatically own the right to use the surface of land?

According to Article 42.1 of the Land Code, the right to the land plot, unless otherwise set out by legislative acts, also affects the surface soil layer, closed ponds and plantings within the boundaries of such land plot.

The subsoil use contract only evidences the subsoil user's rights to use the subsoil plot; however, they do not provide for any land use rights, and the latter should be procured separately (see our response to question 9.1 for further details).

7.2 What obligations does the holder of a reconnaissance right, exploration right or mining right have vis-à-vis the landowner or lawful occupier?

The holder of an exploration or mining right shall agree with the landowner or lawful occupier the terms of using the land plot for subsoil use purposes as discussed in our response to question 9.1.

7.3 What rights of expropriation exist?

According to Article 84 of the Land Code, a land plot can be expropriated for State needs (in exceptional cases when there is no other way of satisfying such needs) by an equivalent reimbursement of property either upon consent of the owner or land user or upon a court decision. The discovery and development of a mineral resources field is one of the grounds for expropriation.

Further, according to Article 90 of the Land Code, expropriation of agricultural land plots is permitted in exceptional cases connected to the discovery of a mineral field under the land plot.

However, in practice, the above provisions do not work due to Article 84.5 of the Land Code, whereby expropriation cannot be considered as being for State needs if such expropriation pursues the commercial targets of non-governmental legal entities and aims to satisfy non-governmental interests.

In view of the above-stated, currently there is no mechanism for the expropriation of land plots. Subsoil users directly depend on the will of owners or land users, and must come to an agreement with them in order to use the land plots, as discussed in our response to question 9.1.

8 Environmental

8.1 What environmental authorisations are required in order to conduct reconnaissance, exploration and mining operations?

According to Article 109 of the Subsoil Law, ecological grounds for carrying out subsoil use operations are: (1) positive conclusions by State ecological experts with regard to project documents; and (2) the environmental permit (setting out a scope of permitted environmental emissions).

Subsoil users are obliged to submit all (i) preliminary project documentation, and (ii) project documentation for State ecological examinations. The documents shall include an assessment of the impact of the proposed activity on the environment and contain an "Environmental Protection" section.

8.2 What provisions need to be made for storage of tailings and other waste products and for the closure of mines?

According to Article 111 of the Subsoil Law, after the termination of subsoil use operations or the depletion of mineral resources, a subsoil user shall immediately proceed to work on the liquidation or conservation of the subsoil use objects (e.g. mines). If an urgent decision on the termination of production is required, the subsoil user must carry out a set of measures for the conservation of production units before their liquidation or conservation.

The liquidation or conservation works are carried out based on a liquidation or conservation plan that has been (i) elaborated by a licensed project company, (ii) agreed to by authorities in the fields of environmental protection, study and use of subsoil, industrial safety, sanitary-epidemiological service, land resources management, and (iii) approved by the subsoil user.

The operation is financed by the liquidation (abandonment) fund of the subsoil user and, if it is not sufficient, at the expense of the subsoil user itself.

The liquidation or conservation of subsoil use objects is considered complete after the signing of the act of acceptance by the commission established by the Competent Authority, which consists of officials in the fields of environmental protection, study and use of subsoil, industrial safety, sanitary-epidemiological service and land resources management, and by the Akimat.

8.3 What are the closure obligations of the holder of a reconnaissance right, exploration right or mining right?

See our response to question 8.2 above.

8.4 Are there any zoning or planning requirements applicable to the exercise of a reconnaissance, exploration or mining right?

Yes, such requirements exist with regard to areas of outstanding natural beauty, where:

- (i) exploration is permitted upon permission of the environmental authorities in view of special ecological requirements; and

- (ii) production of minerals is permitted in exceptional instances upon a decision by the RoK Government made upon a presentation by the Geology Committee agreed with by the environmental authorities.

9 Native Title and Land Rights

9.1 Does the holding of native title or other statutory surface use rights have an impact upon reconnaissance, exploration or mining operations?

There is no concept of native title in Kazakh law.

Surface rights (known in Kazakhstan as land use rights) are separate from mining rights.

According to Article 68.5 of the Subsoil Law, execution of a subsoil contract is the ground for the provision of a relevant land plot by the relevant Akimat, except in cases of the expropriation of a land plot (land use right) for State needs under the Land Code. Provision of land plots under ownership or under the land use right of third parties is made according to the Land Code.

In other words, if the land plot where subsoil use operations are conducted is in the State's property, the relevant Akimat provides such land.

According to Article 71.1 of the Land Code, individuals and entities carrying out geological, geophysical and search works can perform such works without taking away such land plots from their owners or leaseholders. Such provision is normally used for exploration purposes.

In cases referred to in the previous paragraph or if land plots where mining is supposed to be undertaken is owned or leased by a third party (an individual or entity), the subsoil user shall conclude a relevant agreement with such owners/leaseholders. Normally, the subsoil user shall reimburse losses of agricultural activity (due to withdrawal of land plots used for agricultural activities). In certain cases, subsoil users are obliged to conclude servitude contracts.

Please see also our response to question 7.3.

We also note that the only constant and free right which individuals and entities have with regard to subsoil use at the land plots owned or leased by them is the mining of commonly occurring minerals for their own needs.

10 Health and Safety

10.1 What legislation governs health and safety in mining?

There are a number of legal acts directly or indirectly governing health and safety in mining, approved by the orders of the MID.

The regulations set out that each mining company shall have a special person responsible for health and industrial safety. All workers (including workers of contractors, subcontractors) who are directly involved in dangerous fields of work must regularly pass different certifications.

10.2 Are there obligations imposed upon owners, employers, managers and employees in relation to health and safety?

Major requirements for owners, employers, managers and employees in relation to health and safety are set out in Article 115 of the Subsoil Law and include, *inter alia*: prohibition or immediate

termination of works if they are or become dangerous to the life and health of people; admitting to work only those people that have special qualifications; procuring special clothes; having available means of individual and collective protection; using equipment and materials that meet safety and sanitary requirements; constantly monitoring the atmosphere for availability of oxygen and harmful gas and dust, etc.

See also our response to question 10.1 above.

11 Administrative Aspects

11.1 Is there a central titles registration office?

As stated in our response to question 1.2 above, the MID is the Competent Authority for the conclusion and registration of subsoil use contracts for solid minerals. The Competent Authority is responsible for the registration of a subsoil use right, as well as its transfer or pledge.

11.2 Is there a system of appeals against administrative decisions in terms of the relevant mining legislation?

Normally, subsoil users in Kazakhstan appeal against decisions of the State authorities only in cases related to environmental issues, customs and tax charges and termination of subsoil use contracts.

The appeal is made by filing a claim to a State court. There are three stages of court consideration, with the third being the RoK Supreme Court.

The order of appeal is set out in the Civil Procedural Code.

In some subsoil use contracts, there is a direct reference to the fact that any disputes are subject to resolution by foreign arbitration.

12 Constitutional Law

12.1 Is there a constitution which has an impact upon rights to conduct reconnaissance, exploration and mining?

According to the RoK Constitution, which is the main law in Kazakhstan, the land and its mineral resources, water, flora and fauna, and other natural resources are owned by the State.

Article 10 of the Subsoil Law states that, according to the RoK Constitution, the subsoil and the useful minerals that are in it are under State ownership. State ownership of the subsoil shall be recognised as one of the component bases of the state sovereignty of Kazakhstan. The State shall ensure access to the subsoil on the bases, conditions and within the limits provided for by the Subsoil Law.

12.2 Are there any State investment treaties which are applicable?

Kazakhstan is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and to ICSID.

Kazakhstan is also a signatory to bilateral investment treaties with more than 50 countries establishing guarantees for the protection of investment activities (see the list at the website of the Ministry of Foreign Affairs – www.mfa.kz). Texts of these treaties can differ

in terms of defining an investor, an object of investment, protected rights of an investor, and the procedure of investment protection. However, all of the treaties stipulate the right of an investor to apply for international investment arbitration to protect their rights and investment.

13 Taxes and Royalties

13.1 Are there any special rules applicable to taxation of exploration and mining entities?

In addition to obligations to pay ordinary taxes and fees (e.g., VAT, corporate and individual income taxes, property tax, land tax, fees for exploitation of radiofrequency band, etc.), all exploration and mining entities are subject to taxation under section 11 (*Taxation of Subsoil Users*) of the Tax Code, comprising Articles 307–354.

Subsoil users shall carry out separate accounting related (i) for subsoil use activities, and (ii) for all other non-subsoil use activities (if any).

Below is the list of specific taxes for subsoil users:

1. Signature bonus

The signature bonus is a one-off payment for the right to carry out activities for subsoil use. The exact amount of the signature bonus is determined at the tendering stage for subsoil use rights or during direct negotiations on the provision of subsoil use rights.

2. Commercial discovery bonus

The commercial discovery bonus is a one-off payment by the subsoil user for each commercial discovery on the contractual territory. The basis of its calculation is the cost of the volume of recoverable mineral reserves approved by the authorised state body. The cost of recoverable reserves is calculated on the exchange price determined at the International (London) Exchange, listed according to the source given by Platts Crude Oil Marketwire. The commercial discovery bonus is paid at the rate of 0.1 per cent of the tax base (i.e. the cost of the volume of recoverable reserves of minerals, approved by the Geology Committee).

3. Payment to reimburse historical costs

Historical costs are an established payment intended to reimburse the State's expenses for exploration and settlement of the contractual territory, incurred before the contract on subsoil use was concluded.

Liability in respect of the payment to reimburse historical costs arises from the date of the signing of a confidentiality agreement between the subsoil user and the Geology Committee.

4. Tax on extraction of minerals (the "TEMR")

TEMR is a type of tax royalty based on the volume of production, and applies to solid minerals, including gold, silver, platinum and other precious metals and gems. The list of rates is set out in Article 339 (*Rates of Tax on Extraction of Mineral Resources*) of the Tax Code, which consists of 10 categories and 29 subcategories.

5. Excess profits tax (the "EPT")

EPT is calculated on an annual basis. The tax is paid on a sliding scale of rates applied to the part of the net income minus 25 per cent of the deductions (expenses incurred) in the order set out by Articles 350–351 of the Tax Code.

We note that Kazakhstan is elaborating a new Tax Code, which supposedly will enter into force in 2018, where it planned (i) to rescind the commercial discovery bonus, (ii) to eliminate tax borders between an exploration contract and a production contract

(this will allow to deduct exploration costs at the expenses of another production contract and reduce expenses connected to income tax and EPT), and (iii) for new exploration contracts to rescind obligations on financing tuition of Kazakhstani personnel, research and development works, payments on social development of the region and historical costs (such payments shall be made on a production stage).

13.2 Are there royalties payable to the State over and above any taxes?

Kazakhstan used to have royalties paid by subsoil users. But, as from 1 January 2009 when the Tax Code replaced the previous tax code, royalty payment was accordingly replaced by the TEMR. See more detail in our response to question 13.1 above.

14 Regional and Local Rules and Laws

14.1 Are there any local provincial or municipal laws that need to be taken account of by a mining company over and above National Legislation?

Kazakh legislation is centralised and consists mostly of codes, laws, Government Decrees and orders of the ministers. Local authorities do not have the right to adopt laws.

We shall, however, note the following specific case: according to Article 495.9 (Fee Rates) of the Tax Code, the local representation body (the so-called "*maslikhat*") is entitled to increase the rates set out by this Article for environmental emissions for no more than two times (except for the rates for pollutions from gas flaring).

14.2 Are there any regional rules, protocols, policies or laws relating to several countries in the particular region that need to be taken account of by an exploration or mining company?

No, there are no such rules for an exploration or mining companies (solid minerals subsoil users).

The rules referred to in this question apply to oil and gas exploration and production in the territory of the Caspian Sea, which is not the subject of this chapter.

As for customs issues, the customs legislation of the Customs Union (consisting of Russia, Kazakhstan, Belarus, Kyrgyzstan and Armenia) prevails over Kazakh customs legislation.

15 Cancellation, Abandonment and Relinquishment

15.1 Are there any provisions in mining laws entitling the holder of a right to abandon it either totally or partially?

Any subsoil user is entitled to (i) return part of its contracting territory, or (ii) demand pre-scheduled termination of the subsoil use contract through court proceedings or under the grounds set out by the subsoil use contract. In both cases, the subsoil user shall preliminarily carry out relevant liquidation or conservation works (see question 8.2 above).

15.2 Are there obligations upon the holder of an exploration right or a mining right to relinquish a part thereof after a certain period of time?

Yes, the majority of exploration contracts set out a subsoil user's obligation to relinquish a certain percentage of contract territory after a certain amount of years of exploration. The relinquishment is made after signing of the act on relinquishment with further re-issuance of the geological allotment with exclusion of relinquished areas.

15.3 Are there any entitlements in the law for the State to cancel an exploration or mining right on the basis of failure to comply with conditions?

Yes, Article 72 of the Subsoil Law contains a number of grounds entitling the Competent Authority to unilaterally cancel a subsoil

use right in case of violation by a subsoil user's of its obligations. Such grounds, among others, include: a subsoil user's failure to rectify more than two breaches of contractual obligations within the timeline set out by the Competent Authority (for physical obligations – six months, for financial obligations – three months, and one month for other obligations); transfer of the subsoil use right or the Objects without prior obtaining of the Consent; performance of financial obligations for less than 30 per cent during two consecutive years, etc.



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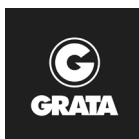
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1 Relevant Authorities and Legislation

1.1 What regulates mining law?

Kenyan Mining Law is regulated primarily by the Mining Act, 2016 (the “**Mining Act**”). The Mining Act came into force on 27 May 2016 and repealed the 1940 Mining Act (“**Repealed Mining Act**”), the Trading in Unwrought Precious Minerals Act and the Diamond Industry Protection Act. The Mining Act applies to minerals that are specified in the Act and these have been classified into various groups including construction and industrial minerals, precious stones, precious metals, semi-precious stones, bases and rare metals, fuel minerals and gaseous minerals.

1.2 Which Government body/ies administer the mining industry?

The mining industry is administered by the Ministry of Mining which is headed by a Cabinet Secretary. The Cabinet Secretary takes over the functions previously vested in the Commissioner of Mines and Geology under the Repealed Mining Act. A key body established under the Mining Act to assist the Cabinet Secretary is the Mineral Right Board and its key function is to advise the Cabinet Secretary in his decisions relating to matters such as issuing and revocation of permits and licences, the demarcation of exploration areas and the categorisation of minerals.

1.3 Describe any other sources of law affecting the mining industry.

A person that holds a prospecting or mining licence must observe other laws including those relating to the contract, environment, health and safety, water and land.

2 Mechanics of Acquisition of Rights

2.1 What rights are required to conduct reconnaissance?

Reconnaissance is defined in the Mining Act as “any operations and words to carry out the non-intrusive search for mineral resources by geophysical surveys, geochemical surveys, photo geological surveys or other remote sensing techniques and surface geology in connection therewith, but excludes drilling and excavations”.

The Mining Act provides for three main types of operations: (a) large-scale operations; (b) small-scale operations; and (c) artisanal mining operations. A small-scale operation is one that, among other things, (i) has a prospecting area that does not exceed 25 contiguous blocks, (ii) does not employ specialised prospecting, mechanised mining technologies or chemicals, or (iii) does not involve an investment or expenditure which exceeds such amount as may be prescribed by the Cabinet Secretary. Artisanal mining is defined as traditional and customary mining operations using traditional or customary ways and means. The operations will be considered large-scale operations if they are not classified as small-scale or artisanal mining operations. There is no requirement for technical capacity, expertise, experience and financial resource by a person that wants to obtain a mineral right in respect of small-scale operations or artisanal mining operations. Unless otherwise indicated, the responses in this guide relate to large-scale operations.

In order to conduct a reconnaissance for a large-scale operation an applicant must apply for a reconnaissance licence to the Cabinet Secretary. The applicant must have adequate financial resources, technical competence and mining industry experience and must have a local product and local employment plan. The licence is granted for a period not exceeding two years and is not renewable. Reconnaissance must commence within three months of granting the licence.

2.2 What rights are required to conduct exploration?

The Mining Act defines prospecting operations as operations carried out to search for and define the extent of a mineral deposit and to determine its economic value. In order to conduct prospecting operations in a large-scale operation, an applicant must apply for a prospecting licence to the Cabinet Secretary. The applicant must submit an environmental rehabilitation and restoration plan and have adequate financial resources, technical competence and mining industry experience as well as a local product and local employment plan. The licence is granted for a period not exceeding three years. Prospecting must commence within three months of grant of the licence or period specified in the approved programme for prospecting operations. The holding of a prospecting right gives exclusivity to the holder in an application for a mining right.

2.3 What rights are required to conduct mining?

A person wishing to conduct mining operations in a large-scale operation must apply for a mining licence to the Cabinet Secretary. The applicant must satisfy the Cabinet Secretary that it has adequate

financial resources, technical competence and mining industry experience and that the project is feasible based on the feasibility study. In addition, the applicant must have obtained an environmental impact assessment licence and a social heritage assessment and environmental management plan. The Cabinet Secretary must also approve the applicant's plans relating to the procurement of local goods and services and the employment and training of Kenyan citizens. The length of the mining licence is 25 years or the forecast life of the mine, whichever is shorter. The holder of a mining licence whose proposed investment exceeds USD 500 million may further enter into a mineral agreement with the Cabinet Secretary.

2.4 Are different procedures applicable to different minerals and on different types of land?

Different procedures are applicable to petroleum as explained in question 2.5. There are also different procedures in respect of what are described as strategic minerals. The Mining Act presently only classifies radioactive minerals as strategic and such minerals can only be explored or mined by the State's National Mining Corporation on its own or in association with any other person. As noted in question 2.1 above, different procedures apply depending on the size of the mining operation. There are no different procedures for different types of land.

2.5 Are different procedures applicable to natural oil and gas?

Yes. Operations relating to the exploration, development, extraction, production, separation and treatment, storage, transportation and sale or disposal of petroleum are regulated under the Petroleum (Exploration and Production) Act (Cap 308).

3 Foreign Ownership and Indigenous Ownership Requirements and Restrictions

3.1 What types of entity can own reconnaissance, exploration and mining rights?

A person shall not be granted a permit in relation to a small-scale operation unless that person is a citizen of Kenya or a body corporate where no less than 60% of the shareholding is held by citizens of Kenya. Further, a permit for artisanal mining can only be granted to a person who (a) is a citizen of Kenya, (b) has attained the age of majority, and (c) may be a member of an artisanal mining cooperative association or group. In the case of a large-scale operation, the applicant should be a company that is registered and established in Kenya.

3.2 Can the entity owning the rights be a foreign entity or owned (directly or indirectly) by a foreign entity and are there special rules for foreign applicants?

The entity owning the mineral right cannot be a foreign entity, but it can be owned directly or indirectly by a foreign entity. There are no special rules for foreign applicants.

3.3 Are there any change of control restrictions applicable?

The Mining Act requires that the prior consent of the Cabinet

Secretary be obtained for a change in shareholding in the mining company exceeding 25%. It is not clear under the Mining Act whether the consent of the Cabinet Secretary will be required in respect of indirect control in ultimate holding companies.

3.4 Are there requirements for ownership by indigenous persons or entities?

As noted in question 3.1 above, there is a requirement for ownership by Kenyan citizens of at least 60% of a mining company that is engaged in small-scale mining operations. A mining company having a right in respect of a large-scale operation may be required to list within three years after commencement of production at least 20% of its shareholding at a local stock exchange once the Cabinet Secretary prescribes the thresholds for listing. An application can be made by the mining company to the Cabinet Secretary to extend the time or to propose an alternative mechanism that can allow it to achieve local equity participation.

3.5 Does the State have free carry rights or options to acquire shareholdings?

The State has the right to acquire 10% free carried interest in the share capital of the mining company of a large-scale mining operation or a mining operation relating to strategic minerals without paying any financial contribution. The State also acquires further interests at arm's length prices. The State's right to a free carried interest will not apply to any right that has been granted prior to the commencement of the Mining Act.

4 Processing, Refining, Beneficiation and Export

4.1 Are there special regulatory provisions relating to processing, refining and further beneficiation of mined minerals?

The mining company in the conduct of processing, refining and treatment operations must give preference to materials and products made in Kenya, to services offered by members of the community and Kenyan citizens and to Kenyan owned businesses. Further, the Cabinet Secretary is expected to make regulations to govern the value addition of minerals.

4.2 Are there restrictions on the export of minerals and levies payable in respect thereof?

No mineral may be exported except in accordance with an export permit granted by the Cabinet Secretary. The application for an export permit is made to the Director of Mines. There are also restrictions on the export of strategic minerals as noted in questions 2.4 and 3.5.

5 Transfer and Encumbrance

5.1 Are there restrictions on the transfer of rights to conduct reconnaissance, exploration and mining?

There are restrictions on the transfer of rights to conduct reconnaissance, exploration and mining rights. The prior consent of the Cabinet Secretary is required where a person seeks to assign, transfer, mortgage or trade such right.

5.2 Are the rights to conduct reconnaissance, exploration and mining capable of being mortgaged or otherwise secured to raise finance?

It is possible to mortgage the rights to conduct reconnaissance, exploration and mining rights. The prior consent of the Cabinet Secretary is required as noted in question 5.1 above.

6 Dealing in Rights by Means of Transferring Subdivisions, Ceding Undivided Shares and Mining of Mixed Minerals

6.1 Are rights to conduct reconnaissance, exploration and mining capable of being subdivided?

The right to conduct prospecting operations can be subdivided, but the right to conduct mining operations cannot. According to the Mining Act, an agent of the holder of a prospecting licence may exercise the rights of the holder of the licence subject to any limitations on the power of the agent contained in the instrument of appointment.

6.2 Are rights to conduct reconnaissance, exploration and mining capable of being held in undivided shares?

It may be possible to hold an undivided share in the right to prospect and mine by way of a partnership or joint venture arrangement.

6.3 Is the holder of rights to explore for or mine a primary mineral entitled to explore or mine for secondary minerals?

The holder of a right to prospect or mine is not entitled to prospect or mine for secondary minerals. However, such holder may apply to have the newly discovered mineral or minerals included in the prospecting or mining licence. The person that makes the discovery has the first right of refusal to apply for a mineral right in the area of discovery.

6.4 Is the holder of a right to conduct reconnaissance, exploration and mining entitled to exercise rights also over residue deposits on the land concerned?

The holder of a prospecting right or mining right does not have any entitlement to residues that existed on the land prior to the holder obtaining a prospecting right or a mining right.

6.5 Are there any special rules relating to offshore exploration and mining?

There are no special rules relating to offshore prospecting and mining.

7 Rights to Use Surface of Land

7.1 Does the holder of a right to conduct reconnaissance, exploration or mining automatically own the right to use the surface of land?

The holder of a right to conduct reconnaissance, prospecting or

mining does not have an automatic right to use the surface of land. If the land is private or community land then consent must be obtained from the landowner or lawful occupier or relevant administrative body. Where the consent is unreasonably withheld or the Cabinet Secretary considers that withholding it is contrary to the public interest, the Cabinet Secretary may take steps to compulsorily acquire the land and vest it in the State.

7.2 What obligations does the holder of a reconnaissance right, exploration right or mining right have vis-à-vis the landowner or lawful occupier?

The holder of a reconnaissance right, prospecting right or mining right has duties towards the landowner or lawful occupier in terms of producing evidence of such right if required to do so by the landowner or lawful occupier and to compensate that owner or lawful occupier for loss or damage suffered because of the conduct of exploration or mining activities.

7.3 What rights of expropriation exist?

Please see our response to question 7.1 above.

8 Environmental

8.1 What environmental authorisations are required in order to conduct reconnaissance, exploration and mining operations?

A person conducting prospecting or mining operations must comply with the requirements of the Environmental Management and Coordination Act, 1999 and this involves undertaking an environmental impact assessment ("EIA") study and submitting a report to the National Environmental Management Authority ("NEMA"). NEMA issues an EIA licence if it finds the EIA study and report adequate. In addition, the right to use water is governed by the Water Act, 2016.

8.2 What provisions need to be made for storage of tailings and other waste products and for the closure of mines?

The holder of a prospecting or mining right must comply with its site mitigation and rehabilitation or mine-closure plan that was approved by the Cabinet Secretary prior to being granted an exploration or mining right. Such holder must also ensure that the seepage of toxic waste into streams, rivers, lakes and wetlands is avoided and that disposal of any toxic waste is done in the approved areas only.

8.3 What are the closure obligations of the holder of a reconnaissance right, exploration right or mining right?

The holder of a mining right must notify the Cabinet Secretary within six months of ceasing the mining operation. Upon ceasing such operation, the land must be restored to its original status or to an acceptable condition as close as possible to its original state.

8.4 Are there any zoning or planning requirements applicable to the exercise of a reconnaissance, exploration or mining right?

Zoning or planning requirements may be applicable based on the

location of the mining area. In some cases, the area may be in a town, municipality, forest or national park and an application to allow for prospecting or mining operations in that area may be required.

9 Native Title and Land Rights

9.1 Does the holding of native title or other statutory surface use rights have an impact upon reconnaissance, exploration or mining operations?

In the case of community land, the reconnaissance or prospecting operations that involve excavation and drilling must be undertaken with the prior consent of the authority that administers and manages the community land or the county government where the community land is unalienated. Consent is deemed to have been given where the parties enter into an agreement allowing for the conduct of such operations or for the payment of adequate compensation. Further, the holder of a mining licence must sign a community development agreement with the community where the mining operations are to be carried out.

10 Health and Safety

10.1 What legislation governs health and safety in mining?

Health and safety in mining is governed by the Mining (Safety) Regulations and the Occupational Health and Safety Act, 2007. The Mining (Safety) Regulations were enacted under the Repealed Mining Act, but remain in force to the extent they are consistent with the Mining Act and until specifically revoked by the Cabinet Secretary.

10.2 Are there obligations imposed upon owners, employers, managers and employees in relation to health and safety?

The applicable legislation imposes extensive obligations upon owners, employers, employees and managers in relation to health and safety including mine construction requirements, handling explosives, establishing committees, records maintenance, and conducting enquiries and compliance assessments.

11 Administrative Aspects

11.1 Is there a central titles registration office?

There is a registry system in place and the Ministry of Mining is in the process of setting up a computerised mining cadastre. Once in place, the computerised mining cadastre and registry system shall include a transactional facility to enable applications for granting and renewal of mineral rights to be submitted electronically through the website of the Ministry of Mining.

11.2 Is there a system of appeals against administrative decisions in terms of the relevant mining legislation?

A decision or order of the Cabinet Secretary can be appealed within 30 days to the High Court.

12 Constitutional Law

12.1 Is there a constitution which has an impact upon rights to conduct reconnaissance, exploration and mining?

The Kenyan Constitution provides that any transaction involving the grant of a right or concession for the exploitation of minerals must be ratified by Parliament. The enabling legislation is the Natural Resources (Classes of Transactions Subject to Ratification) Act, 2016 which requires that a mineral agreement whose value exceeds USD 500 million must be ratified by Parliament.

12.2 Are there any State investment treaties which are applicable?

The Kenyan Constitution guarantees the sanctity of private property such that the State cannot appropriate property or investments without promptly paying compensation. The Foreign Investment Protection Act also guarantees against expropriation of private property by the State. Kenya has concluded bilateral investment treaties/investment promotion and protection agreements with countries such as the United Kingdom, France, Finland, Germany, Italy, the Netherlands, Switzerland, China, Libya, the Islamic Republic of Iran and Burundi. These agreements generally prohibit expropriation except for a public purpose and against prompt, adequate, effective, fair compensation.

13 Taxes and Royalties

13.1 Are there any special rules applicable to taxation of exploration and mining entities?

There are extensive special rules applicable to taxation of prospecting and mining companies including in relation to capital expenditure deductions and these are set out in the Income Tax Act, Cap 470.

13.2 Are there royalties payable to the State over and above any taxes?

There are royalties payable to the State over and above the taxes according to prescribed rates set by the Cabinet Secretary. Mineral samples for testing are not subject to royalties.

14 Regional and Local Rules and Laws

14.1 Are there any local provincial or municipal laws that need to be taken account of by a mining company over and above National Legislation?

There are local county laws which may need to be complied with by a mining company. For example, these laws could relate to land use restrictions or conditions or consents required in relation to unalienated community land.

14.2 Are there any regional rules, protocols, policies or laws relating to several countries in the particular region that need to be taken account of by an exploration or mining company?

There are rules relating to the East African Community that govern

rules of origin and custom restrictions that may need to be complied with by a prospecting or mining company.

15 Cancellation, Abandonment and Relinquishment

15.1 Are there any provisions in mining laws entitling the holder of a right to abandon it either totally or partially?

The holder of a mining licence is entitled to give notice of any intention to cease or suspend mining operations or curtail production. The notice period is six months for cessation of a mining operation, three months for suspension of the operation, or one month for curtailment in production.



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15.2 Are there obligations upon the holder of an exploration right or a mining right to relinquish a part thereof after a certain period of time?

There are no obligations upon the holder of a prospecting right or a mining right to relinquish part of the prospecting or mining area after a certain period.

15.3 Are there any entitlements in the law for the State to cancel an exploration or mining right on the basis of failure to comply with conditions?

The State through the Cabinet Secretary can suspend or cancel a prospecting or mining right because of failure to comply with the licence conditions. The holder of the prospecting or mining right must be given an opportunity to make representations prior to suspension or cancellation.



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1 Relevant Authorities and Legislation

1.1 What regulates mining law?

The Law on Minerals is *lex specialis* regulating the types of concession (for exploration and exploitation) of different types of minerals, the processes for obtaining each of the required concessions and permits and their revocation and defining the main, general liabilities and obligations of both the concessionaire and the conceding authority.

1.2 Which Government body/ies administer the mining industry?

The mining industry is primarily administered by the Ministry of Economy, but the Ministry of Environment is also greatly involved. The formal grant of concession is done by the Government of the Republic of Macedonia pursuant to a formal Decision and by means of signing a concession agreement.

1.3 Describe any other sources of law affecting the mining industry.

Alongside general legislation referring to administrative procedures, taxes and trading companies, the mining industry is also directly regulated by the Law on environment, the Law on waters, the Law on construction, the Law on physical and urban planning, the Law on concessions and public-private partnerships and the Law on waste management.

2 Mechanics of Acquisition of Rights

2.1 What rights are required to conduct reconnaissance?

Reconnaissance may be conducted upon prospective explorations' concession granted by the Government of the Republic of Macedonia. Such right is granted pursuant to a public bidding procedure, for the purpose of determining areas for possible detailed explorations.

2.2 What rights are required to conduct exploration?

Exploration may be conducted upon detailed explorations' concession granted by the Government of the Republic of

Macedonia. Such right may be granted pursuant to a public bidding procedure or immediately to an actual concessionaire – in cases of potential expanding of an existing exploitation concession.

2.3 What rights are required to conduct mining?

Mining may be conducted upon exploitation concession granted by the Government and exploitation permit issued by the Ministry of Economy. Such right may be granted pursuant to a public bidding procedure or immediately to the entity that holds the right over the results from conducted detailed geological explorations.

2.4 Are different procedures applicable to different minerals and on different types of land?

There is no strict differentiation in the procedural milestones and general permits, plans and studies regarding different types of mineral or land; however, there are differences in the deadlines, areas, certain geological documentation and other specific terms of the concession that depend on the type of mineral.

2.5 Are different procedures applicable to natural oil and gas?

There is no explicitly diverse procedure prescribed for natural oil and gas exploitation (referred in the law as energetic minerals); however, certain elements, such as deadlines, areas, geological documentation and other terms of the concession differ for energetic minerals in comparison to other types.

3 Foreign Ownership and Indigenous Ownership Requirements and Restrictions

3.1 What types of entity can own reconnaissance, exploration and mining rights?

Such rights may be granted to any legal entity that fulfils all conditions of “good standing” set forth in the Law on minerals, including foreign companies.

3.2 Can the entity owning the rights be a foreign entity or owned (directly or indirectly) by a foreign entity and are there special rules for foreign applicants?

Yes, any of the said entities may be granted a concession. If the

entity applying for concession has its registered office outside Macedonia, it would need to establish and register its subsidiary locally. No additional conditions are imposed on foreign entities as opposed to indigenous companies.

3.3 Are there any change of control restrictions applicable?

The transfer of control directly over the entity that has conducted the detailed geological explorations and applied for exploitation concession, as well as over the entity holding exploitation concession, cannot be made without a prior written consent of the state Government unless the right of ownership of the share with the concessionaire is acquired by inheritance or the concessionaire is a company listed on the stock market. An acquisition fee of seven per cent of the appraised value of the concession applies.

3.4 Are there requirements for ownership by indigenous persons or entities?

The only requirement relates to foreign entities applying for concession imposing that they need to establish a subsidiary in Macedonia in order to perform any mining activities on its territory. It should be noted that this requirement is not specific only to mining, but it represents a rather general rule of direct business of foreign entities in Macedonia, also prescribed under the Law on trading companies.

3.5 Does the State have free carry rights or options to acquire shareholdings?

No, the state has no carry rights or options, nor it may forcibly or *ex lege* acquire shareholding in the concessionaire.

4 Processing, Refining, Beneficiation and Export

4.1 Are there special regulatory provisions relating to processing, refining and further beneficiation of mined minerals?

Except general legislation regarding protection of the environment and customs, there are no special regulations concerning processing, refining and further beneficiation of mined minerals. However, it should be noted that all such activities need to be included and described in the main (and additional) mining plans and are thus subject to prior consent by the Ministry of Economy. Also, all processes need to be provided for and pre-approved by the Ministry of Environment pursuant to the applicable integrated ecological permit.

4.2 Are there restrictions on the export of minerals and levies payable in respect thereof?

There are no restrictions on the export of mineral ore and concentrate. Levies, on the other hand, are part of the concession fee and are calculated as a percentage of the market price of the mineral at hand applied to the quantities of sold concentrate.

5 Transfer and Encumbrance

5.1 Are there restrictions on the transfer of rights to conduct reconnaissance, exploration and mining?

The transfer of a mining concession is conditioned by prior written consent of the state Government and a payment of a transfer fee amounting to seven per cent of the appraised value of the concession. The law is silent on the transfer of reconnaissance and detailed exploration concessions, but, by means of analogy, it could be argued that such transfer is permissible but also subject to prior governmental consent. Notwithstanding the last, there is an explicit possibility for transfer of the ownership over the results of the detailed explorations without the necessity of prior governmental consent.

5.2 Are the rights to conduct reconnaissance, exploration and mining capable of being mortgaged or otherwise secured to raise finance?

The reconnaissance, exploration and mining concession may be provided as security to raise finance, there is no explicit interdiction thereto. However, the enforcement of such security would be subject to prior approval by the Government and may, especially in the case of a mining concession, be subject to payment of the seven per cent acquisition fee.

6 Dealing in Rights by Means of Transferring Subdivisions, Ceding Undivided Shares and Mining of Mixed Minerals

6.1 Are rights to conduct reconnaissance, exploration and mining capable of being subdivided?

No, such rights may be granted, executed, transferred or revoked as a whole and could not be subdivided.

6.2 Are rights to conduct reconnaissance, exploration and mining capable of being held in undivided shares?

As provided under the law, only one entity may hold a certain concession granted to a certain territory and in reference to certain minerals, with exception to the concession over springs of mineral water that may be used for medical purposes by more entities simultaneously. Moreover, such concessionaire has a favourable position regarding further explorations on area bordering to the territory of its concession.

6.3 Is the holder of rights to explore for or mine a primary mineral entitled to explore or mine for secondary minerals?

Yes, the law provides for two possibilities in this direction: (i) the concessionaire may exploit secondary ore as an additional, second product, in which case it would need to obtain second concession for such ore under the general terms and procedure; or (ii) if the other ore is found in low quantities in the primary mineral without it being separated and processed, there is no legal requirement for obtaining separate concession, but the concessionaire would be obliged to pay

a concession fee calculated at a percentage of the market price of the secondary ore as per the actual proportion of such ore in the sold primary mineral.

6.4 Is the holder of a right to conduct reconnaissance, exploration and mining entitled to exercise rights also over residue deposits on the land concerned?

The concessionaire is able to exercise any rights over residue deposits as far as such rights are provided for in the concession agreement, the exploitation permit, any of the mining plan or waste management plan and the A-integrated ecological permit.

6.5 Are there any special rules relating to offshore exploration and mining?

Macedonia is a continental state so the use of any waters for mining purposes, alongside the necessary exploration/exploitation concession and permit, is also subject to specific water management permit and integrated ecological permit, both issued by the Ministry of Environment.

7 Rights to Use Surface of Land

7.1 Does the holder of a right to conduct reconnaissance, exploration or mining automatically own the right to use the surface of land?

Yes, the concessionaire holds the right to use the surface of the land to which the concession has been granted. It should be noted that, prior to any use of agricultural land for mining or construction activities, such land needs to be converted into construction land by means of consent by the public enterprise that manages the land at hand and pursuant to an agreement with the concessionaire for payment of all related costs. Also, prior to using the land, the concessionaire is obliged to resolve all title issues with the owner or lawful occupier of the plots.

7.2 What obligations does the holder of a reconnaissance right, exploration right or mining right have vis-à-vis the landowner or lawful occupier?

If the land is owned by a private person, the concessionaire may purchase the land from its owner under commercial terms or may request expropriation if no purchase could be agreed; if the land is owned by the state, it shall merely register its entitlement to use the land for exploitation purposes in the public cadastre. If there has been a lease agreement in place concerning certain land plot owned by the state, the costs of terminating such agreement would be borne by the concessionaire.

7.3 What rights of expropriation exist?

The Law on expropriation provides possibility for two types of expropriation: (i) complete expropriation upon which the State acquires full ownership over the expropriated property; and (ii) incomplete expropriation which only entitles the state or the municipality to right of easement.

8 Environmental

8.1 What environmental authorisations are required in order to conduct reconnaissance, exploration and mining operations?

The permits for reconnaissance, exploration and mining are granted pursuant to a formal consent of the Ministry of Environment to a revised Environmental Impact Study. Such study refers to the environmental impact and protection measures to be undertaken by the concessionaire throughout performing each separate activity of exploration or mining.

Alongside the said studies, prior to engaging in operation, a concessionaire must also obtain an A-integrated ecological permit, also issued by the Ministry of Environment that regulates the complete operation of the mining facilities, their output and emissions, waste management as well as the manner of re-cultivation of the mine upon expiry of the concession.

8.2 What provisions need to be made for storage of tailings and other waste products and for the closure of mines?

The storage of waste is subject to a specific Waste Management Plan, which is prepared by authorised waste management experts. Such plan provides for the construction and technical characteristics of the pit or tailings facility, whichever is most appropriate for the mineral at hand. The construction of such facilities is also to be approved by the Ministry of Environment by means of approval of the Environmental Impact Study prepared regarding the facility and to be based on appropriate construction permit. The law enables the concessionaire to seek enlargement of the concession field for the purpose of constructing waste storage facilities, if necessary.

The closure of the mine, on the other hand, implies secure closure of the tailings facility/pit and the revitalisation of the area. The activities thereto are provided for in the A-integrated ecological permit and are to be done on the expense of the concessionaire. If the concessionaire fails to undertake all prescribed measures, the authorities would activate the bank guarantee provided for this purpose prior issuance of the exploitation permit.

8.3 What are the closure obligations of the holder of a reconnaissance right, exploration right or mining right?

The concessionaire is obliged to undertake all technical measures prescribed in the A-Integrated Ecological Permit and the Waste management plan regarding the closure of any waste storage pits or tailing facilities, to reinstate the excavated land to the pits if possible and to re-cultivate the site restoring it to its state prior mining, if possible. All costs hereto are borne by the concessionaire.

8.4 Are there any zoning or planning requirements applicable to the exercise of a reconnaissance, exploration or mining right?

Pursuant to the laws on physical planning and construction, a mine may only be located and may operate on an area in which heavy industry is permitted to be built pursuant to the regional Physical Planning Documentation. Such documentation is prepared and adopted by the State, on the grounds of prior consent of the competent municipality. No zoning or planning requirements apply to activities of prospective or detailed explorations.

9 Native Title and Land Rights

9.1 Does the holding of native title or other statutory surface use rights have an impact upon reconnaissance, exploration or mining operations?

There is no native title recognised in Republic of Macedonia. As to other statutory surface rights, their existence does not impede the realisation of the concession entitlement over the land to any further extent than it would be required for such land to be purchased by the concessionaire or expropriated for the purpose of the mining activities.

10 Health and Safety

10.1 What legislation governs health and safety in mining?

Such issues are regulated under the Law on health and safety at work and the applicable by-laws. Of course, general legislation on pension, disability insurance and working ability applies.

10.2 Are there obligations imposed upon owners, employers, managers and employees in relation to health and safety?

All employees, including managers, are obliged to act under the safety requirements set forth in the internal rules of the company, to take care of their own safety, the safety of other and the safety of the property and to undergo regular annual medical examinations. The law requires for one person to each 20 workers to be designated as responsible for issues of safety and health as the employees' representative. Owners (not employed in the company), as well as any other person on-site, when visiting the company's premises, are obliged to act under the rules for the safety of visitors.

11 Administrative Aspects

11.1 Is there a central titles registration office?

Yes, all granted concessions are inscribed in the concessions registry kept with the Ministry of Economy. Further on, all land titles are inscribed in the Agency of cadastre whereas all company-connected details are registered with the Central Registry of Republic of Macedonia. Both the inscriptions in the cadastre and in the Central Registry have constitutional effect so that the title rights and the corporate activities are deemed acquired/executed upon their registration.

11.2 Is there a system of appeals against administrative decisions in terms of the relevant mining legislation?

Yes, depending on the instance in which certain decision has been reached, it may either be subject to a two-tier system of remedies (appeal and, further on, an administrative lawsuit) or a one-instance legal remedy directly through administrative dispute initiated by a lawsuit.

12 Constitutional Law

12.1 Is there a constitution which has an impact upon rights to conduct reconnaissance, exploration and mining?

Notwithstanding the general principles of free market economy and entrepreneurship, protection of private ownership, protection of foreign investors and the principle of state ownership and protection over all natural wealth of the country, the Constitution does not contain provision that apply to mining and concessions directly and explicitly.

12.2 Are there any State investment treaties which are applicable?

Yes, the country has entered into several investment protection Treaties with foreign states, which warrant the mutual protection of investments and free capital flow.

13 Taxes and Royalties

13.1 Are there any special rules applicable to taxation of exploration and mining entities?

No, general rules on taxation apply, meaning that the concessionaire would be subject to regular charges of VAT, profit tax and property tax, and to all applicable exemptions thereto. The prior does not refer to the concession fees payable by the concessionaire in addition and regardless to the regular taxes, which are also calculated and collected by the State Revenue Office.

13.2 Are there royalties payable to the State over and above any taxes?

Yes, each type of concession is subject to specific concession fee:

- A fee of MKD 60,000–120,000 is payable upon obtaining detailed geological explorations (the amount depends of the type of mineral ore at question).
- An exploitation concession fee, comprised of two portions:
 - (i) a fee concerning the exploited quantities of ore, calculated on quarterly basis as a certain percentage of the market value of the ore at hand; and
 - (ii) a fixed fee, varying from MKD 100,000–240,000 depending on the type of ore, per square kilometre of land under concession, payable annually.

14 Regional and Local Rules and Laws

14.1 Are there any local provincial or municipal laws that need to be taken account of by a mining company over and above National Legislation?

The local units of self-governance have no legislative competitions that may have an affect over or above the national legislation. However, the municipality is involved in certain procedures regarding granting concession, obtaining integrated permits, planning and similar, mostly by means of rendering prior consent or opinion. Such involvement may also be influenced by regional referendums and public consultations.

14.2 Are there any regional rules, protocols, policies or laws relating to several countries in the particular region that need to be taken account of by an exploration or mining company?

There are no regional rules or protocols relating to the issue. However, the Macedonian Law on minerals provides an obligation for the Macedonian authorities to enable a neighbouring country's authorities and concerned public to review the terms under which an exploitation permit is required, in cases when the mining or waste storage facility has/have over-border impact.

15 Cancellation, Abandonment and Relinquishment

15.1 Are there any provisions in mining laws entitling the holder of a right to abandon it either totally or partially?

Pursuant to the Law, the concessionaire may, pursuant to a request to the Ministry of Economy, unilaterally terminate the concession agreement if the economic interest in the exploitation activities ceased to exist. If the concessionaire does abandon the concession without appropriate resolution by the State Government the concessionaire would be liable for compensation of all damages occurred due such action, including loss of monetary means, any environmental damages, costs, etc.

15.2 Are there obligations upon the holder of an exploration right or a mining right to relinquish a part thereof after a certain period of time?

No, there are no such legal obligations, the concessionaire is entitled to exercise its concession right for the whole period of its duration and on the whole territory for which it has been granted.

15.3 Are there any entitlements in the law for the State to cancel an exploration or mining right on the basis of failure to comply with conditions?

The Law on minerals sets forth quite a general possibility for the State to revoke the granted concession due to failure of the concessionaire to comply. Such incompliance refers to some of the terms of the Law on minerals and the concession agreement, such as the obligation for payment of concession fee, the obligations to obtain and act under the exploitation permit, the obligations to prepare geodetic surveys, the duties to submit true and accurate reports and similar. Any incompliance with environmental legislation may also present basis for termination of the concession.

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Katarina was born on 15 September 1981 in Skopje, Republic of Macedonia. She attended the University of St. Cyril and Methodius, Skopje and later received an LL.M. in Commercial Law with honours from the University of Glasgow, Scotland. She joined Georgi Dimitrov attorneys in 2007 and became a Partner in 2011.

As partner in the company, Katarina is involved in most complex M&A arrangements in the country, leading a team with a vast experience in Legal Due Diligence procedures over entities operating in highly regulated areas. In the last couple of years, Katarina has completed the largest M&A project in the private sector in the country, representing the foreign investor in the procedure for obtaining government approval for transfer of shares with a concessionaire. Katarina is fluent in English and has basic use of the German language.

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Marija joined Georgi Dimitrov Attorneys in 2011 and has since acquired a vast experience in commercial and property law, mining and concessions. She is a significant member of a highly experienced team being involved in a number of acquisition procedures in the banking area, minerals and international trading, also gaining experience in relations with the state National Bank and other governmental bodies. Marija is fluent in English and has a certain understanding of German and Italian.

Alongside the managing partner, Marija participated in the procedure for drafting the Policy Paper, and henceforth, the new Law on general administrative procedure in Macedonia.



GEORGI DIMITROV ATTORNEYS was founded in 1996 by the Managing partner Georgi Dimitrov. Today, the office has 20 employees and it is located in the Skopje city centre.

The firm is highly qualified in providing legal services to companies and investors of international type with complex organisational structure. The investment portfolio of the company's clients in the country amounts to over 650 million EUR. Their expertise is most expressed in the field of mining and concessions, international M&A, competition and commercial law and real estate.

Georgi Dimitrov Attorneys work with a number of clients whom they dedicate all their resources and knowledge to the maximum extent. Hence their long list of satisfied clients among which are Arcelor, Orion Mines, Traxys Capital Partners, Halk Bank, Pro Credit Bank, Volvo, Samsung, Philips, Wiebe, UPS, Microsoft, Deutsche Telekom, SOL Hydropower, Macedonian Telecommunications, Mermeren Kombinat AD Prilep.

Mauritania

Christopher Dempsey



Johanna Cuvex-Micholin



Latournerie Wolfrom Avocats

1 Relevant Authorities and Legislation

1.1 What regulates mining law?

The Islamic Republic of Mauritania (hereafter “**Mauritania**”) is not a member of the West African Economic and Monetary Union (hereafter “**WAEMU**”) and the WAEMU Mining Code does not therefore apply in Mauritania.

The principal laws regulating mining in Mauritania are:

- Law n°2008-011 dated 27 April 2008 enacting the Mining Code, as amended by Law n°2009-026 dated 7 April 2009, Law n°2012-014 dated 22 February 2012 and Law n°2014-088 dated 27 April 2014 (hereafter the “**Mining Code**”);
- Decree n°2008-158 dated 4 November 2008, on taxes and mining royalties;
- Decree n°2008-159 dated 4 November 2008 (hereafter the “**Decree**”), on mining and quarry titles;
- Decree n°2009-051 dated 4 February 2009 (amending certain provisions of the Decree); and
- Law n°2012-012 dated 12 February 2012, on mining conventions and approving the Model Mining Convention (hereafter the “**Model Mining Convention**”).

1.2 Which Government body/ies administer the mining industry?

The mining industry in Mauritania is administered by the Ministry of Mines and the following departments:

- The Department of Mines and Geology.
- The Department of Industrial Development.
- The Department of Mine Police.
- The Department of Standardisation and Quality Promotion.
- The Mining Registry.

1.3 Describe any other sources of law affecting the mining industry.

- Order n°89-126 dated 14 September 1989, enacting the Code of Obligations and Contracts.
- Law n°2005-05 dated 18 January 2000, enacting the Commercial Code.
- Law n°2004-42 dated 25 July 2004, on the financial relations with foreign countries.
- Law n°2000-045 dated 26 July 2000, enacting the Environment Code.

- Bilateral and multilateral conventions to which Mauritania is a party.

2 Mechanics of Acquisition of Rights

2.1 What rights are required to conduct reconnaissance?

If works are to be carried out that involve going deeper than ten (10) feet below the surface of the ground then a prior declaration must be made to the Ministry of Mines. Similarly, the taking of geophysical measuring, geochemical prospection or studies of minerals must be declared first to the Ministry of Mines.

The information and documents collected may not, unless so authorised by the entity/person carrying out the prospection works, be made public or disclosed to third parties by the Ministry of Mines before the expiry of a period of three (3) years as from the date on which they were obtained.

The authorisation for prospection grants to its holder the non-exclusive right of prospection within the perimeter for all types of minerals.

The authorisation of prospection is granted by order of the Minister of Mines to any individual or legal entity who applies for it in order to carry out prospection works and who justifies possessing the requisite technical and financial capabilities. The authorisation is delivered for a period of four (4) months following the date of signature of the letter of receipt of the authorisation.

2.2 What rights are required to conduct exploration?

In order to be entitled to conduct exploration activities, an application must be lodged with the Mining Registry.

Procedure:

After checking the admissibility of the application, the Mining Registry assigns an identification code to the exploration permit that has been requested and enters the name of the applicant and the date (and time) of the presentation of the application in a register, which is jointly signed by the applicant (or its representative) and the person in charge of the Mining Registry. A signed copy of the form is given to the applicant by way of a receipt.

The processing of the application cannot exceed fifteen (15) days as from the date of registration.

If the application complies with the provisions of the Mining Code and the Decree of application, the Mining Registry proceeds with its provisional registration on the map of the mining registry, which is

valid for the duration of the investigation. Until a final decision is taken, any new application for an exploration permit covering all or part of the requested perimeter will be refused.

The Mining Registry prepares the draft decree granting the permit, or a letter which refuses the application (giving reasons for such refusal), as appropriate. If approved, the Minister of Mines will submit the draft decree to the Council of Ministers, for the latter's approval. Once the decree has been signed, it is sent to the Mining Registry which will notify the applicant within a period of four (4) months, as from the date of registration of the application. In case of refusal, the letter signed by the Minister is returned to the Mining Registry for transmission to the applicant and the provisional registration of the application is cancelled.

The Mining Registry informs the applicant of the amounts of duties and the surface royalty that must be paid, as well as the fact that such amounts must be paid within seven (7) days of notification. Further, in the letter of notification, the Mining Registry informs the applicant of (i) the amount of the performance banking guarantee, and (ii) the deadline of fourteen (14) days within which to present to the Mining Registry the documentary proof of the performance banking guarantee.

Following presentation of the receipt (within the above-mentioned time limit) proving that the required amounts have been paid, the applicant signs the letter of receipt, which is then the date from which the exploration permit is valid.

The exploration permit is delivered for a period of three (3) years, and it may be renewed twice (and each time for a maximum period of three (3) years).

Rights given by virtue of holding an exploration permit include the following:

- Right of access to the land covered by the exploration permit.
- Exclusive right to explore and research all substances within the scope of what has been authorised by the permit.
- Right to use sand and gravel on land belonging to the State (except if the land is subject to a quarry title held by a third party).
- Right to remove and ship out mineral samples.

Obligations of the title holder:

- Within 90 days of the date of the granting of the permit the title holder must commence the works.
- The minimum cost of the works carried out will be 15,000 UM/km² during the first period of validity of the permit, 20,000 UM/km² during the period of the first renewal and 30,000 UM/km² during the period of the second renewal.
- Submission of an annual report on activities to the Ministry of Mines.

2.3 What rights are required to conduct mining?

Mines may only be operated in accordance with the terms of (i) a mining permit, or (ii) a small-scale mining permit.

The mining permit may only be issued to a legal entity incorporated under Mauritanian law, in which the State is entitled to have a 10% free participation. The State is entitled to acquire a further 10% participation, for consideration.

(i) Mining permit

Procedure: The applicant must submit an application (at the latest) six (6) months prior to the date of expiry of the exploration permit. If the application complies with the Mining Code, the Mining Registry makes a provisional registration. After a favourable examination

of the application, the Mining Registry prepares a draft decree and submits it to the Minister of Mines, who presents it to the Council of Ministers, for approval.

The Mining Registry notifies the applicant of the permit (within six (6) months as from the date of registration of the application), as well as the amounts payable. The applicant must present a receipt of payment of such amounts, within fifteen (15) days of receiving notification. The applicant signs the letter of receipt, which is the date of the validity of the permit. The Mining Registry removes the provisional registration and records the permit on the map of the registry and the registry of permits. The Department of Mines and Geology is informed of the permit. The mining permit is granted for a period of thirty (30) years. It can be renewed several times, each time for a period of ten (10) years.

Rights given by virtue of holding a mining permit include the following:

- Exclusive right of prospection, exploration and mining for a defined group of minerals for which evidence of a commercially viable deposit has been provided.
- Right to carry out all activities of concentration, enrichment and sale (assimilated to mining operations).
- The rights and obligations of an owner (subject to restrictions provided under the Mining Code).
- Right of ownership of the minerals extracted within the perimeter of the permit.

Obligations are as follows:

- The title holder is required to commence mining works within twenty-four (24) months of the granting of the permit.
- The title holder must possess the financial and technical capacity to carry out the mining works (assessed by the Department of Mines and Geology prior to the commencement of works). If it does not, the title holder's ability to start mining would be subject to either:
 - a) association with a legal entity that does comply with the technical and financial capacity criteria referred to above, within a new Mauritanian company, to which the mining permits would be transferred; or
 - b) the mining permit is transferred to an existing Mauritanian legal entity that complies with the technical and financial capacity criteria.
- Payment of duties, taxes and royalties.
- Submission of quarterly and annual reports on mining activities to the Ministry of Mines.
- Declaration to be made in the event of cessation of mining activities.
- Declaration regarding the closure of the mine (approved), including measures to be put in place – the title holder is obliged to guarantee the restoration of the site to its previous state.

(ii) Small-scale mining exploitation permit

Procedure: Application process similar to that for a mining permit. Granted for a period of three (3) years (renewable).

Rights: Gives the title holder the exclusive right to prospection, research, mining and sale of product extracted, within its perimeter, up to a depth of 150 metres.

Obligations:

- The title holder must commence mining works within twelve (12) months.
- As soon as mining operations commence, the title holder must notify the Ministry of Mines of the forecast minimum annual production.

2.4 Are different procedures applicable to different minerals and on different types of land?

There are different procedures applicable for industrial and artisanal quarries. In accordance with article 6 of the 2008 Mining Code (as amended), the following are examples of those substances that are subject to the regime applicable to quarries: sand; silica sand; gravel; limestone; calcite; dolomite; common clay and argillaceous rocks used for the manufacture of clay products; and other minerals found in their natural state as a loose deposit.

It is to be noted that there are different procedures applicable to different types of land. In this respect, article 7 of the 2008 Mining Code (as amended) provides that minerals found in the continental shelf and in the exclusive economic zone are subject to the 2008 Mining Code (as amended). In other cases, the minerals found are subject to the regime applicable to quarries, or to the mining regime in accordance with articles 5 and 6 of the 2008 Mining Code (as amended).

2.5 Are different procedures applicable to natural oil and gas?

There is a quite different procedure applicable to oil and gas, as provided by Law n°2010-033, dated 20 July 2010, enacting the Crude Hydrocarbons Code. Research and/or production of hydrocarbons are carried out upon the basis of exploration-production contracts with the State.

The State is entitled to a 10% participation in the rights and obligations of the contractor in the research perimeter and reserves the right to have a participation of 10% in the rights and obligations of the contractor in the production perimeter.

Procedure: The exploration and production contract results from an invitation to tender. A multidisciplinary technical committee is set up for each invitation to tender to assist the Minister in the evaluation of offers submitted. The exploration and production contract is signed by the Minister on behalf of the State and by the contractor and approved by decree issued by the Council of Ministers.

Rights: The contractor has the exclusive right to carry out research activities within the perimeter, as defined by the contract, as well as production in the event of a commercially viable discovery that has been declared and following approval by the Ministry of the development plan for the discovery.

3 Foreign Ownership and Indigenous Ownership Requirements and Restrictions

3.1 What types of entity can own reconnaissance, exploration and mining rights?

The Mining Code does not provide the type of entity than can carry out prospection or exploration activities. However, only legal entities incorporated under Mauritanian law can carry out mining activities.

3.2 Can the entity owning the rights be a foreign entity or owned (directly or indirectly) by a foreign entity and are there special rules for foreign applicants?

As provided in question 3.1, in the context of mining activities, the legal entity must be incorporated under Mauritanian law. However, the entity can be directly or indirectly owned by a foreign entity.

3.3 Are there any change of control restrictions applicable?

In the event of a new majority shareholder, the change in the capital structure of the title holder will be viewed (under the new mining regime) as corresponding to a transfer of the mining title as far as the Mauritanian mining authorities are concerned (and as may be inferred from article 69 of the 2012 Model Mining Convention and article 97 of Decree n°159/2008).

In accordance with article 97 of Decree n°159/2008, prior authorisation from the Mining Registry is required. Whereas under article 69 of the 2012 Model Mining Convention the prior consent of the Minister of Mines is not specifically required, if the transfer leads to a change of more than 10% in the title holder, the Minister of Mines may limit the amount of the transfer, or oppose it altogether.

3.4 Are there requirements for ownership by indigenous persons or entities?

There are no requirements for indigenous persons. However, as regards legal entities, see question 3.4 below.

3.5 Does the State have free carry rights or options to acquire shareholdings?

Under article 38(2) of the Mining Code (as amended), the mining permit may only be granted to a legal person incorporated under Mauritanian law in which the State possesses a 10% free participation. Moreover, the State reserves the right to exercise an option for additional participation, for consideration, of up to a further 10% in the operating company.

4 Processing, Refining, Beneficiation and Export

4.1 Are there special regulatory provisions relating to processing, refining and further beneficiation of mined minerals?

Processing and beneficiation are considered under Mauritanian mining law as being included within “mining operations” and are not therefore treated separately.

4.2 Are there restrictions on the export of minerals and levies payable in respect thereof?

In accordance with article 56(6) of the 2012 Model Mining Convention, the State guarantees the title holder the right to export mineral substances that have been mined, produced or transformed, and to freely sell such substances. However, it is to be noted that, in accordance with article 5 of Law n°2004-42 dated 25 July 2004, relating to financial relations with foreign countries, the exportation of gold and other precious substances is subject to prior authorisation from the Central Bank of Mauritania.

As regards the payments of royalties, article 108 of the 2008 Mining Code (as amended) provides that the title holder pays the royalty on all sales or exports made. The rate of the royalty is set according to substance groups and as detailed in this article. For example, if iron is exported, the rate depends on the price per tonne and varies between 2.5% and 4%. As far as gold is concerned, the rate varies between 4% and 6.5% and depends on the price per ounce.

We would point out that these rates do not apply to sales or exports that are part of a bulk sample. Further, and as regards industrial quarries and small-scale mining, the above rates are subject to certain reductions.

5 Transfer and Encumbrance

5.1 Are there restrictions on the transfer of rights to conduct reconnaissance, exploration and mining?

■ Exploration permit:

A request for the transfer must be lodged with the Mining Registry. The examination procedure of the application for a transfer is the same as that for the grant of the initial permit, except that the Mining Registry will check the date of signature of the deed of transfer, and the date of grant. Indeed, the request for transfer must be made within 30 days of the date of signature of the deed of transfer. If the outcome of the examination is favourable, the Mining Registry prepares the draft decree authorising the transfer and submits it to the Minister of Mines for signature. After notification of the order by the Mining Registry and upon signing the registration form of the decree authorising the transfer, the Mining Registry informs the transferee of the fees to be paid and the delay within which payment is to be made (i.e., ten (10) days). After presentation of the receipt of payment, the transferee signs the letter of receipt, whose date shall be the date of the transfer of the permit.

■ Mining permit:

A request for the transfer is lodged with the Mining Registry at least one year prior to the expiry of the permit. The examination procedure for the application for a transfer is the same as that for the granting of the initial permit, with the difference being that the Mining Registry must check the date of signature of the deed of transfer and the date on which it is granted. The transfer request must be made within 30 days of the date of signature of the deed of transfer. If the outcome of the examination is favourable, the Mining Registry prepares the draft decree authorising the transfer and submits it to the Minister for presentation to the Council of Ministers for their approval. Once the decree has been signed, the Mining Registry notifies the transferee of the fees to be paid and the delay within which to do so (i.e., fifteen (15) days). After presentation of the receipt of payment of the fees, the transferee signs the letter of receipt, which date shall be the date of the transfer of the permit.

5.2 Are the rights to conduct reconnaissance, exploration and mining capable of being mortgaged or otherwise secured to raise finance?

In accordance with article 17(1) of the Mining Code, the rights conferred by an exploration permit and a small-scale mining permit are rights of limited duration, which are indivisible and may not be farmed out. Exploration permits cannot be mortgaged or made subject to a pledge.

Pursuant to article 17(3) of the Mining Code (as amended) the rights conferred by the mining permit are real property rights, which are divisible and may be farmed out. A mining permit may therefore be mortgaged but it may not be made subject to a pledge.

6 Dealing in Rights by Means of Transferring Subdivisions, Ceding Undivided Shares and Mining of Mixed Minerals

6.1 Are rights to conduct reconnaissance, exploration and mining capable of being subdivided?

■ Exploration permit:

In accordance with article 17 of the Mining Code and article 33 of the Decree, exploration permits are indivisible. That being said, article 33 of the Decree provides that during the validity of the exploration permit the perimeter of the latter is divisible, since the title holder is the sole holder of the different perimeters that may be issued from the original permit. The title holder may ask for the division of its perimeter into several polygons at least six (6) months prior to the renewal date.

As regards the procedure, the title holder submits the application form to the Mining Registry. After checking the admissibility of the application, the Mining Registry registers the applicant's name and the date of submission. If the application complies with the provisions in force, the Mining Registry will proceed with the provisional registration of the perimeters requested on the official map of the Mining Registry, which is valid for the duration of the investigation. Thereafter, the procedure is the same as that for the application of the exploration permit. A new independent permit will be granted for each of the perimeters. Surface area royalties and duration will be the same as for the initial permit.

■ Mining permit:

In accordance with article 17(3) of the Mining Code (as amended), the real property rights conferred by the mining permit are divisible. The title holder of the permit can ask the Mining Registry at least six (6) months prior to the renewal date for the division of its perimeters into several polygons. The procedure that applies is the same as that for the exploration permit.

6.2 Are rights to conduct reconnaissance, exploration and mining capable of being held in undivided shares?

Mining rights are divided into two categories:

- moveable rights which are indivisible; and
- real property rights which are divisible.

Both categories of rights may be brought into a company.

Undivided shares may be held by a joint venture.

6.3 Is the holder of rights to explore for or mine a primary mineral entitled to explore or mine for secondary minerals?

The title holder is entitled to explore or mine for the group of substances that has been identified in the permit and only for those substances. Otherwise, separate permits will have to be applied for. In accordance with article 17(3) of the Mining Code (as amended), it is possible to have overlapping exploration permits where the substances concern different groups of substances. No overlapping of mining permits is allowed (even if the substances are from different groups), except if the holder of the first permit gives its consent.

6.4 Is the holder of a right to conduct reconnaissance, exploration and mining entitled to exercise rights also over residue deposits on the land concerned?

Residue deposits belong to the holder of the mining title.

6.5 Are there any special rules relating to offshore exploration and mining?

There are no specific provisions relating to offshore exploration and mining.

7 Rights to Use Surface of Land

7.1 Does the holder of a right to conduct reconnaissance, exploration or mining automatically own the right to use the surface of land?

First, please refer to the answers under questions 2.2 and 2.3 above. In addition, the title holder has the following rights:

- Establishment and operation of power plants, substations and power lines.
- Safety works.
- Preparation, washing, concentration, and the mechanical, chemical or metallurgical processing of extracted minerals, distillation, and the gasification of fuels.
- Storage and deposit of products and waste.
- Buildings for the housing and health of personnel.
- Establishment of all forms of communication channels.

7.2 What obligations does the holder of a reconnaissance right, exploration right or mining right have vis-à-vis the landowner or lawful occupier?

The obligations of the title holder include:

- obtaining the consent of the landowner (except in specified cases);
- purchasing the land if easements (i.e., rights of way) render normal use impossible; and
- compensation to be given to the landowner if the works cause damage.

7.3 What rights of expropriation exist?

As regards the title holder, and in general terms (in accordance with the 2012 Model Mining Convention), the State guarantees that it will take no measures of expropriation or seize assets, except in circumstances where it is justified and in which case the State will first pay the title holder a fair compensation.

Notwithstanding the above, both exploration and mining permits may be cancelled in circumstances specifically provided for in the Mining Code.

As regards landowners, where the title holder and a landowner are unable to reach an agreement regarding either the amount of compensation to be paid or a proposal to buy the land in question, the State may expropriate the land, provided that fair compensation is paid first to the landowner.

8 Environmental

8.1 What environmental authorisations are required in order to conduct reconnaissance, exploration and mining operations?

For the purposes of conducting mining operations, authorisation is given on the basis of an environmental impact study.

8.2 What provisions need to be made for storage of tailings and other waste products and for the closure of mines?

In the event of the closure of a mine, the title holder is under an obligation to restore the site to its previous state. For this purpose, provision may be made at the outset of operations. The provision is deductible in the year that it is made, provided that the amount corresponding to the provision is paid into an account that has been specifically opened for the purpose, in the same year or within two (2) months of the end of the year in which the provision is made. This provision may be supported by a guarantee or a bank guarantee and the fees for obtaining the guarantee will be deductible in the year in which it is made.

8.3 What are the closure obligations of the holder of a reconnaissance right, exploration right or mining right?

Upon the cessation of exploration works or at the end of mining operations, the title holder must declare the measures that it intends to take in order to comply with its obligations under the Environment Code and with a view to the restoration of the site to its previous state.

Where a mine is being closed, the title holder must draw up a detailed plan outlining what is going to be done – approval is given by the Minister of Mines following reports/opinions from different authorities, including from the Ministry of the Environment. The title holder guarantees the due performance of the works to restore the site. Such due performance is recorded in an Order issued by the Minister of Mines. The mine will then be deemed to be closed.

8.4 Are there any zoning or planning requirements applicable to the exercise of a reconnaissance, exploration or mining right?

The Mining Code provides for the creation of the following zones:

- “**Promotional zone**”: where a national public operator will conduct reconnaissance and exploration to promote the development of the mining industry, with a maximum area of 5,000 km² and a maximum duration of three (3) years.
- “**Special zone**”: an area with demonstrated interest arising out of terminated, expired, cancelled, surrendered or matured mining titles.
- “**Reserved zones**”: where no mining activities are possible.

9 Native Title and Land Rights

9.1 Does the holding of native title or other statutory surface use rights have an impact upon reconnaissance, exploration or mining operations?

No (other than the rights of landowners referred to above).

10 Health and Safety

10.1 What legislation governs health and safety in mining?

- The Labour Code.
- The Public Health Code.

10.2 Are there obligations imposed upon owners, employers, managers and employees in relation to health and safety?

The obligations imposed include the following:

- Informing the Labour Inspector of all accidents that occur at work, or of all work-related diseases.
- Making medical services available to employees.
- Use of machinery that has appropriate safety standards.
- Indicating on unsafe products the nature and level of danger.
- Compliance with provisions relating to specific diseases.

11 Administrative Aspects

11.1 Is there a central titles registration office?

Yes – the Mining Registry in Nouakchott.

11.2 Is there a system of appeals against administrative decisions in terms of the relevant mining legislation?

The administrative chamber of the Supreme Court hears at first and last instance, appeals on grounds of abuse of power, or on the legality of decisions as regards individual or regulatory acts but also on interpretation and disputes relating to exploration permits.

12 Constitutional Law

12.1 Is there a constitution which has an impact upon rights to conduct reconnaissance, exploration and mining?

The Mauritanian Constitution has both a direct and indirect impact on mining activities.

12.2 Are there any State investment treaties which are applicable?

Mauritania has signed investment treaties with countries such as Switzerland, Algeria, Tunisia and Belgium.

13 Taxes and Royalties

13.1 Are there any special rules applicable to taxation of exploration and mining entities?

Yes – as provided for under the mining legislation (and the Model Mining Convention), including:

- Remuneratory tax: 2,000,000 ouguiyas – exploration permit; 10,000,000 ouguiyas – mining permit.

- Exoneration from the BIC tax for 36 months as from the preliminary production phase (and then no more than 25%).
- Exoneration from the fixed minimum tax on any sale or export for 36 months as from the beginning of the preliminary production phase (and then at half the rate of the fixed minimum tax for the accounting period with a ceiling of 1.75%).

13.2 Are there royalties payable to the State over and above any taxes?

An annual surface royalty (not deductible) is payable:

- for exploration permits, at 2,000 ouguiyas per km² for the first year, and 24,000 ouguiyas per km² for the ninth year; and
- for mining permits, at 50,000 ouguiyas per km².

A mining royalty is payable at an escalating amount (based upon sale price): this being 6.5% where the price is more than \$1,800 per ounce.

14 Regional and Local Rules and Laws

14.1 Are there any local provincial or municipal laws that need to be taken account of by a mining company over and above National Legislation?

Laws are national. However, and in the execution of such laws, local town councils can adopt regulations relating to the administration of their respective municipalities, which should be taken into account by mining operators that operate in the territory of these municipalities.

14.2 Are there any regional rules, protocols, policies or laws relating to several countries in the particular region that need to be taken account of by an exploration or mining company?

No, there are not.

15 Cancellation, Abandonment and Relinquishment

15.1 Are there any provisions in mining laws entitling the holder of a right to abandon it either totally or partially?

The holder of an exploration permit can abandon its rights in the following situations:

- Pursuant to article 55 of the 2008 Decree, the exploration permit may be terminated at the request of the title holder. The request (which is sent to the Mining Registry) will only be valid if the acknowledgment of receipt for the payment of duty is attached.
- In accordance with article 33 of the 2008 Mining Code (as amended), the holder of an exploration permit can abandon its rights provided it has paid any fees due and provided it has sent a written notice to the competent authority. The exploration permit is deemed abandoned as from the day the abandonment is registered in the public register of mining titles. The notice of the abandonment is published in the Official Journal.
- The holder of an exploration permit can ask the Mining Registry for the reduction of its permit at least six (6) months before the date of the renewal of the latter (article 32 of the 2008 Decree).

The holder of a mining permit can abandon its rights in the following cases:

- In accordance with article 109 of the 2008 Decree, the mining permit may be terminated if the holder sends a request to the Mining Registry at least eighteen (18) months before the expiry date. Pursuant to article 48 of the 2008 Mining Code (as amended), the holder of a mining permit may abandon its rights, if it has sent a written notice to that effect to the Ministry of Mines and it has met the conditions provided by the Mining Code. The mining permit is considered abandoned as from the date of the order issued by the Minister of Mines.
- The title holder can ask the Mining Registry for the reduction of its permit at least six (6) months prior to the date of the renewal of the latter (article 94 of the 2008 Decree).

15.2 Are there obligations upon the holder of an exploration right or a mining right to relinquish a part thereof after a certain period of time?

No, there are not.

15.3 Are there any entitlements in the law for the State to cancel an exploration or mining right on the basis of failure to comply with conditions?

In accordance with article 24 of the 2008 Mining Code (as amended) and article 60 of the 2008 Decree, an exploration permit can be cancelled in the following situations:

- In the event of a serious breach of the provisions of the Mining Code by the title holder, the Minister of Mines may, upon the basis of the recommendation of his technical departments, suspend activities within the perimeter of the permit. If the breaches are not remedied within the prescribed period of time, the permit may be definitively withdrawn.

- If the works carried out within the perimeter of the permits are less than the minimum costs provided for in article 26 of the 2008 Decree (i.e., 15,000 UM/km² for the first period of validity, 20,000 UM/km² during the first renewal and 30,000 UM/km² during the second renewal).
- If the annual surface royalty is not paid within the prescribed period.
- If mining activities are carried out in an area covered by an exploration permit.

A mining permit can be cancelled in the following situations:

- If the title holder does not possess the financial and technical capacity to carry out the mining works, it will have to regularise the situation by one of the two solutions described in question 2.3, within a period of six (6) months following the notification by the Minister of Mines that it does not in fact meet the criteria required. Once these six (6) months have been exceeded the mining permit may then be revoked.
- If the applicant for a mining title does not appear before the Mining Registry within fifteen (15) days of receipt of the letter of notification with proof that the taxes owed have been paid (article 85 of the 2008 Decree).
- In cases of serious breaches of the provisions of the Mining Code by the title holder, the Minister of Mines can, based upon the recommendation of his technical departments, suspend activities within the area of the permit. Further, if the breaches are not remedied within the prescribed period of time, the permit may be definitively withdrawn (article 115 of the 2008 Decree).
- If the title holder of a small-scale mining permit fails persistently to comply with the health and safety obligations relating to personnel, and this notwithstanding, measures will be prescribed by the authorities.
- Finally, the permit will be revoked if the holder of a small-scale mining permit has not begun mining activities within a period of twelve (12) months.



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The firm was founded in 1995. It is an independent French business law firm that covers all areas of French law with a domestic and international clientele. The firm has an entrepreneurial style and seeks to build long-term relationships with its clients through an in-depth understanding of their needs and objectives. The firm has expanded over recent years and continues to do so in order to meet the needs of its clients.

Mexico

RB Abogados

Enrique Rodríguez del Bosque



1 Relevant Authorities and Legislation

1.1 What regulates mining law?

The Mexican Mining Law Regulations and Article 27 of the Mexican Constitution regulate mining issues, in particular the exploration, exploitation and beneficiation of minerals or substances which in veins, strata, masses or beds constitute deposits of which the nature is different from the components of land. The Mining Law and Constitution also provide for the mining of: salt directly formed by marine waters from actual seas – surface or underground, naturally or artificially – and salts and by-products thereof, except petroleum and other solid hydrocarbons, liquid or gaseous, which are also found underground; radioactive minerals; substances contained in suspension or dissolution by groundwater, provided they do not come from a mineral deposit different from the components of the land; rocks or decomposed products that can only be used for the manufacturing of construction materials or are intended for this purpose; and products derived from the decomposition of rocks when their exploitation is through opencast work, and the salt comes from salt formed in endorheic basins.

The application of the Mining Law and its Regulations is the responsibility of the Federal Executive (President's Office) through the Ministry of Economy. The following laws govern all ancillary activities to the mining activities: the Mexican Federal Constitution; the Federal Environmental Law; the Federal Water Law; the Federal Agrarian Law (social tenure of most of the lands where mining projects are located); Federal Tax, State Civil Codes applicable on lands tenure; the Federal Commercial Code; Federal Army Regulations for the storage, transport and use of explosives; Federal Labor Laws; Municipal regulations for the use of the lands; and Federal Environmental Norms.

1.2 Which Government body/ies administer the mining industry?

The *Dirección General de Minas* (Mexican Mines Bureau), formed under the Ministry of Economy. Notwithstanding the foregoing, other Government bodies administer the regulatory regimes relating to mining activities: *Secretaría del Medio Ambiente y Recursos Naturales* (Environmental Ministry); *Comisión Nacional del Agua* (Waters Commission); *Secretaría de la Defensa Nacional* (Army Ministry); *Secretaría del Trabajo y Previsión Social* (Labour Ministry); and the States Public Registries of Real Estate and the National Agrarian Registry.

1.3 Describe any other sources of law affecting the mining industry.

All laws and other norms and regulations are mentioned in question 1.1 above. These laws affect the industry as they regulate the activities the mining companies conduct in order to stake, maintain, explore and exploit mining concessions and to process and commercialise minerals. They also regulate environmental aspects in connection with the exploration and exploitation of these mining concessions. Other sources of law affecting the mining industry are: international treaties; and administrative regulations on Federal Laws and Court Resolutions.

2 Mechanics of Acquisition of Rights

2.1 What rights are required to conduct reconnaissance?

Understanding reconnaissance as the preceding stage to conducting mining minimum exploration activities prior to the issuance of a mining concession, an informal permission from the land owner where the mining concession is located or where the area proposed to be staked is located is required to conduct such activities. In the case that the areas of reconnaissance are already covered by an existing mining concession, the permission of the existing mining concessionary is also needed.

2.2 What rights are required to conduct exploration?

In order to conduct exploration activities, a mining concession is required covering the proposed exploration area; or a written agreement executed with the recorded owner of the mining concession before the Public Registry of Mines ("PRM") (formalised before a Mexican public notary and registered at the PRM) to explore the area is needed. In addition, permission or an agreement executed with the owner or possessor of the lands where the mining concession is located and an Environmental Impact Manifest authorised by the Environmental Authority are needed.

A mining concession allows its holder to conduct exploration, exploitation, mining and development activities.

2.3 What rights are required to conduct mining?

In order to conduct exploitation activities, a mining concession is required covering the proposed exploration area; or the written

agreement executed with the recorded owner of the mining concession before the PRM (formalised before a Mexican public notary and registered at the PRM) to exploit the area is needed. In addition, permission or an agreement executed with the owner or possessor of the lands where the mining concession is located, an Environmental Impact Manifest authorised by the relevant Environmental Authority and permission from the Army Ministry to store, transport and use explosives are needed.

If the mining concessions are located in a forest reserve, a change of use of the land is required.

A water concession is needed for activities beyond the extraction of minerals activities, such as for a processing plant, and a permit for the discharge of water is also required in case such processing activities are conducted in the mine.

2.4 Are different procedures applicable to different minerals and on different types of land?

Different procedures are applicable for radioactive minerals, which are reserved for exploration and exploitation by the Mexican Government. Please also refer to question 2.5 hereinbelow.

Radioactive minerals are reserved for exploration and exploitation by the Federal State. Regarding the types of lands, in Mexico there are: private lands; Government-owned lands (Federal, Estate and Municipal); and social lands (*Ejido* and Communal lands). Please refer to question 7.1 hereinbelow.

2.5 Are different procedures applicable to natural oil and gas?

Gas derived from the exploitation of mineral coal, oil and solid, liquid or gaseous hydrocarbons are reserved for the exclusive exploitation of the Mexican Authorities.

3 Foreign Ownership and Indigenous Ownership Requirements and Restrictions

3.1 What types of entity can own reconnaissance, exploration and mining rights?

Only Mexican Companies registered before the PRM can own mining rights to explore and exploit mining concessions. In the capital of the aforementioned Companies foreign investment can participate up to 100%. These Companies must be incorporated under the laws of Mexico and have their corporate domicile within the country.

Also, social entities which are not commercial Companies and which do not allow foreign investment participation can own mining rights, such as Communities and *Ejidors* (social land granted to a group of individuals or communities).

3.2 Can the entity owning the rights be a foreign entity or owned (directly or indirectly) by a foreign entity and are there special rules for foreign applicants?

Foreign entities cannot directly own, explore or exploit mining concessions but can do so through their Mexican subsidiaries. As mentioned above, the mining industry has no limits for foreigners to participate in the ownership of Mexican mining Companies. Either foreign individuals or entities can own capital of Mexican mining

Companies. Mexican mining companies that are 100% (or less) owned by foreigners are considered Mexican entities and have the same rights as a Mexican doing business.

Mexican Companies with foreign investment shall be registered at the Foreign Investment Registry and notify all changes in their capital, as well as to provide periodical economic reports (this is mainly for statistics purposes). The foregoing has no impact on an application for a mining concession.

3.3 Are there any change of control restrictions applicable?

No there are not.

3.4 Are there requirements for ownership by indigenous persons or entities?

In the acquisition of mining concessions, if there are simultaneous applications for the acquisition of a mining concession, indigenous communities living where the relevant mining concession is located have preferred rights to acquire the mining concession.

Mexico has subscribed the Convention for Protection of the Indigenous and Tribal People (Convention No. 169 – ILO). In accordance to this Convention, before the starting of mining activities, concessionaries shall consult indigenous communities located in areas where the mining concession is located. However, there are no mechanisms implemented in the Mexican applicable legislation in this regard nor sanctions or penalties imposed if the concessionary does not consult the indigenous community.

3.5 Does the State have free carry rights or options to acquire shareholdings?

No, it does not.

4 Processing, Refining, Beneficiation and Export

4.1 Are there special regulatory provisions relating to processing, refining and further beneficiation of mined minerals?

There are environmental laws, rules and Technical Norms (NOMS) to comply with in order to build and operate plants for the processing and beneficiation of mined minerals. The Mexican Official Standard NOM-141-SEMARNAT-2003 sets the procedure for the preparation, design, construction, operation and post-operation of mine tailings dams.

For the exploration and exploitation of tailings, no mining concession is required.

There are no specific rules under the Mining Law for the ownership of tailings. If tailings result from the ore beneficiated by the mining concession holder, they belong to the mining concession holder. In the case of tailings derived from the beneficiation of ore in a third parties' beneficiation plant, it usually belongs to the owner of the beneficiation plant.

In Mexico there are ancient mining works that produced tailings. Those tailings have no relationship with today's mining concessions; for these, in accordance with civil law (*Código Civil Federal*), they belong to the owner of the lands where such tailings are located.

Furthermore, dumps (*terrerros*), in accordance with the Mexican Mining Law, belong to the mining concession holder, unless it is evident that a particular *terrerros* comes from another mining concession.

There are no restrictions on the beneficiation of minerals in a different location from where the minerals were extracted.

There are no provisions which prohibit the export of unbeneficiated minerals. Local beneficiators do not have pre-emptive rights to beneficiate minerals.

4.2 Are there restrictions on the export of minerals and levies payable in respect thereof?

In general terms, there are no restrictions. All import and export processes require a permit. However, in order to export iron, gold, silver and copper minerals, the producing-exporting company or individual must be registered in a Mining Sectorial Registry for the Exportation of such minerals.

For the exportation of iron, exporters are required to be the owners of the mining concession from where the minerals are extracted.

5 Transfer and Encumbrance

5.1 Are there restrictions on the transfer of rights to conduct reconnaissance, exploration and mining?

There are no restrictions whatsoever on the transfer of mining concessions and rights thereto. Agreements assigning, or generating rights over mining concessions must be notarised. The transfer of mining concessions or rights thereunder shall produce legal effects against third parties, the Ministry of Economy and other governmental authorities upon their registration before the PRM. Owners of mining concessions shall be only recognised as so, it is, they must be recorded as concessionaires before the PRM.

A transfer or assignment will be null and void when made to an unqualified person under the Mining Law. However, the Mining Law provides that a transfer to a unqualified person will not be null and void when it occurs pursuant to a court resolution ordering the debtor (mining concessionaire) payment of the debt, and provided further that the rights are then transferred to a capable party within 365 calendar days after the date of the issuance of the court resolution.

A Government consent is not required in order to transfer a mining concession, or in the event of change of control of its holder or its parent.

5.2 Are the rights to conduct reconnaissance, exploration and mining capable of being mortgaged or otherwise secured to raise finance?

Mining concessions and rights can be pledged and even mortgaged as a guarantee to raise finance. All guarantees over rights of mining concessions must be registered at the PRM in order to have full effect before third parties. Creditors often require the registration of the guarantees over mining concessions at the Movable Guarantees Registry (*Registro Unico de Garantías Mobiliarias*).

6 Dealing in Rights by Means of Transferring Subdivisions, Ceding Undivided Shares and Mining of Mixed Minerals

6.1 Are rights to conduct reconnaissance, exploration and mining capable of being subdivided?

Yes. The co-ownership of a mining concession (the co-ownership granting different percentages to the co-holders) may exist. A percentage of a mining concession may be transferred to a third party through an Assignment Agreement. Co-holders shall have the right of first refusal to acquire the transferable interest.

A mining concession also may be subdivided through an administrative proceeding conducted before the Mexican Mines Bureau.

6.2 Are rights to conduct reconnaissance, exploration and mining capable of being held in undivided shares?

If a mining concession is held by two or more parties through a joint venture, the rules of the joint venture shall apply. If no joint venture rules exist, the right is undivided.

The co-ownership of a mining concession may be owned by: Mexican Commercial Companies; Mexican individuals; and Social Entities.

6.3 Is the holder of rights to explore for or mine a primary mineral entitled to explore or mine for secondary minerals?

A mining concession holder may explore and exploit all minerals and/or substances specified in the Article 4 of the Federal Mining Law, except for those reserved to be exploited by the Mexican Government as mentioned in questions 2.4 and 2.5 above.

6.4 Is the holder of a right to conduct reconnaissance, exploration and mining entitled to exercise rights also over residue deposits on the land concerned?

Please refer to the answer to question 4.1 above.

6.5 Are there any special rules relating to offshore exploration and mining?

Yes, there are special rules. It is necessary to comply with all rules governing shores, lake shores, water deposits and rivers.

Regarding mining activities in the exclusive economic zones and the continental shelf, Mexico is party to several international treaties which determine, together with the Mexican Constitution, the limits of exclusive economic zones, which mining activities shall be governed in accordance with Mexican laws, and activities in the continental shelf to be conducted in accordance with international treaties.

7 Rights to Use Surface of Land

7.1 Does the holder of a right to conduct reconnaissance, exploration or mining automatically own the right to use the surface of land?

The mining rights covered under a concession do not include direct

ownership or possession rights over the surface where a mining concession is located.

The use of the lands may be obtained through direct ownership or possession of lands (e.g. lease agreements/temporary occupation agreements/easement agreements, expropriation through an administrative proceeding).

The Mexican Constitution recognises the following surface rights:

- A. *Bienes Comunales* (social land granted to aborigines).
- B. *Ejidos*.
- C. National Lands.
- D. *Zonas Federales* (federal areas, beaches and river causes).
- E. Private Property.

The Agrarian Law governs the property rights mentioned in sections A through C above. Said lands can be legally occupied or acquired by private parties as provided in the Agrarian Law.

A concession holder may acquire all property rights mentioned above. Typically, the consideration payable for the lands is agreed between the parties. The Mining Law provides the rules under which a mining concession holder may require the expropriation or the temporary occupation of the land when it does not reach an agreement with the landowner. In case of expropriation by the Mexican Government, the consideration is payable based on an appraisal made by an agency of the Mexican Government.

7.2 What obligations does the holder of a reconnaissance right, exploration right or mining right have vis-à-vis the landowner or lawful occupier?

In accordance with Mexican Mining Law, the mining activities should be preferred over any other use or exploitation of the land where the mining concessions are located (except the case of exploration and exploitation of oil and other hydrocarbons and the performance of power generation activities in which activities shall be preferred over the mining activities; and in case a mining concession and an assignation for the exploitation of oil and a mining concession coexist, the mining concession holder must comply with certain technical specifications), therefore the Mexican Mining Law and its Regulations provide the rules under which a mining concession holder may require the expropriation or the temporary occupation of the land when it does not reach an agreement with the land owner. In case of expropriation, the consideration is payable based on an appraisal made by an Agency of the Mexican Government.

The company has the right to explore and exploit the minerals underground because of the mining claim rights granted by the Federal Government (underground rights); surface rights are honoured to third parties as explained in question 7.1. Under the Mining Law, there is no obligation for the holder of a mining right to share any rights over the exploration or exploitation with the landowners or lawful occupier, but a legal consent should exist between the two of them to be able to prove legally to the Environmental Authorities that the company has the legal occupancy of the surface rights and the legal use of the land. It is also important to have the social licence in order to develop the project in harmony with the community.

Please also consider that the Economy Ministry may revoke the temporary occupation agreement or to revert the surface expropriated in the following cases:

- (i) if the mining works to develop are not started within the 365 days following the issuance of the relevant resolution;
- (ii) if the mining works are suspended for a year or more;

- (iii) if the surface granted is destined to a use other than the mining activities;
- (iv) if the concessions holders do not pay the consideration determined in the relevant resolution of temporary occupation or expropriation;
- (v) if the mining concession is nullified or cancelled; and
- (vi) by a Court resolution.

7.3 What rights of expropriation exist?

In accordance with Mexican mining legislation, the owner of a mining concession may require the expropriation of the surface where the mining concession is located under the rules stated in the Mexican Expropriation Law. If the expropriation is of lands owned by *Ejidos* or Agrarian Communities, the process is carried out before the Agrarian Authorities and under the rules of the Mexican Agrarian Law. Please also refer to question 7.2 above.

8 Environmental

8.1 What environmental authorisations are required in order to conduct reconnaissance, exploration and mining operations?

Each stage requires authorisation and is subject to different requirements.

The prospective and exploration stage requires a Preventive Report where it is justified that activities undertaken comply with the Mexican official standard number 120-SEMARNAT-2010, which establishes the specifications for environmental protection for direct mining exploration activities.

The operation stage requires the submission of an Environmental Impact Statement (MIA) and a request for authorisation of Change of Use on Forest Land (CUSTF), or the requirement to qualify for the benefit of the Secretarial Agreement which establishes the possibility of the unified process through the presentation of the Unified Technical Paper (DTU).

In any case, the MIA or the DTU must contain a risk assessment because the operation stage is considered a high risk activity. Also, it is necessary to prove compliance with the Official Norm, NOM-141. In case of the leaching of gold, silver and copper, it is necessary to prove compliance with the NOM 155 and 159.

For the operation stage it is also necessary to register as a hazardous waste generator, and to register a Hazardous Waste Management Plan according to the NOM-157 and a Programme for the Prevention of Accidents (PPA). For air emissions issues, a Single Environmental Licence (LAU) and a Report on Releases and Transfers of Pollutants (COA) is required. It is also necessary to prove compliance with the Emissions Standards (NOM-043 for particulate matters; and NOM-085 for combustion and other matters).

8.2 What provisions need to be made for storage of tailings and other waste products and for the closure of mines?

Regarding the restrictions for storage of tailings or waste dams, there is an Official Mexican Rules (Norma Oficial Mexicana) NOM-141-SEMARNAT-2003, which establishes the procedure for characterising the tailings, as well as the specifications and criteria for the characterisation and preparation site, project, construction, operation and post-operation of tailings dams.

These facilities are inspected by authorities quite often; there are no specific periods for such inspections.

In addition, there is an obligation to get a permit from the authority Program for the Prevention of Accidents (PPA); in certain cases, to submit a Risk Assessment, to register the Hazardous Waste Management Plan, to have environmental insurance and to provide notice to the authority in case of emergencies, accidents or loss of hazardous waste.

For the closure of mines, there are two different forms of closure:

1. Closure notification for hazardous waste control.
2. Closing Programme for the operation of the mine.

The first one needs the authorisation of the Contaminated Soil Remediation Programme. The second needs the authorisation of the Closure and Closing Programme.

8.3 What are the closure obligations of the holder of a reconnaissance right, exploration right or mining right?

There are a number of obligations to comply with for the closure of a mine. However, the specifications depend on the Closing Programme authorised by the Environmental Authority for the specific mine. Basically, the obligations relate to: safety (stability of the lands where mining activities were conducted); the closing of all the entrances to underground mines; and control of hazardous materials and waste.

Remediation works are performed in Mexico just in case there is soil contamination. Otherwise, a refurbishing process must be performed. Those responsible for activities that involve the generation and management of hazardous materials and waste that cause contamination of sites are required to carry out remediation works.

If hazardous substances which are considered as high-risk activities are used during the exploitation phase, it is necessary to have environmental risk insurance that will be required in the corresponding resolution of the Environmental Impact Assessment, as a condition to start operating activities. Three insurance or guarantees may be required: (i) if hazardous substances are used; (ii) if hazardous waste is generated; and (iii) another, contained in the resolutions of the environmental impact authorisation, for the fulfilment of obligations.

8.4 Are there any zoning or planning requirements applicable to the exercise of a reconnaissance, exploration or mining right?

Yes, there are zoning requirements for nature-protected areas.

9 Native Title and Land Rights

9.1 Does the holding of native title or other statutory surface use rights have an impact upon reconnaissance, exploration or mining operations?

Please refer to the answer to question 3.4.

The land native titles are described in question 7.1 and for each title there are different types of rights over the land use, such as common land use, parcel land (lots), human settlement or land squatters (possessors).

All the land native titles and surface rights have to be legally acquired or occupied to have access to the land for exploration and/or exploitation for mining purposes when the activities are

conducted by a different entity than one of those mentioned in points A and B of question 7.1 above.

The possession by Communities and *Ejidors* groups of the surface where a mining concession is located may be transferred to private entities. The consent of those groups is needed to conduct mining activities where those groups own or possess the lands where mining activities will be conducted.

10 Health and Safety

10.1 What legislation governs health and safety in mining?

The principal health, safety and labour laws pertaining to the mining industry are:

- Federal Labor Law.
- Federal Social Security Law.
- Federal Regulations on Safety, Health and Work Environment.
- Official Regulation NOM-023-STPS-2012, Underground and Open Pit Mines – Safety and Health Conditions at Work.
- Official Regulation NOM-032-STPS-2008, Security for underground coal mines.

The principal regulatory entity is the Ministry of Labor and Social Welfare.

10.2 Are there obligations imposed upon owners, employers, managers and employees in relation to health and safety?

The main obligations fall on the operator of the mining project. Usually, the operator is a Mexican mining company which, through the management, must comply with safety and health dispositions. In case of negligence of the management to provide safe and healthy conditions as provided by law, the Board Members may be personally responsible for the damages suffered by workers or third parties in the mine. This responsibility may result in criminal charges.

11 Administrative Aspects

11.1 Is there a central titles registration office?

Yes. The central titles registration office is the PRM, which depends on the Mexican Mines Bureau.

In accordance with the Mexican Mining Law, all acts, agreements and contracts related to the transmission of mining concessions and rights thereto shall be registered before the PRM. Promises to execute an agreement, liens, contractual obligations, royalties affecting mining concessions, etc., must also be registered before this Registry.

In addition, certain agreements for use of the lands where mining concessions are located (temporary occupation agreements/easements agreements, etc.) may be registered before the PRM in addition to their registration at the National Agrarian Registry. The surface covered by such agreements shall be entirely covered by a mining concession in order for these kind of agreements to be registered before the PRM.

Any person may consult the PRM and request, at their expense, certified copies of their entries and documents that relate to them, and of the absence of a registration or subsequent entries in relation to a particular entry.

11.2 Is there a system of appeals against administrative decisions in terms of the relevant mining legislation?

The concessionaires have a Review Action (an administrative appeal) against the resolutions of the relevant authorities that they may consider illegal. Also, concessionaires have the right to appeal any unlawful act made by the authority before the courts.

In the case that an action was brought to the Mexican Mines Bureau, the Bureau may rule ratifying, revoking or modifying the resolution appealed through the Review Action. This proceeding shall be conducted in terms of the Law of the Public Administration Process (*Ley Federal del Procedimiento Administrativo*).

In the case of proceedings brought by concessionaires through courts, the court is the institution that shall rule about the action made by the authority. A court proceeding is feasible against the resolution of the Mines Bureau of the Review Action.

12 Constitutional Law

12.1 Is there a constitution which has an impact upon rights to conduct reconnaissance, exploration and mining?

Article 27, paragraphs 4 and 6 of the Mexican Constitution states that the Mexican Nation is the owner of minerals and substances that, in veins, ledges, masses or beds, constitute deposits, the nature of which is different from the components of the earth. The use and exploitation of these minerals and substances specified in the Mexican Constitution and in the Mexican Mining Law, in its Article 4, as mentioned previously, may be granted through a mining concession to Mexican individuals and companies organised under the laws of Mexico.

The Mexican Constitution protects the owners of mining concessions, for all Mexican Authorities, from unlawful acts which may harm the rights of a legal owner of a mining concession.

12.2 Are there any State investment treaties which are applicable?

The Mexican state has several bilateral agreements with other countries that contemplate certain matters related to the mining industry:

- i) NAFTA. The purpose of NAFTA and other Commercial Treaties was to eliminate most of the duties imposed to the exportation and importation of goods.
Mexico has a temporary importation scheme through which payment of duties are not triggered, except that the equipment remains in the country after the term for its temporary importation elapses.
Furthermore, Chapter 3 of NAFTA includes certain benefits for the import of mining equipment against countries without free trade agreements, which usually are subjected to a payment of a tax that ranges from 10% to 20%.
- ii) Mexico and Japan Free Trade Agreement. With this agreement, Mexican companies will have a zero rate for the exportation of up to 95% of the goods exported to Japan, including, among others, minerals.
Mexico will reduce duties in the upcoming years up to 44% of goods imported from Japan, among others, goods with electronic and steel components.

- iii) México and Chile Free Trade Agreement. The agreement provides the opportunity to participate as a supplier of mining industry inputs with a tax rate of 0% between the parties for chemical products for the flotation of minerals, and other processes performed in the mining industry including leachates, depressants, foaming agents, flocculants, sodium cyanide and sodium pentasulfide, among others.

13 Taxes and Royalties

13.1 Are there any special rules applicable to taxation of exploration and mining entities?

Yes, a special mining surface fee is payable in accordance with the Mexican Mining Law and the Federal Duties Law. Mining concessionaires must pay, on a semi-annual basis, governmental mining fees, the payable amounts of which depend on: (i) the date on which the title document of a mining concession was registered before the Public Registry of Mines (the older the mining concession, the more expensive the governmental fees); and (ii) the surface (number of hectares) of the mining concession (the "Governmental Mining Fees").

Furthermore, in accordance with Article 268 of the Federal Duties Law, holders of mining concessions shall pay, on a yearly basis, the 7.5% of the positive difference that results from the income of the sale of the minerals extracted from a mining concession minus the authorised deductions (the "Governmental Royalty"). Payment of this Governmental Royalty must be made before 31 March of the following year in which the sale of minerals happened.

In accordance with Article 270 of the Federal Duties Law, in addition to the abovementioned Governmental Royalty, mining concessions holders that commercialise gold, silver or platinum shall pay, on a yearly basis, the 0.5% of the income for the sale of such minerals, (the "Extraordinary Governmental Royalty").

Finally, the mining concessions holders that do not perform and verify exploration and/or exploitation works during two consecutive years or during the first 11 years of seniority counted from their issuance, shall pay on a semiannual basis, an additional 50% of the corresponding Governmental Mining Fees in accordance with the quotas stated in the Duties Law or 100% if the concession's seniority is over 11 years.

13.2 Are there royalties payable to the State over and above any taxes?

Please refer to question 13.1 above.

Likewise, in accordance with the Mexican Mining Law, mining concessions may be granted exclusively to Mexican persons or to Mexican companies, and through assignments (for mining concessions, held by the Government, which, once they are explored, are sold to private entities by way of auctions) from the Mexican Geological Service (SGM), the owner of assignments which depends on the Mexican Government.

Once a title document for a mining concession acquired from the SGM is issued, this title document shall state the royalty amount payable to the Mexican Government as consideration for the exploration activities and discoveries made by the SGM. This royalty is payable to the SGM.

Concessionaires that own mining concessions derived from assignments of the SGM must submit semiannual reports containing works and production in the mining lot covered by the mining concession, and these affect the payment of the royalties payable to the SGM.

14 Regional and Local Rules and Laws

14.1 Are there any local provincial or municipal laws that need to be taken account of by a mining company over and above National Legislation?

No, there are not. Exploration, exploitation, and beneficiation of ore activities ruled by the Mexican Mining Law are listed in the catalogue of activities ruled by the Federal Environmental Law; however, ancillary activities of mining companies which are not under the aforementioned catalogue are ruled by local legislations.

14.2 Are there any regional rules, protocols, policies or laws relating to several countries in the particular region that need to be taken account of by an exploration or mining company?

No, there are not.

15 Cancellation, Abandonment and Relinquishment

15.1 Are there any provisions in mining laws entitling the holder of a right to abandon it either totally or partially?

Yes; in accordance with Article 19 of the Federal Mining Law, a mining concession holder is entitled either to abandon its mining concession or to reduce it. In each case, an administrative proceeding should be conducted before the Mexican Mines Bureau.

15.2 Are there obligations upon the holder of an exploration right or a mining right to relinquish a part thereof after a certain period of time?

No, there are not.

15.3 Are there any entitlements in the law for the State to cancel an exploration or mining right on the basis of failure to comply with conditions?

The State may only cancel a mining concession through the corresponding administrative proceeding in the following cases: (i) in case a concession holder exploits minerals or substances not specified in Article 4 of the Federal Mining Law; (ii) in case it does not pay the consideration and the royalties payable to the SGM if it acquired its mining concession from the SGM (please refer to question 13.2); (iii) in case a mining concession holder is no longer entitled to own mining concessions (i.e. a Mexican Company becomes a Foreign Company); (iv) in case the concession holder does not properly comply with the surface fees payable in accordance with the Federal Mining Law and the Federal Duties Law; or (v) in case it does not perform and verify exploration and/or exploitation works through the filing of work assessment reports. Also, please note that the concessions holders that conduct exploitation of coal shall comply with certain additional rules and in case of incompliance of them, the Mexican Mines Bureau may be entitled to cancel such mining concessions.

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RB Abogados was founded in 1993 by Enrique Rodríguez del Bosque, who had previously worked for four years at the Mexican mining group, Luismin, which was subsequently sold to Silver Wheaton and then to Goldcorp. For eight years Enrique Rodríguez del Bosque worked as a Corporate-M&A and Transactional lawyer at one of the largest Mexican law firms.

Since its foundation, RB Abogados has focused on counselling mining transactions mainly conducted by Canadian mining companies, whilst also specialising in: incorporating Mexican companies to be able to acquire mining properties; conducting due diligences of properties and/or mining companies; structuring deals to acquire mining properties/mining concessions/lands/assets, and/or mining companies or joint ventures; and structuring credit transactions including structuring royalty stream transactions, the granting of guarantees to finance projects or raise funds at TSX and NYSE. The firm also focuses on mining obligations compliance.

RB Abogados' lawyers studied in the most recognised Mexican Universities, many of them started as students in the law firm and now have become very experienced transactional lawyers focused in mining transactions, the rest of the lawyers worked in law firms focused in commercial transactions, foreign investment, corporate law, etc. All of our lawyers speak fluent English and have English writing skills.

Our main objective is to provide legal security to investors participating in the Mexican mining industry (i.e., controlling Mexican subsidiaries, shareholders to the Mexican subsidiaries' parent companies, and banks and financial institutions as lenders/investors).

Mongolia

GTs Advocates LLP

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1 Relevant Authorities and Legislation

1.1 What regulates mining law?

The main legislations that govern the mining sector are the Constitution of Mongolia, the Subsoil Law, the Minerals Law, the Common Minerals Law, the Land Law, the Investment Law and the Environmental Protection Laws and National Security Law. In addition, various resolutions are issued by the State Great Khural (Parliament) and the Government (Cabinet) of Mongolia for the implementation of these and other laws that affect the mining sector. The most notable resolution is the one enacted by Parliament approving the State Policy on Minerals.

While the Constitution of Mongolia and the State Policy on Minerals lay out the foundation and general state policy and principal towards subsoil and mineral wealth, the Minerals Law governs reconnaissance, exploration and mining of all types of mineral except water, petroleum, natural gas, radioactive minerals and common minerals which are regulated by other specific laws. In particular, the Minerals Law regulates the ownership of minerals classification of mineral deposits, requirements for minerals licence holders, state involvement and participation in minerals sector, requirements for taking back a licensed area for reserve, limitations and prohibitions of minerals prospect, exploration and mining, regulations for licensing, term, fee, exploration and mining activities and their requirements, obligations of licence holders (environmental protection requirements, royalties and reporting), licence transfer and licence revocation related issues, licence-related dispute settlement mechanism.

1.2 Which Government body/ies administer the mining industry?

The mining industry is administered by the Ministry of Energy and Heavy Industry (“**Ministry**”) and the Mineral Resources and Petroleum Authority of Mongolia, a government’s implementing agency (“**MRPAM**”).

The Ministry oversees the mining industry in its capacity as a central administrative authority for the mining and petroleum sector. However, MRPAM is the main governmental authority in charge of applying its geological knowledge and information to recommend areas, policies and plans for preservation, conservation, reclamation of geological resources and administration of geological resources and activities. The MRPAM conducts geological and mineral surveying, inspecting, studying, researching, knowledge developing,

distributing and servicing, and cooperating in geology and mineral resources with other countries and international organisations. Most importantly, MRPAM maintains the minerals data and licence information and issues minerals licences.

1.3 Describe any other sources of law affecting the mining industry.

The Law of Mongolia on Special Permits for Commercial Activities, enacted by Parliament on 1 February 2001 (amended from time to time), sets forth the types of licensed activities and governs the issuance, suspension and termination of licences in general:

- The Law of Mongolia on the Prohibition against Exploration and Mining in Headwater Areas, Protected Zones for Water Reserves and Forest Lands (“**Prohibition Law**”) enacted on 16 July 2009 implements legislation. The Prohibition Law strictly forbids minerals exploration and mining in certain areas, namely areas overlapping to (i) headwaters of rivers and lakes, (ii) forested areas, and (iii) protected zones for rivers and lakes (please note that although the Prohibition Law is in effect as of August 2017, the implementation of this law is still pending due to lack of concrete identification of affected areas under Resolution No. 194 of the Government).
- Environmental Impact Assessment Law, enacted by Parliament on 1 May 2012 requires the licence holders to have an environmental impact assessment (general and detailed) conducted prior to commencement of any activities on the licensed area. This is also a pre-requisite for obtaining a minerals licence.
- Cultural Heritage Protection Law, enacted by Parliament on 15 May 2014 (amended from time to time), requires the applicants of land rights for minerals exploration and mining purposes to have an archaeological and paleontological survey conducted by experts on the relevant area.
- Regulation on General Requirements of Scoping Study, Pre-Feasibility Study and Feasibility Study, and Accepting a Feasibility Study, approved by the Order No. 074 of the Minister of Mining and Energy of Mongolia dated 17 April 2012.
- Resolution No. 174 of the Government of Mongolia adopted on 8 June, 2011 setting and approving the certain part of the boundaries of the areas of land in which the minerals exploration and exploitation is prohibited.
- Resolution No. 194 of the Government of Mongolia adopted on 5 June, 2012 setting and approving the boundaries of (i) headwater areas for rivers and lakes, (ii) forest reserve areas, and (iii) protected areas of water reserve areas.

- Resolution No. 27 of the Parliament adopted on 6 February, 2007 designating fifteen (15) minerals deposits as the Strategic Deposits and thirty-nine (39) minerals deposits as potential Strategic Deposits.

2 Mechanics of Acquisition of Rights

2.1 What rights are required to conduct reconnaissance?

Under the Minerals Law, reconnaissance of minerals means carrying out investigation in order to identify mineral concentration without disturbing the subsoil and includes physical observation, rock sampling, airborne surveys and reviewing related geological and field information.

Any legal entity can have the right to conduct reconnaissance for minerals in areas already under exploration or the rights to a mining licence within the territory of Mongolia, except for reserved areas and special needs land, without a licence.

However, a legal entity proposing to conduct reconnaissance must notify the MRPAM registering its name and address and a description and location of the area in which they propose to conduct reconnaissance. The Minerals Law prohibits disturbing the subsoil while conducting reconnaissance and any legal entity proposing to conduct reconnaissance must obtain permission from the holders of land ownership, possession and use right to enter their land.

2.2 What rights are required to conduct exploration?

The Minerals Law defines a mineral exploration as work carried out on and under the earth's surface for the purpose of identifying the location of minerals concentration and evaluating the quality and determining its economic and commercial feasibility. The Minerals Law strictly prohibits minerals exploration without the relevant exploration licence granted by the MRPAM.

An exploration licence can be granted to legal entities incorporated under Mongolian laws and registered with the Mongolian registration authorities. In other words, only legal entities incorporated in Mongolia can apply for and hold a licence to explore minerals.

According to the Minerals Law, the exploration licences can be granted 1) upon a request of the legal entity, or 2) by a way of tendering.

The first and the common method to grant an exploration licence is an application process. Upon receipt of application by a legal entity, the MRPAM checks for any overlap of coordinates and other technical matters and notifies the applicant if there are any problems within 20 business days following the filing. If and when the application is approved, the applicant has 10 business days to pay the applicable fee. An exploration licence is issued in the name of only one legal entity for a term of three years. The exploration licence can be extended by three times each for three years provided that the licence holder has been in compliance with the terms and conditions of the Minerals Law.

The second method is reissuance of an exploration licence for the area where the licence is revoked. The MRPAM select the areas where the licence is revoked announcing to the public in a daily newspaper within 30 days of the date that it will accept an application for tender bids. Applicants will be evaluated considering the skills of the applicant's professional staff and an applicant with the highest rating will be granted. If evaluation of two or more applicants has the same rating, the licence will be granted to the entity who applied first.

As required under the Investment Law, foreign state-owned enterprises investing in a legal entity holding a minerals licence need prior approval from the relevant agency if they acquire 33% or more of the shares.

2.3 What rights are required to conduct mining?

The Minerals Law defines mineral mining as the entire range of activities that include separating and extracting minerals from land surface and subsoil, ore stockpile, waste or tailings, increasing the concentration of its usable contents, producing products, marketing those products, selling and other activities related therewith. The Minerals Law also prohibits minerals mining without a mining licence.

Under the Minerals Law, the holder of an exploration licence has an exclusive right to apply for and obtain a mining licence covering all or any portion of the exploration licensed area. In order to obtain a mining licence, the exploration licence holder must submit to the MRPAM application documents including an application form, environmental impact assessment reports, an environmental protection plan, map of the mine and some other information.

The MRPAM grants a mining licence for a period of 30 years which can be extended two times for a period of 20 years, each depending on the reserve of the mineral.

If the exploration licence holder fails to submit an application for a mining licence upon expiration of its exploration licence, the mining licence for the area will be put for tender.

2.4 Are different procedures applicable to different minerals and on different types of land?

An application for a minerals licence except for natural gas, oil, radioactive minerals and common minerals are the same. However, the land rights are different depending on the ownership of the license holding entity. For instance, an entity of which its capital comprises of 25%–100% foreign investment, the licence holder can only have land use right. Other entities with less than a 25% foreign investment are considered domestic entities and are eligible for land possession right. The main differences are that the land possession right holder is allowed to sublease and pledge its land right, while the land use right holders are prohibited from such sublease or pledge.

2.5 Are different procedures applicable to natural oil and gas?

Natural oil and gas licences are granted according to the Petroleum Law under (i) the competitive bidding procedure, and (ii) direct contracting procedure, with applicants depending on the prospect funding party and other considerations.

3 Foreign Ownership and Indigenous Ownership Requirements and Restrictions

3.1 What types of entity can own reconnaissance, exploration and mining rights?

In general, a for profit legal entity can have reconnaissance, exploration and mining rights. The Company Law provides for two types of companies: limited liability companies ("LLC"); and joint stock companies ("JSC"). Both LLC and JSC can have reconnaissance, exploration and mining rights.

3.2 Can the entity owning the rights be a foreign entity or owned (directly or indirectly) by a foreign entity and are there special rules for foreign applicants?

Under the Licensing Law and the Minerals Law, mining and exploration licences can be granted to legal entities incorporated under Mongolian laws and registered with the Mongolian state registration authorities. Therefore, a foreign investor (a foreign person or foreign legal entity) cannot directly apply for and hold any minerals licences in Mongolia. They can only do so by way of establishing a wholly foreign-owned company in Mongolia or investing in a joint venture with a local partner.

3.3 Are there any change of control restrictions applicable?

In general, there are no restrictions applicable to any change of control involving private entities or persons. However, foreign state-owned enterprises investing in an entity operating in the mining sector need prior approval from the relevant government agency if they acquire 33% or more of the shares as required under the Investment Law.

3.4 Are there requirements for ownership by indigenous persons or entities?

There are no specific requirements for ownership by indigenous persons or entities.

3.5 Does the State have free carry rights or options to acquire shareholdings?

Pursuant to the Minerals Law, the State may hold up to 50% equity interest in an entity, which holds a mining licence for a strategic deposit provided that its reserve was determined as a result of exploration conducted using the State funds. In the event that a strategic deposit reserve was determined as a result of exploration conducted using private funds, the state may hold up to 34% of the equity interest in such the strategic deposit.

Parliament has the authority to designate minerals deposits as strategic deposits. A holder of a mining licence in respect of a strategic deposit must have at least 10% of its shares traded on the Mongolian Stock Exchange. However, this requirement has not been enforced in practice.

4 Processing, Refining, Beneficiation and Export

4.1 Are there special regulatory provisions relating to processing, refining and further beneficiation of mined minerals?

The Minerals Law obligates the minerals licence holder to give preferential supply of the mined, beneficiated and semi-processed mining products to the domestic refineries or processing plants that operates in the territory of Mongolia at a market price.

4.2 Are there restrictions on the export of minerals and levies payable in respect thereof?

The mining licence holder may export precious stones and extracted

metals through the Central Bank of Mongolia. However, export of ferrous and non-ferrous metal (cast iron, steel, copper, brass, aluminium or their alloys, scraps, except recyclable cans of beer or other drinks (beverages), ferrous and non-ferrous metals (casted) in ingots or other primary forms, spare parts made of ferrous or non-ferrous metals and lost their feasibilities (not feasible for their intended use)) is prohibited.

There is no restriction on the levies payable in respect of minerals export. The sales value of the exported products is determined at the average monthly prices of the products or similar products, based on regularly published international market prices or determined through recognised principles of international trade.

5 Transfer and Encumbrance

5.1 Are there restrictions on the transfer of rights to conduct reconnaissance, exploration and mining?

There are no restrictions on the transfer of a minerals licence. However, in the case a licence dispute is under review by the court, a licence cannot be transferred until there is a final court decision. Under the Minerals Law, a holder of an exploration and mining licence can transfer the mining licence on the following circumstances:

1. if the licence holder was reorganised by way of a merger or consolidation to the company resulting from such reorganisation;
2. if more than 20% of the shares of the licence holder is owned by another company, to the parent company;
3. if the licence holder sold the mine equipment, machinery and documents and its proven that the applicable tax has been fully paid, to the purchaser of the same; or
4. if the licence holder to perform defaults on its obligations under the pledge agreement or underlying loan agreement, the pledgee may enforce the licence pledge by transferring the licence pledge to itself or a third party which is incorporated under the Mongolian laws to be the resident taxpayer.

Also, the Minerals Law allows exploration and mining licence holders to transfer a part of the licensed area to persons eligible to hold a licence upon registration with the MRPAM. This also includes transfer under the valid pledge agreement.

5.2 Are the rights to conduct reconnaissance, exploration and mining capable of being mortgaged or otherwise secured to raise finance?

Yes, the Minerals Law allows holders of mineral exploration and mining licences to pledge their licences only to banks and non-banking financial institutions solely for the financing of its investments, development and operations of the licensed activity or the minerals deposit covered by the licence subject to the pledge. However, mineral licences alone cannot serve as a collateral and they must be accompanied with exploration reports, feasibility study, geological research and other properties that are not prohibited by law to pledge. Pledge agreement for mineral licences must be registered with the MRPAM in order to be effective.

The Minerals Law does not specify whether banks and non-banking financial institutions need to be Mongolian entities. In practice, Mongolian entities often grant security over their minerals licences in favour of foreign banks and the MRPAM does register such pledges.

6 Dealing in Rights by Means of Transferring Subdivisions, Ceding Undivided Shares and Mining of Mixed Minerals

6.1 Are rights to conduct reconnaissance, exploration and mining capable of being subdivided?

Pursuant to the Minerals Law, a holder of a minerals licence may transfer a part of the licensed area to persons eligible to hold a licence in line with conditions, requirements and procedures set for in the Minerals Law. In this case, area, size and position of the transferred and remained parts of the licensed area must both comply with the relevant conditions and requirements.

6.2 Are rights to conduct reconnaissance, exploration and mining capable of being held in undivided shares?

According to the Minerals Law, one licence is granted to one legal entity only. Minerals reconnaissance, exploration and mining rights cannot be held in undivided shares.

6.3 Is the holder of rights to explore for or mine a primary mineral entitled to explore or mine for secondary minerals?

Under Mongolian laws, all minerals must be included in the technical and economic feasibility study with respect to the mine and the reserve of such minerals must be registered with the state registry at the MRPAM. However, a holder of a mining licence may conduct exploration work within the licensed area. A holder of a mining licence will have to notify the MRPAM of any amendment to the feasibility study and to have their approval for any other minerals not covered in the feasibility study.

6.4 Is the holder of a right to conduct reconnaissance, exploration and mining entitled to exercise rights also over residue deposits on the land concerned?

As explained in question 6.3 above, all minerals must be included in the technical and economic feasibility study with respect to the mine. In other words, this is subject to the prior approval of the MRPAM.

6.5 Are there any special rules relating to offshore exploration and mining?

There are no special rules in Mongolia relating to offshore exploration and mining.

7 Rights to Use Surface of Land

7.1 Does the holder of a right to conduct reconnaissance, exploration or mining automatically own the right to use the surface of land?

A holder of a minerals licence does not automatically hold a right to use the surface of land and it must acquire a land use right obtaining a land right certificate and entering into a land use agreement with the relevant governor prior to commencing its mining operations.

7.2 What obligations does the holder of a reconnaissance right, exploration right or mining right have vis-à-vis the landowner or lawful occupier?

The general obligations of the holder of a minerals licence are as follows:

- a licence holder is obliged to pay land use fees and other fees as provided in the land use agreement;
- a licence holder must conduct reclamation on the land;
- a licence holder must comply with the environmental regulations; and
- in order to ensure that mining licence holders perform its obligations that are described in the laws and regulations, they must deposit monetary funds no less than 50% of its annual budget for environmental protection into a special bank account established by the Ministry of Environment and Tourism before the relevant year's mining work has started.

7.3 What rights of expropriation exist?

Under the Land Law, the (Central) Government and local government may take land for public use or special needs for compensation upon having prior negotiation and entering into an agreement with the holder of land possession or use right.

One of the potential risks faced by mineral exploration and mining licence holders is that the surface land area can be re-taken by the State as a special needs territory for up to five (5) years. Consequently, the MRPAM must terminate a minerals exploration or mining licence provided that the licence holder has obtained and agreed to compensation.

Under the Constitution of Mongolia and the Land Law, Parliament, the Government, and local government all have the authority to re-acquire land for special needs. Within 10 business days after the relevant level of authority makes its decision to re-acquire land for special needs, it must notify the MRPAM.

The authority that made the decision to re-acquire land for special needs and the affected minerals licence holder must negotiate the amount of compensation and the timing for the payment of the compensation. If the parties fail to reach an agreement, then the MRPAM shall determine such on the basis of an authorised independent body. The licence holder has the right to continue its operations if the relevant authority failed to pay the compensation within the specified timing.

When taking the land for state special needs, the Government must provide at least one year's notice to the land right holder, enter into an agreement and pay the price for the immovable property built on the land re-acquired by the Government. The price of the immovable property is determined by the Government and the land right holder on the basis of the then current market price and, possibly, the independent property valuation.

The Government can take the land for a special needs area for any of the following grounds or reasons:

- i. state special protection area;
- ii. state border strip land;
- iii. ensuring state defence and security;
- iv. providing land to foreign diplomat missions and consulates, and representative offices of international organisations;
- v. land for scientific and technological tests, experiments, and sites for regular environmental and climatic observation;
- vi. inter-province pasture land;
- vii. pasture reserve area;

- viii. contracted oil exploration sites to be utilised in compliance with the production sharing agreements;
- ix. a free trade zone;
- x. constructing and using nuclear facilities;
- xi. artisanal mining;
- xii. border ports;
- xiii. an area designated to develop and implement large-scale nationwide construction and infrastructure projects; and
- xiv. a centralised disposal area for hazardous items.

8 Environmental

8.1 What environmental authorisations are required in order to conduct reconnaissance, exploration and mining operations?

Under Mongolian laws, applications for a licence for the use of natural resources, extraction of petroleum and minerals, and possession and use of land for business purposes and an approval for any other projects are subject to a prior 1) general environmental impact assessment, and 2) an archeological, paleontological and ethnological preliminary survey.

General environmental impact assessments for all new projects and existing plants, factories, services and building facilities that are planned to be renovated and expanded and projects that will make use of natural resources in one way or another must be performed by an assessment expert who completes the assessment within 14 working days and issues a formal opinion as to whether:

- a) the project should not be permitted or rejected on the grounds that it is likely to cause considerable harm to the environment by virtue of its proposed technology, technique and activities, that it is absent in the land management planning, that its activities are inconsistent with the state policy and the strategic assessment opinions or relevant legislation;
- b) the project may be implemented without a detailed environmental impact assessment subject to specific conditions; and
- c) the project requires a detailed environmental impact assessment.

Pursuant to the Environmental Impact Assessment Law, a detailed impact assessment must be prepared by an authorised Mongolian legal entity. Such entity must prepare a report presenting findings of the detailed environmental impact assessment and develop an environmental management plan.

Pursuant to the Cultural Heritage Protection Law, a preliminary prospecting and research must be carried out by professional paleontological, archaeological or ethnological scientific organisations for assessments prior to the issuance of land rights for economic purposes associated with settlements, constructions, construction of new roads, establishment of hydro power plants, agriculture, minerals exploration and mining.

If paleontological, archaeological or ethnological preliminary prospecting concludes that there is a risk to cultural heritage, this shall give basis to halt the activity of the legal entity.

8.2 What provisions need to be made for storage of tailings and other waste products and for the closure of mines?

There are no specific requirements for storage of tailings and other waste products stated in the Minerals Law. However, tailings and

waste management must be an integral part of the technical and economic feasibility study with respect to the mine and it must be reviewed and approved by the Minerals Council of the MRPAM.

For the closure of mines, according to the Environmental Impact Assessment Law, a licence holder must prepare a mine closure plan at least three years prior to a mine close and submit to the Ministry of Environmental and Tourism for their review. Following the submission of a mine closure plan, a licence holder must inform the mine close to the Ministry of Mining and Heavy Industry at least one year prior to mine close.

8.3 What are the closure obligations of the holder of a reconnaissance right, exploration right or mining right?

As for obligations of a mining licence holder, they must take preparatory measures pursuant to regulations prior to the closure of a mine. A mine can be closed in whole or in part and must implement the following measures:

- 1. take all necessary measures to ensure safe use of the mine area for public purposes and reclamation of the environment;
- 2. take preventive measures if the mine claim is dangerous for public use; and
- 3. remove all machinery, equipment and other property from the mining area except as permitted by local administrative bodies or the specialised inspection authority.

Furthermore, the licence holder must prepare a detailed map of an appropriate scale showing dangerous or potentially dangerous areas created by mining operations by placing necessary warnings and markings in the vicinity of the mining claim and must submit the map to the specialised inspection authority and the local Governor.

8.4 Are there any zoning or planning requirements applicable to the exercise of a reconnaissance, exploration or mining right?

Yes. Pursuant to the Minerals Law, within three (3) months following the registration of the mining licence in the register of licences, the mining licence holder must establish the boundaries and mark the approved mining by permanent markers in accordance with the technical requirements specified by the professional inspection agency. A person authorised by the MRPAM performs the establishment of the boundaries of the mining area, who files a report with the MRPAM upon completion of the establishment of the boundaries.

A mining licence holder preserves the boundary markers in good condition and is obliged to adjust and remove the marker in case of rearrangement of boundaries following the decisions of the MRPAM.

9 Native Title and Land Rights

9.1 Does the holding of native title or other statutory surface use rights have an impact upon reconnaissance, exploration or mining operations?

Pursuant to the Subsoil Law, a holder of a minerals licence has a duty not to interfere in any way with rights of others to own, possess and use land. Any damages caused to others due to such interference must be compensated by the holder of a minerals licence.

10 Health and Safety

10.1 What legislation governs health and safety in mining?

The Law of Mongolia on Safety and Hygiene is the main legislation that governs labour safety and hygiene relations in Mongolia. Any company and employer conducting business in Mongolia must comply with standards and requirements applicable to industrial buildings and facilities, machinery, mechanisms, equipment, medical checks, fire safety, professional training, among others.

10.2 Are there obligations imposed upon owners, employers, managers and employees in relation to health and safety?

The Minerals Law requires minerals licence holders (both exploration and mining alike) to undertake activities to ensure the safety and hygiene of its employees and the safety of the local residents.

As a general rule, the minerals licence holder must take the following actions and measures in relation to safety and hygiene:

- approve and implement rules, regulations and procedures in accordance with workplace nature;
- undertake activities to protect the lives and health of employees and preventative measures from toxic and dangerous chemical substances, explosives, explosives devices, radioactive, and biologically active substances and their impact;
- arrange for employees to receive preliminary and scheduled medical check-ups necessary for and related to their work performance;
- have the responsibility to provide employees special garments and protective equipment which are fit for their working conditions and work performance nature and is free of charge;
- create conditions in which chemical, physical and biological factors developed in the course of industrial operations shall not affect labour, hygiene and the environment and to take technical and organisational measures for creating such conditions;
- stop immediately if any conditions emerged in the course of industrial operations which could impose a danger to human life and health and to eliminate such dangerous conditions immediately;
- introduce labour safety and hygiene management for protecting employees from accidents, damages and diseases which could occur in the course of industrial operations;
- make risk evaluations for the purpose of elimination and control of possible danger and accidents in a workplace;
- conduct training on safe operations, take yearly examination of labour safety and hygiene, give instruction on safe operation and not allow employees to perform work who did not attend training, receive instruction or take examination;
- keep a numerical record on industrial accidents, acute poisoning and occupational diseases and report these to relevant organisations; and
- pay compensation, in accordance with laws and legislations, to employees who have lost the ability to work due to industrial accidents, occupational diseases and acute poisoning.

11 Administrative Aspects

11.1 Is there a central titles registration office?

The MRPAM keeps and maintains a central database of minerals licences and transfer and pledge of minerals licences. The MRPAM also maintains records of pledges, transfers, payment of annual licence fees and changes in coordinates.

11.2 Is there a system of appeals against administrative decisions in terms of the relevant mining legislation?

Yes. The Administrative Court of Mongolia deals with any matters relating to public law outside of purely constitutional matters. Under the Law on Procedure for Administrative Cases, the Administrative Court has exclusive jurisdiction over all disputes arising out of actions of public administration and directed out to citizens or businesses. Any disputes arising from or in relation to an administrative act and which may affect a person's rights, may be challenged before the Administrative Court.

The General Administrative Law requires that pre-hearing of the administrative case be held by the MRPAM before commencing the actions at the Administrative Court. For complaints of a citizen or legal entities against action taken by the government or its agency or officials, a direct supervising administration or officer should be the one to decide whether the action is lawful or not before it goes to court.

If a mining licence holder asserts that any public administration or official's act or action (oral, written form of decree, order, decision and regulation) breached its lawful right, a licence holder may submit a complaint to the direct higher officials or administrative tribunals above it within 30 days upon receipt of the decision or inaction. If the dispute is still not resolved by the direct higher officials or administrative tribunals, or a licence holder does not accept a decision on the dispute, a licence holder may initiate administrative court proceedings against the MRPAM.

12 Constitutional Law

12.1 Is there a constitution which has an impact upon rights to conduct reconnaissance, exploration and mining?

There is no specific clause in the Constitution that would directly impact the rights to conduct reconnaissance, exploration and mining. However, Article 6.1 of the Constitution states that the land, its subsoil, forests, water, fauna and flora and other natural resources in Mongolia shall belong exclusively to the people and be under State protection.

12.2 Are there any State investment treaties which are applicable?

Yes, there are. Mongolia is a party to Bilateral Investment Treaties which provide standards of protection for foreign investors with 39 countries, such as the USA, Canada, China, Russia, Austria, the United Arab Emirates, Belarus, Bulgaria, Vietnam, Denmark, Egypt, Israel, Indonesia, Italy, India, Kazakhstan, Canada, Qatar, Kyrgyz, Cuba, Kuwait, Laos, Lithuania, Malaysia, the Netherlands, Poland, Romania, Singapore, South Korea, North Korea, Tajikistan, Turkey, Ukraine, Hungary, Philippines, Finland, Croatia, Czech Republic, Switzerland and Sweden.

By definition of such treaties, investment comprises any kind of assets, including, movable and immovable property, shares, copyright, industrial property rights, trademarks, know-how, trade names, among others.

13 Taxes and Royalties

13.1 Are there any special rules applicable to taxation of exploration and mining entities?

There is no special rule applicable to taxation of exploration and mining entities. According to the Minerals Law and the Business Entities Income Tax Law, both exploration and mining entities are subject to a 10% corporate income tax for annual profit below 3 billion Mongolian Tugrug or a 25% tax for profit exceeding 3 billion Mongolian Tugrug plus 300 million Mongolian Tugrug.

13.2 Are there royalties payable to the State over and above any taxes?

Under the Minerals Law, a holder of mining licence must pay a royalty. There are two types of royalties calculated on the basis of the total sales value of the minerals extracted:

(i) The standard flat rate royalty

The standard royalty rates are 2.5% for coal sold in Mongolia as well as gold sold to the Bank of Mongolia and an its authorised entities, and 5% for all other minerals, i.e., coal sold abroad, gold sold at mine, or shipped for sales from the mine, or used by the licence holder.

(ii) The surtax royalty

The surtax royalty is imposed on the total sales value of 23 types of minerals in addition to the standard flat rate royalty.

The rates of the surtax royalty vary from 1% to 5% for minerals other than copper. For copper, the surtax royalty rates range between 22 and 30% for ore, between 11%–15% for concentrates, and between 1%–5% for final products.

14 Regional and Local Rules and Laws

14.1 Are there any local provincial or municipal laws that need to be taken account of by a mining company over and above National Legislation?

There are no such rules.

14.2 Are there any regional rules, protocols, policies or laws relating to several countries in the particular region that need to be taken account of by an exploration or mining company?

We are not aware of any such rules.

15 Cancellation, Abandonment and Relinquishment

15.1 Are there any provisions in mining laws entitling the holder of a right to abandon it either totally or partially?

Yes, there are. Pursuant to the Minerals Law, a holder of a minerals licence may relinquish all or part of the mining area.

15.2 Are there obligations upon the holder of an exploration right or a mining right to relinquish a part thereof after a certain period of time?

A licence holder may voluntarily submit an application on an approved form approved by the Ministry of Mining. The main document required to relinquish is evidence that the licence holder has met the environmental obligations and the requirements for mine closure and it must be attached to the application.

15.3 Are there any entitlements in the law for the State to cancel an exploration or mining right on the basis of failure to comply with conditions?

Pursuant to the Minerals Law, the MRPAM has the authority to terminate a minerals licence in any of the following events:

- (a) the licence holder is no longer registered in Mongolia;
- (b) the licence holder has failed to pay the licence fees within the specified period;
- (c) the licence holder has failed to spend or the expenditure is lower than the minimum amount for exploration work;
- (d) the State has re-acquired the exploration or mining area (i) for reserve in order to undertake geological studies, prospecting or exploration using the State funds, (ii) for special needs, or (iii) as a result of the statutory prohibition of minerals exploration or mining in the licensed area and the licence holder has been fully compensated;
- (e) the ministry in charge of environment has issued an opinion based on the local government proposal in respect of the licence holder's failure to perform its obligations to reclaim the environment;
- (f) it is determined that there is a cultural heritage in an exploration site; or
- (g) the licence holder has breached the agreement concluded in accordance with the Prohibition Law.

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GTs is recognised internationally and domestically as one of the leading law firms in Ulaanbaatar. What distinguishes GTs is the hard-working team of lawyers who are always on the offence for knowledge and greater experience. The firm has risen in the rankings to a Band One firm for Mongolia focused in General Business Law in 2015, 2016 and 2017. GTs provides a full range of legal advisory services focalised in five key areas including corporate and M&A, finance and capital markets, all stages of project finance (encompassing mining, infrastructure and energy), commerce and real estate, and lastly, litigation and arbitration. As a law firm with wide-ranging experience with far-reaching clients, GTs has cultivated a consistent and instinctive pragmatism that is sensitive of cultural, social and legal differences.

Mozambique

Taciana Peão Lopes



TPLA – Taciana Peão Lopes
& Advogados Associados

André Cristiano José



1 Relevant Authorities and Legislation

1.1 What regulates mining law?

The Mining Law (ML) was approved by Law 20/2014, 18 July, which came into force on 18 August 2014, repealing Law 14/2002 of 26 June (2002 Mining Law), or any other pre-existing inconsistent legislation. The respective regulation (Mining Law Regulations) was published on 31 December by the Decree 31/2015 that revoked the Decree 62/2006 of 26 December.

Mozambique has been experiencing enormous growth in its mining sector. The discovery of the coal reserves in the Tete basin are considered the largest undeveloped coal reserves in the world. The world's biggest mining companies, such as Vale, Jindal and Coal India, have been developing huge amounts of thermal and coking coal mines, but the lack of developed infrastructure in Mozambique presents big challenges to the investors.

In light of the above and in consistency with the approach taken with the PPP Law (Public Private Partnership Law) and the new Petroleum Law, the Government of Mozambique has decided to review the existing legal framework applicable to the mining sector in order to make it more favourable to Mozambique and the Mozambican citizens.

1.2 Which Government body/ies administer the mining industry?

The mining industry is primarily regulated by the Council of Ministers, the highest governmental body in Mozambique that includes the President, the Prime Minister and all the other Government Ministers, who are responsible for creating the main legislation for the sector and in granting concessions and mining contracts.

The Ministry of Mineral Resources and Energy (MIREME) is responsible for implementing government policy in the mining sector and oversees the National Directorate of Mines (NDM) and the National Institute of Mines (INM), whose main responsibilities are:

- (a) Development of public policies with respect to the mining sector, regulating and monitoring the implementation of new mining projects, managing the day-to-day process for the allocation of concessions and licences, including overseeing any public procurement process, monitoring and mitigating the potential social environmental impact of mining projects, developing and enforcing health and safety standards in the mining sector and promoting the international exportation of minerals and metals from Mozambique.

- (b) Review, analysis and approval of mining projects, including carrying out technical and economic studies for the opening of new mines, in addition to decommissioning and/or the closure of mines, minimising the social and environmental impact of mining projects, publishing guidelines on public and private sector participation in the mining sector, proposing new policies to MIREME regarding the development of the mining sector, and promoting, reviewing and supporting other institutes in relation to mining sector activities, including small-scale mining.

The ML also creates the High Authority for the Extractive Industry, which has the power to oversee the extractive industry, although the ML is silent in respect to its specific powers and responsibilities.

The Inspectorate-General of Mineral Resources has been created as a supervisory entity that shall supervise the compliance with mining activity and technical safety regulations.

1.3 Describe any other sources of law affecting the mining industry.

The regulation of the mining sector is supplemented by other laws, among which are the following:

- The Constitution of the Republic of Mozambique of 2004 (CRM).
- The 2015 Mining Law Regulations (MLR) (Decree 31/2015 of 31 December of 2015) ML.
- The Law on Public-Private Partnerships, Large Scale Enterprises and Business Concessions, also known as the Mega-Projects Law (PPP Law) (Law n° 15/2011 of 10 August 2011) and the Regulations on Law on the Public-Private Partnerships (PPP Law Regulations) (Decree n° 16/2012 of 4 of June). The law and regulations establish the general framework of private relations between the private sector and the State in the context of mega investments (public-private partnerships, mega projects and concessions).
- The Law on the Specific Regime of Taxation and Fiscal Benefits for Mining Operations (Mining Tax Regime) (Law n° 28/2014, of 23 September 2014) and the Regulation on the Specific Regime of Taxation and Fiscal Benefits for Mining Operations (Decree 28/2015 of December 28), and Law n° 13/2007, both of 27 June 2007.
- The Land Law (Law n° 19/97, of 1 October 1997) and the Regulations on Land Law (Decree n° 66/98, of 8 December 1998).
- The Environmental Law (Law n° 20/97, of 1 October 1997) and the Environmental Regulations for Mining Activities (Decree n° 26/2004, of 20 August 2004).

- The Regulation on Technical Safety and Health for Geological and Mining Activities (Mining Safety Regulation), (Decree n° 61/2006 of 26 December 2006).
- The Regulation on Waste Management, (Decree n° 13/2006 of 15 June 2006).
- The Basic Rules and Directives for Environmental Management for Mining Activities (Ministerial Diploma 189/2006 of 14 December 2006).
- The Regulations on the Process of Resettlement Resulting from Economic Activities (Decree n° 31/2012, of 8 August 2012).
- The Regulation on the Commercialization of Mineral Products (Decree n° 20/2011, of 1 June 2011) that revoked the Decree n° 16/2005 of 24 June.
- The Policy of Corporate Social Responsibility for the Extractive Industry of Mineral Resources (Resolution No. 21/2014 of 16 May 2014).
- The Labour Law (Law n° 23/2007, of 1 August 2007).

The licences commonly awarded for the implementation of medium- and large-scale projects are Prospecting and Exploration Licences and mining concessions.

Prospecting and Exploration Licences are granted to corporate entities legally incorporated and registered in Mozambique and govern exploration and prospecting activities. These licences are valid for (i) two years for mineral resources being supplied for the construction activity, renewable for the same period, and (ii) five years for other mineral resources, including mineral water and renewed for an additional period of three years. Holders of Prospecting and Exploration Licences are required to submit to the Government annual reports containing information on the previous year's activities and expenditure, the work programme and budget for the forthcoming year. Holders of the Prospecting and Exploration Licence should also respect the local communities and pay the required compensations to the title holders of land that may result from the damages caused by the mining activities.

2 Mechanics of Acquisition of Rights

2.1 What rights are required to conduct reconnaissance?

The ML specifies the following mining titles:

- a) Prospecting and Exploration Licence (*Licença de Prospecção e Pesquisa*);
- b) Mining Concession (*Concessão Mineira*);
- c) Mining Certificate (*Certificado Mineiro*);
- d) Mining Pass (*Senha Mineira*);
- e) Mineral Treatment Licence (*Licença de Tratamento Mineiro*);
- f) Mineral Processing Licence (*Licença de Processamento Mineiro*); and
- g) Trading Licence for Mineral Products (*Licença de Comercialização de Produtos Mineiros*).

The reconnaissance licence is not regulated under the ML. However, holders of the reconnaissance licence must request the regularisation of the respective rights under the 2002 Mining Law, within 180 days following the entry into force of the ML.

2.2 What rights are required to conduct exploration?

In accordance with the CRM, all mineral resources in the soil, subsoil, interior waters, continental platform and economic exclusive zone are property of the State and belong to the public domain. This principle is also reflected in the ML and private prospection, exploration and mining of mineral resources can only be carried out under a concession, licence or authorisation from the Government.

Pursuant to the ML, and taking into account the public interest, the Government may carry out public tenders for mining activities and operations in areas: (i) that have been subject to geological studies; (ii) showing mineral resources potential; (iii) that have been subject to prior mining activity; (iv) that have been reserved for mining activity; and (v) of total or partial protection.

If no tender process is opened, the awarding of mining titles is granted accordingly with the principle of priority, considering the proposal that offers the best advantages for the Mozambican State.

Under the ML, only Mozambican individuals or corporate entities legally incorporated and registered in Mozambique are entitled to hold mineral titles, provided that the applicants show their financial and technical capabilities.

2.3 What rights are required to conduct mining?

Mining Concessions are granted to corporate entities legally incorporated and registered in Mozambique, and give the right to extract, develop and process mineral resources that have been discovered under the exploration phase, and to subsequently commercialise such minerals, and are valid for a period of 25 years that can be renewed once for an equal period. The holder of a Prospecting and Exploration Licence enjoys priority in applying for a Mining Concession over any other request. The holder of the Mining Concession, before commencement of extraction activities, is required to obtain: (i) the environmental licence; (ii) right of use and development of land; and (iii) the approval of the resettlement and compensation plan.

In order to obtain a Mining Concession, an administrative fee must be paid and certain information must be provided to MIREME, including an economic feasibility study, the mining production plan and proof of the applicant's technical expertise and financial resources to proceed with extraction. The mining production plan must include details of the ore deposit, mine site design, the operations schedule, expected dates for commencement of development and commercial production, as well as environmental, health and safety plans.

A new requirement of the ML is that holders of Mining Concessions have to be listed on the Mozambique Stock Exchange. Further to this obligation, the PPP Law establishes the right for Mozambican nationals, corporate entities and the State to participate in mining projects shareholding – between 5% and 20% – via the stock market.

Mining Contracts can be negotiated between the holders of a Prospecting and Exploration Licence and/or Mining Concession and the Government. They are usually negotiated for large-scale projects but there is no objective criteria setting out when they should be entered into. Mining Contracts contain mandatory clauses such as clauses referring to: (i) the level of participation of the Government of Mozambique in the undertaking; (ii) minimum local content; (iii) local employment and training requirements; (iv) incentives in relation to increasing the value of the minerals to be extracted; (v) corporate social responsibility obligations; (vi) memorandum of understanding between the licence holder, the local communities and the Government; (vii) dispute resolution mechanisms, including provisions relating to the settlement of disputes via arbitration; and (viii) the indication of how the local communities will be involved and benefit from the project.

Mining Certificates are granted to Mozambican individuals and/or legal corporate entities where the majority of the share capital

belongs to Mozambican individuals or entities and the effective centre of management is located in Mozambique. Mining Certificates aim to govern small-scale mining operations, and may be granted for a period of 10 years and renewable once for an equal period.

Mining Passes aim to regulate small-scale and artisanal mining operations for the benefit of the communities, and can only be issued to Mozambican individuals and/or legal corporate entities exclusively incorporated between Mozambican nationals.

2.4 Are different procedures applicable to different minerals and on different types of land?

Pursuant to the CRM and the Land Law, all land belongs to the State and cannot be sold, traded, mortgaged, pledged or by any other means disposed of. Accordingly, this is the main reason the right of use and development of the land (DUAT) is required for conducting any economic activities. The procedures for the award of a DUAT does not depend on the type of land or minerals to be explored. However, there are different levels of decision for the award of DUATs. Where the Mining Concession falls within an approved urbanisation plan, the Municipality Authorities are the competent authority to issue DUATs.

In other areas: (i) the Provincial Government authorises DUATs for Mining Concessions covering an area of up to 1,000 ha; (ii) the Ministry of Land, Rural Development and Environment is competent to issue DUATs for areas between 1,000 and 10,000 ha; and (iii) the Council of Ministers grants DUATs for areas where the mining concession exceeds 10,000 ha.

2.5 Are different procedures applicable to natural oil and gas?

Natural oil and gas are governed by the Petroleum Law (Law n° 21/2014, of 18 of August 2014) and respective regulations. However, there are some transversal legal matters that are ruled by the same laws, namely the Land Law, Labour Law and the Exchange Control Law.

3 Foreign Ownership and Indigenous Ownership Requirements and Restrictions

3.1 What types of entity can own reconnaissance, exploration and mining rights?

The Mining Law provides that individual persons, as well as entities incorporated and constituted as Companies under the Mozambique Commercial Code, can be entitled to own reconnaissance, exploration and mining rights. Moreover, article 20, paragraph 1 of the MLR provides that the individuals or entities shall be granted right of use and development of the land (DUAT) prior to approval of the reconnaissance, exploration and mining rights that will be under the custody of the State until the closure of the mining activities.

3.2 Can the entity owning the rights be a foreign entity or owned (directly or indirectly) by a foreign entity and are there special rules for foreign applicants?

The Mining Law provides that only Mozambican individual persons and entities incorporated and constituted as Companies under the Mozambique Commercial Code can be entitled to own mining

titles in Mozambique. This means that foreign entities have to incorporate a Mozambican legal person in order to own mining rights and in this context, it is worth noting that the ML defines this as “[a] national legal person one that is registered in Mozambique and has its effective headquarters in national territory, and which the majority of equity capital is held by Mozambique nationals (...)”.

There are no special rules for foreign applicants but in the event of foreign individual applicants, they are required to comply with the Regulation of the legal regime applicable to foreign citizens in regards to entry, stay and departure from the country (Decree n° 108/2014 of 31 December 2014) with the National Service of Migration of Mozambique.

3.3 Are there any change of control restrictions applicable?

Pursuant to the ML, any transfer of a direct or indirect stake by the title holder requires the Government’s prior consent, irrespective of the amount of shareholding transferred.

Non-compliance with any transfer requirements will result in any of such transfers being void and invalid.

3.4 Are there requirements for ownership by indigenous persons or entities?

There are programmatic principles related to local content requirements, with a view to a greater involvement of the national entrepreneurs in the mining sector.

Mining Certificates, Mining Passes and Trade Licences are only awarded to Mozambican individuals and/or corporate entities fully or owned in the majority by Mozambicans.

Further, paragraph (1) of article 33 of the PPP Law, applicable to mining concessions, requires for participation of Mozambicans in the share capital of each undertaking in a percentage ranging between 5% and 20% of the equity capital.

The ML sets out local content requirements for the procurement of goods and services for mining activities, which are designed to promote the development of Mozambican businesses and know-how. Single or foreign legal persons providing services to mining operations shall be associated with Mozambican single or collective legal persons in accordance with further regulations.

Mining companies must assure the employment and professional training of Mozambican workers according to the applicable legislation.

A percentage of State revenues generated by mining activities is allocated, through the State Budget Law, for the development of the communities established in the areas where mining activities take place.

3.5 Does the State have free carry rights or options to acquire shareholdings?

The State’s right to participate in mining projects is provided for in the ML, pursuant to which the State is required to progressively increase its participation in mining projects. According to the PPP Law, mining concessions shall allow the participation of private or public Mozambican corporate persons in the share capital of each undertaking in a percentage ranging between 5% and 20% of the equity capital.

The PPP Law Regulations provide that in consideration for the award of exploitation rights over natural resources, the State will have the right of a free carry participation of at least 5% of the share capital during any phase of the project.

4 Processing, Refining, Beneficiation and Export

4.1 Are there special regulatory provisions relating to processing, refining and further beneficiation of mined minerals?

Mining Treatment Licences and Mining Processing Licences are issued only to Mozambican corporate entities, incorporated and registered pursuant to the Mozambican law, which have the technical and financial capacity to undertake such activities and that do not hold a Mining Concession, a Mining Certificate and/or a Mining Pass. Treatment and/or processing of radioactive minerals require further authorisation and this is regulated by the law applicable to atomic energy and radioactive materials.

Holders of a Mining Concession, Mining Certificate or Mining Pass may carry out mining treatment activities without a Mineral Processing Licence.

Pursuant to the ML, processing activities relating to minerals produced in Mozambique must be produced in the country, if economically viable.

4.2 Are there restrictions on the export of minerals and levies payable in respect thereof?

Entities extracting minerals under a Mining Concession, Mining Certificate and Mining Pass, may freely dispose of the output of their production. A Trading Licence is required when the entity selling or exporting the minerals is not the same entity that has produced or mined them. The Trading Licence is granted by the NDM.

Any sale, purchase or transportation of mineral products outside Mozambique without the respective authorisation is considered a criminal act and may be punishable by imprisonment.

5 Transfer and Encumbrance

5.1 Are there restrictions on the transfer of rights to conduct reconnaissance, exploration and mining?

The transfer of rights and obligations under mining holding permits and/or mining rights to an affiliate or a third party is subject to approval by the Mozambican Government. This also applies to other direct and indirect transfers of participation interests, permits and/or mining rights, including the transfer of shares or other forms of participation.

The transfer of permits and/or mining rights may occur two years after the activity for which the holder was authorised has commenced, and the request must comprise of the activity report, as well as the certificate of tax discharge issued by the tax administration.

Mining permits may be transferred on the death or disability of its holder in order to be regulated.

Capital gains of non-residents in Mozambique resulting from the onerous or gratuitous transfer of mining rights are taxed at a rate of 32%.

5.2 Are the rights to conduct reconnaissance, exploration and mining capable of being mortgaged or otherwise secured to raise finance?

Under the terms of Mozambique legislation, certain licences,

infrastructure, premises and other property may be given as security, provided that this is required to guarantee funding for mining activities and that such security has been authorised by the MIREME.

Due to the fact that there are some conditions to meet in order to transfer rights, it is debatable whether a direct pledge or mortgage over mining interests is permissible.

The creation and the enforcement of security rights over mining interests would always be subject to the prior authorisation of the MIREME, meaning that the beneficiary of the security does not have an immediate right to execute the collateral in case of default of the underlying loan or financing arrangement – the intervention of the MIREME will always be required, with the Ministry having full discretionary powers to authorise or refuse the enforcement of the collateral.

6 Dealing in Rights by Means of Transferring Subdivisions, Ceding Undivided Shares and Mining of Mixed Minerals

6.1 Are rights to conduct reconnaissance, exploration and mining capable of being subdivided?

The rules applicable to the transfer of mining titles are also applicable to this question.

6.2 Are rights to conduct reconnaissance, exploration and mining capable of being held in undivided shares?

The ML does not provide restrictions on the issue of shares. Legal persons and respective shareholders should meet the requirements provided by the Mozambican Commercial Law.

6.3 Is the holder of rights to explore for or mine a primary mineral entitled to explore or mine for secondary minerals?

The holder of the rights for prospecting and/or exploration of mineral resources enjoys, beside others, the right to request, with right of first refusal, inclusion in the mining holding permit, the associated minerals or others which may have been found (including associated methane gas in the area subject to the prospecting and research licence for coal).

The discovery of associated minerals must be reported to the Government. If the holder has an interest in the exploration of associated minerals, the working programme of mining operations should be appropriately amended.

6.4 Is the holder of a right to conduct reconnaissance, exploration and mining entitled to exercise rights also over residue deposits on the land concerned?

Yes. Please see our answer to question 6.3.

6.5 Are there any special rules relating to offshore exploration and mining?

No, there are not.

7 Rights to Use Surface of Land

7.1 Does the holder of a right to conduct reconnaissance, exploration or mining automatically own the right to use the surface of land?

The mining exploration right is distinct from the use and development of land rights and from other pre-existing rights. Mining title holders can apply for DUAT. Pre-existing rights of use and development of land are considered extinct after the payment of a fair compensation to land users and the termination thereof.

The Land Law primarily determines access to and the allocation of land. It allows developers to obtain rights to use and develop land under a DUAT and provides its holder with legal certainty that it will be entitled to use the land for the purposes of which the DUAT was granted, such as mining, and to become owners of the buildings, premises or other immovable assets built on the land.

The DUATs obtained under the terms of the Land Law will have a validity period and size consistent with the mining title, and will be renewed automatically whenever those mining titles are renewed. The holder of a mining concession has an automatic right to a DUAT, namely, has registered rights over the land. Nonetheless, the land registration process must be completed by the holder of a mining concession by submitting the relevant application before the start of the exploration activities. Mining activities in partially or total protected areas is not allowed under the ML.

7.2 What obligations does the holder of a reconnaissance right, exploration right or mining right have vis-à-vis the landowner or lawful occupier?

The ML imposes more rigid obligations with respect to the resettlement of the communities affected by mining activities.

Besides the need to prepare a relocation plan for the affected communities, the company must pay them a fair and transparent compensation, under terms to be regulated. The fair compensation value must be fixed in a memorandum of understanding to be entered into by the Government, the mining holder and the community, and such act must be witnessed by a community-based organisation, if requested by one of the parties. The memorandum of understanding is one of the requirements for the award of mining exploration rights.

7.3 What rights of expropriation exist?

Pursuant to the CRM and the ML, the expropriation of goods and private property rights, in the context of a mining title, shall only take place exceptionally and with justification, in the public interest, and shall be subject to the payment of fair compensation. Further, the ML also provides that mining holders have the right to be compensated from losses arising from actions which may limit the exercise of mining rights under the law or concession contracts.

8 Environmental

8.1 What environmental authorisations are required in order to conduct reconnaissance, exploration and mining operations?

Under the ML, mining activities are classified as: Category A – environmental impact study (mining activities carried out under a mining concession); Category B – simplified environmental impact

study (mining activities in quarries, prospecting and research activities for pilot experiment purposes and activities undertaken under a mining certificate); and Category C – environmental management programme (activities carried out under a mining pass and non-mechanised prospecting and research activities).

Communities must be heard throughout the process of implementation of the environmental management tool until the closure of the mine.

8.2 What provisions need to be made for storage of tailings and other waste products and for the closure of mines?

Mining operations should not be closed or abandoned without running the mine closure plan approved by the relevant authority. Mining right holders may be required, in certain circumstances, to issue performance bonds or other guarantees to cover decommissioning costs.

8.3 What are the closure obligations of the holder of a reconnaissance right, exploration right or mining right?

In cases where the law requires holders to provide a performance bond to cover the cost of rehabilitation and mine closure, its value shall be reviewed every two years by the sector that oversees the area of mineral resources.

The performance bond shall be returned when the mining right holder has terminated its mining activities and the previous environmental audit concludes that fulfilment of rehabilitation and mine closure obligations have been met. The performance bond shall be used by the State for rehabilitation and mine closure purposes when the mining activity ends and the previous environmental audit concludes that the holder has not fulfilled its rehabilitation and mine closure obligations.

8.4 Are there any zoning or planning requirements applicable to the exercise of a reconnaissance, exploration or mining right?

Under Article 9 of the Land Law, no rights of land use and benefit may be acquired in relation to total and partial protection zones, although special licences may be issued for specific activities. The special licence is a document that authorises the carrying out of an economic activity within total or partial protection zones: a) the bed of interior water, the territorial sea and the exclusive economic zone; b) the continental platform; c) the strip of maritime coastline, including that around islands, bays and estuaries, which is measured from the high tide line to a mark 100 metres inland; d) a strip of land up to 100 metres surrounding water sources; e) a strip of land up to 250 metres along the edge of dams and reservoirs; f) land occupied by public interest railway lines and their respective stations with a bordering strip of 50 metres on each side of the line; g) land occupied by motorways and four lane highways, aerial, surface, underground and underwater installations and conduits for electricity, telecommunications, petroleum, gas and water, including a bordering strip of 50 metres on each side, as well as the land occupied by roads including a bordering strip of 30 metres for primary roads and 15 metres for secondary and tertiary roads; h) a two-kilometre strip of land along the terrestrial border; i) land occupied by airports and aerodromes with a surrounding strip of land of 100 metres; and j) the 100 metre strip of land surrounding military or other defence and security installations of the State.

9 Native Title and Land Rights

9.1 Does the holding of native title or other statutory surface use rights have an impact upon reconnaissance, exploration or mining operations?

The CRM and the Land Law recognise and protect native and community land rights, including occupation and customary acquisitions. The protection of indigenous and community rights does not depend on formal land titles. The use and development of land for carrying out mining activities is regulated by law in terms described above.

10 Health and Safety

10.1 What legislation governs health and safety in mining?

Health, safety and labour issues are mainly regulated by the Labour Law and the Regulations on Health and Safety for Mining Activities.

10.2 Are there obligations imposed upon owners, employers, managers and employees in relation to health and safety?

Mining legislation requires that the mining operator is insured against all risks and that the insurance covers at least the following risks: damage to mining installations and infrastructures; third party liability; and accidents at work for staff.

Article 297 of the Mining Safety Regulation provides guidelines for risk assessment to ensure the safety of workers and equipment. Companies, miners' associations and workers will be involved in the risk analysis.

Regarding employee health and safety, the mining operator must provide first aid and safety equipment for workers, which must be kept in accessible locations and be suitable for use in the event of an emergency. The mining operator must also prepare a safety and evacuation exercise programme.

11 Administrative Aspects

11.1 Is there a central titles registration office?

The acquisition, alteration, transfer and termination of mining titles are subject to registration in the mining records in accordance with article 82 of Mining Law and article 4 of the Mining Law Regulation (Mining Cadastre). Copies of mining titles shall also be filed with the NDM, the Provincial Directorate and at the District Government.

11.2 Is there a system of appeals against administrative decisions in terms of the relevant mining legislation?

Administrative decisions are subject to hierarchical appeal and appeal for judicial review, in terms regulated by the Administrative Court Law.

The Mining Law provides that Mining Contracts must be published in Mozambique's Official Gazette and are subject to the Administrative Court's prior approval.

12 Constitutional Law

12.1 Is there a constitution which has an impact upon rights to conduct reconnaissance, exploration and mining?

According to the CRM, the mineral deposits are the public domain of the State. Following the CRM, the ML provides that mineral resources found in the soil and subsoil, internal waters, territorial sea, continental shelf and in the exclusive economic zone are also property of the State.

The CRM recognises and protects private property and private investment. Hence, only in exceptional cases (in the name of public interest), can rights arising from participation in private investment be limited. If, somehow, rights are limited, there will be a payment of compensation.

Pursuant to the CRM, Mozambique has an independent judicial system and observes the principles of the rule of law. Besides ordinary courts, the Constitution also recognises the following alternative dispute resolution mechanisms:

- (i) Mozambique is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention), having deposited its instrument of accession with the Secretary-General of the United Nations on 10 June 1998.
- (ii) The rules contained in the Law on Arbitration, Conciliation and Mediation (Law n° 11/99 of 12 July 1999) provide solutions to litigation, either by agreement through conciliation or mediation, or through arbitration. All arbitral awards are enforceable in Mozambique and have the same force as a judicial sentence.
- (iii) The ICSID regulations, or the Convention on the Settlement of Investment Disputes between States and Nationals of other States.
- (iv) Other rules or regulations from reputable international institutions, provided that the parties have specifically agreed the conditions for the conduct of arbitral proceedings, including the rules on appointment of arbitrators and deadline for the rendering of the award.

The Supreme Court of Mozambique has the power to assess the validity of any foreign judgments or arbitral awards with reference to Mozambican public policy. If the foreign judgment or award is not contrary to Mozambican public policy, it is, in principle, recognised and enforceable. The Supreme Court does not have any authority to re-examine a case on its merits.

12.2 Are there any State investment treaties which are applicable?

The bilateral investment treaties that are currently in force include those between Mozambique and Algeria, Belgium and Luxembourg, China, Cuba, Denmark, Finland, France, Germany, Indonesia, Italy, Mauritius, the Netherlands, Portugal, South Africa, Sweden, Switzerland, the United Kingdom, the United States and Vietnam.

13 Taxes and Royalties

13.1 Are there any special rules applicable to taxation of exploration and mining entities?

Law n° 28/2014, of 23 September 2014, was published and came into force on 1 January 2015 establishing a new tax framework for the mining activity.

Its aim is to establish new specific rules on taxation of all mining activity, and to grant the tax benefits applicable to that activity. This new set of rules makes the framework for Mozambique taxation in mining activity similar to others around the world, and it also has the benefit of condensing the tax framework in a single document with both the taxes applied and the tax benefits a company can be entitled to.

In terms of the taxes applied to the mining activity, this new piece of legislation establishes the following: i) Mining Production Tax (IPM); ii) Surface Tax (ISS); iii) Corporate Income Tax (IRPC); and iv) Resource Rent Tax (IRRM).

Other than the specific taxes mentioned above, a company is also liable to the remaining taxes in Mozambique, such as Valued Income Tax, Custom Duties and Municipal charges.

13.2 Are there royalties payable to the State over and above any taxes?

No, there are not.

14 Regional and Local Rules and Laws

14.1 Are there any local provincial or municipal laws that need to be taken account of by a mining company over and above National Legislation?

Mining holders may be subject to the payment of taxes or municipal taxes. Municipalities have the power to rule on local taxes.

14.2 Are there any regional rules, protocols, policies or laws relating to several countries in the particular region that need to be taken account of by an exploration or mining company?

Mozambique has entered into several double taxation treaties and bilateral investments treaties, which provide for certain benefits that are also applicable to the mining industry. Mozambique has entered into double taxation treaties with Botswana, China, Italy, Mauritius, Portugal, South Africa, the United Arab Emirates and Vietnam.

Angola and Mozambique entered into a bilateral cooperation treaty for the mining sector in 2007.

Further, Mozambique is implementing the Extractive Industry's Transparency Initiative (EITI).

15 Cancellation, Abandonment and Relinquishment

15.1 Are there any provisions in mining laws entitling the holder of a right to abandon it either totally or partially?

The licence holder may abandon all or part of the area by giving notice to the MIREME and if it is in compliance with the respective Law and Regulations. Partial abandonments must be registered on the licence holder's title.

15.2 Are there obligations upon the holder of an exploration right or a mining right to relinquish a part thereof after a certain period of time?

Please refer to question 15.1.

15.3 Are there any entitlements in the law for the State to cancel an exploration or mining right on the basis of failure to comply with conditions?

The ML provides several provisions that determine the revocation and subsequent extinction of mining titles. Mining titles are revoked when the holder: a) fails to pay the specific [mining] taxes; b) does not comply with any regulatory provision, or specific provision contained in a Mining Contract, when such provision stipulates that such violation shall constitute grounds for the revocation of the Mining Title; c) becomes bankrupt, or enters into an agreement or composition with its creditors, unless a mortgage has been registered over the mining installations; d) transforms or dissolves the company, unless prior consent had been obtained from the Minister for such transformation or dissolution, when the intended result is its merger or reincorporation; and e) is indebted to the State.

A Prospecting and Exploration Licence may be revoked if the title holder does not: a) submit annual reports on prospecting and exploration and investments carried out; and b) spend the minimum expenditure established in the regulations and carry out exploration in accordance with the approved work programme.

A Mining Concession may be revoked if its title holder does not comply with the provisions of paragraph 1, and clauses a), c), d), g) and n) of article 17(2): a) to demarcate and maintain the boundaries of the mining area; b) to commence mining production within a maximum period of up to forty eight (48) months, starting from the date of the issuing of the mining concession; c) to maintain the level of production defined in the mining plan and subsequent amendments approved by the competent entity; d) to submit information and periodical reports of mining activities, as may be legally required, including as regards production and commercialisation; and e) to undertake the environmental recuperation of the area, and the closure of the mine in accordance with approved plans. Further, a mining concession may be revoked if the title holder ceases production without there being a situation of *force majeure*, or if the title holder of a Mining Concession violates any regulatory provision, or provision of a Mining Contract, and such provision foresees that a violation will be punishable by revocation of the Concession.

A Mining Certificate may be revoked if the title holder does not comply with the provisions provided by paragraph 2, clauses a) and b) of Article 21: a) to commence mining production within a period of up to twenty four (24) months, starting from the date of issue of the Mining Certificate; and b) to respect the local communities and contribute to the preservation of the social and cultural aspects of such communities. Further, a mining certificate may be revoked if the title holder of the Mining Certificate violates any term or condition set out therein and such term or condition foresees that its violation shall be punishable by way of the revocation of the certificate.

Mining Passes may be revoked in the case of: a) non-compliance with environmental norms; b) the illegal sale of mineral products; c) the trafficking, or concealment of the trafficking, of mineral products; and d) when mining activities result in serious environmental damage.

The revocation of a Mining Title shall not exclude the obligation to comply with any obligations contracted by the licence title holder prior to the date of revocation, or for any third party claims, brought in good faith, for damage or injury caused by mining activities.

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Taciana Peão Lopes & Advogados Associados (TPLA) is a Mozambican boutique law firm focusing its practice in core areas where it can absolutely guarantee the quality of the services and where it can aggregate value to their clients, by delivering legal service in oil & gas, mining, energy and infrastructure projects.

The practice in these sectors is focused on the following areas:

- assistance in all aspects related with petroleum operations, upstream, midstream and downstream, including the review and drafting of relevant Petroleum legislation;
- assistance in all aspects associated with drafting and negotiation of concession agreements, namely PPPs, and obtaining approvals and licensing with local authorities;
- drafting and negotiation of power generation concessions related contracts, such as power purchase agreements, facility agreements, off take agreements, transport agreements and procurement contracts; and
- assistance in all corporate related issues.

Namibia

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Axel Stritter

1 Relevant Authorities and Legislation

1.1 What regulates mining law?

The Minerals (Prospecting and Mining) Act 33 of 1992 (“**Minerals Act**”) is the principal legislation governing mining law in Namibia. Mining rights do not vest in the owners of the land and the right to prospect or mine is granted by the State under licence. It is therefore more in the nature of a personal right than a real right which avails against the whole world. While the licence confers upon the holder a right to prospect or mine subject to the conditions of the Minerals Act, the holder is not a real property owner in the true sense of the word. The Minerals Act provides for the following licences: reconnaissance licences (“**RL**”s); exclusive prospecting licences (“**EPL**”s); mineral deposit retention licences (“**MDRL**”s); non-exclusive prospecting licences (“**NEPL**”s); mining claims (“**MC**”s); and mining licences (“**ML**”s). RLs, EPLs, MDRLs, and MLs are described as “Mineral Licences”.

1.2 Which Government body/ies administer the mining industry?

The Minister of Mines and Energy is responsible for carrying out the functions as are assigned to him or her in terms of the Minerals Act, who is required to appoint the “Mining Commissioner” who exercises, subject to the direction and control of the Minister, the powers, duties and functions conferred upon the Commission by the Minerals Act and such other functions as may be imposed upon the Commissioner by the Minister.

1.3 Describe any other sources of law affecting the mining industry.

Other than the Minerals Act, the following legislation is material to the mining industry: the Environmental Management Act 7 of 2007; the Hazardous Substance Ordinance 14 of 1974; the Atmospheric Pollution Prevention Ordinance 11 of 1976; the Nature Conservation Ordinance of 1975; the Forest Act 12 of 2001; National Heritage Act 27 of 2004; the Atomic Energy and Radiation Protection Act 5 of 2005; the Labour Act 11 of 2007; Regulations issued under the Labour Act 1992; and relating to the health and safety of employees at work, the Affirmative Action (Employment) Act 29 of 1998; the Water Act 54 of 1956; the Income Tax Act 24 of 1981; and the Export Levy Act 2 of 2016.

2 Mechanics of Acquisition of Rights

2.1 What rights are required to conduct reconnaissance?

A person intending to carry on reconnaissance operations is required to be issued with a reconnaissance licence under the Minerals Act, which would allow the holder of such licence to carry on operations in a general search for any mineral or group of minerals by means of aerial sensing techniques, including geophysical surveys, photogeological mapping or imagery carried on from the air. A person who applies for a reconnaissance licence, or the holder thereof, may apply for an exclusive right to be conferred upon such person to carry on in the reconnaissance area to which such reconnaissance licence relates, reconnaissance operations in relation to any mineral or group of minerals specified in such licence, if the Minister is on reasonable grounds satisfied that the extent of the reconnaissance operations to be carried out and the expenditure to be incurred in or in relation to the reconnaissance area justifies the grant of such exclusive right.

2.2 What rights are required to conduct exploration?

A person intending to carry on exploration operations would be required to be issued with either a non-exclusive or an exclusive prospecting licence under the Minerals Act, which would allow the holder of such licence to carry on operations in connection with prospecting, including any accessing, extraction or incidental winning of any mineral or group of minerals for the purposes of mineralogical examination, assaying, testwork or marketability surveys.

2.3 What rights are required to conduct mining?

A person intending to carry on mining operations would be required to be issued with a mining licence under the Minerals Act, which would allow the holder of such licence to carry on mining operations calculated to win any mineral or group of minerals from a mine or from any ore won from a mine, and which would include any excavation or accessory works which is necessary for, or incidental to, such mining operations. A mining claims also allows the holder thereof to carry on mining operations.

2.4 Are different procedures applicable to different minerals and on different types of land?

There are no different procedures applicable for the application for licences for different minerals and different types of land, except that licences concerning diamonds are dealt with under the Diamonds Act 13 of 1999 and certain additional requirements apply to exercising of rights under mineral licences described below, save that licences which are situated on communal land would require prior notice to certain authorities as discussed under question 3.4 below.

The holder of a mineral licence is prohibited from exercising any rights conferred upon such holder by the Minerals Act or under such mineral licence:

- (a) in, on or under any *private land* until such time as such holder has entered into an agreement in writing with the owner of such land containing terms and conditions relating to the payment of compensation;
- (b) in, on or under any:
 - (i) *town or village*;
 - (ii) land comprising a *proclaimed road, aerodrome, harbour railway or cemetery*; or
 - (iii) *land used or reserved for any governmental or public purpose*,

without the prior permission of the Minister granted:

- (c) in, on or under any *land subject to a production licence*, as defined in section 1 of the Petroleum (Exploration and Production) Act 2 of 1991, which existed at the time of the issue of the licence in question, without the prior permission in writing of the holder of the production licence concerned; and
- (d) which in any way will *interfere with fishing or marine navigation*, without the prior permission of the Minister, by notice in writing and subject to such conditions as may be specified in such notice.

It is pointed out that, with regard to the above-mentioned prior permission requirements, the mineral licences would be issued without such permissions being in place, but that the rights conferred upon the holders of such licences may only exercise such rights if and when such permissions have been obtained.

The Namibian Cabinet in 2011 declared uranium, gold, copper, coal, diamonds, and rare earth metals as constituting “strategic minerals”, further stating that licences in respect of these minerals may only be issued to a State-owned company, who would be allowed to enter into joint ventures with interested parties for exploration and development. Existing explorations and mining licences would not be affected. Applications for prospecting and mining licences, and applications for mining licences by the holders of prospecting licences, in respect of “strategic minerals”, may be granted on condition requiring the licence holders: “to give the first rights of refusal of shareholding to the GRN before they can approach other parties”.

The Nature Conservation Ordinance 4 of 1975 deals with “*Game Parks*”, “*Nature Reserves*”, “*Conservancies*” and “*Wildlife Councils*”. UNESCO have voiced an interest in declaring one of these areas, the Namib-Naukluft National Park, a world heritage site. The fact that a mineral licence is located in such parks would have had a bearing on the environmental impact assessment and management plan which are required in respect of the applications for the mineral licences. That said, it worth noting that there exist a fairly large number of prospecting licences and a few mining licences in the Namib-Naukluft Park.

A *conservancy* may be declared in terms of the Nature Conservation Ordinance 4 of 1975, and a committee may be recognised as a conservancy committee which would represent such conservancy. The Minerals Act and the Nature Conservation Ordinance 4 of 1975 are silent on the interaction between these pieces of legislation. Since the Minister of Mines and Energy is, in terms of the Minerals Act, entitled to give directions in relation to conservation, it is believed that he would be able to give a direction that the prospecting practices should have regard to a game management and utilisation plan of a conservancy.

We further refer to the response to question 3.4 below concerning *communal land*.

2.5 Are different procedures applicable to natural oil and gas?

The procedures that are applicable to licences concerning natural oil and gas are governed by the Petroleum (Exploration and Production) Act 2 of 1991.

3 Foreign Ownership and Indigenous Ownership Requirements and Restrictions

3.1 What types of entity can own reconnaissance, exploration and mining rights?

An application for a reconnaissance licence, an exclusive prospecting licence and a mining licence may only be made by a company that is either incorporated under the Namibian Companies Act 28 of 2004 or a foreign registered company which is registered as an “external company” or “branch” in terms of the Companies Act 28 of 2004, or by another juristic person, and by a Namibian citizen (natural person). Any person may apply for a non-exclusive prospecting licence (whether a natural or a juristic person).

3.2 Can the entity owning the rights be a foreign entity or owned (directly or indirectly) by a foreign entity and are there special rules for foreign applicants?

Mineral licences may be held by a foreign entity which would, however, be required to register as an “external company” or “branch” in terms of the Companies Act 28 of 2004. A Namibian registered company holding mineral licences can be wholly foreign owned or controlled. A mining claim can only be applied for by a Namibian citizen, by a company whose articles of association stipulating that only Namibian citizens may own shares in such company, or another company whose articles contain such a provision, or by another juristic person. If any of the aforementioned licences and the mining claims are issued to a natural person, such person is required to be resident in Namibia, unless a resident person is designated as an accredited agent.

The Foreign Investments Act 27 of 1990

The Foreign Investments Act 27 of 1990 does stipulate that no foreign national engaged in a business activity or intending to commence a business activity in Namibia shall be required to:

- (a) provide for the participation of the government, or any Namibian as shareholder or as partner, in such business; or
- (b) provide for the transfer of such business to the government or any Namibian, provided that it may be a condition of any licence or other authorisation to, or any agreement with, a foreign national for the granting of rights over natural resources that the government shall be entitled to, or may acquire an interest in any enterprise to be formed for the exploitation of such rights.

Namibia Investment Promotion Act, 2016

On 31 August 2016, the Namibia Investment Promotion Act, 2016 was promulgated. It will, however, only come into force and effect once the Minister of Industrialisation has issued regulations and determines that this Act shall commence. Indications are that this Act will not be put into force and effect in its current form.

The Foreign Investment Act 27 of 1990 has been repealed by the Namibia Investment Promotion Act, 2016, but it is expressly stipulated that any “investment contract” or “permit” executed under the Foreign Investment Act 27 of 1990 and in force at the date of commencement of the Namibia Investment Promotion Act, 2016 would continue to be in force as if it has been made under the Namibia Investment Promotion Act, 2016. It is, however, further stipulated that despite the aforesaid provision, the “investment contract” or “permit”: (a) is subject to review by the State and may be aligned to the requirements of the Namibia Investment Promotion Act, 2016 if the circumstances so require; and (b) ceases to be of effect upon its expiry, unless the Minister of Industrialisation and the investor agree to its renewal on terms consistent with the Namibia Investment Promotion Act, 2016.

It is not clear what “investment contract or permit” is intended to mean. The Foreign Investment Act did not, in our view, provide for such contracts or permits. The intention may be to refer to permits that have been issued to foreign investors, not under the Foreign Investment Act, but in terms of other legislation. If “permit” included mineral licences or environmental clearance certificates, for example, and they expire, subject to renewal, then it seems that the holder of such licences or certificates would be required to obtain the Minister’s approval for being issued with new licences or certificates or a renewal thereof.

The extent and meaning of these provisions are not clear. We also point out that there is a strong presumption against legislation having retrospective effect under common law and the Namibian Courts would therefore interpret restrictively in this regard.

Section 9(2) of the Namibia Investment Promotion Act, 2016 stipulates that: “... an investor who had lawfully invested in an economic sector or business activity before the sector or activity has been reserved under section 8 is entitled to maintain his or her investment after the effective date of the reservation of the sector or activity”.

An investor would be entitled to maintain its investment but would still need to register with the Namibia Investment Centre.

Section 8 authorises the Minister, by issuing regulations to that effect, to reserve certain categories of:

- (a) economic sectors; or
- (b) business activities,

as exclusive to certain categories of investors, namely:

- (a) reserved for the State;
- (b) reserved for Namibians and entities whose majority shareholdings are owned by Namibians;
- (c) reserved for joint venture partnership between Namibian investors and foreign investors; and
- (d) reserved for investors that meet the requirements of section 4 and the prescribed specific conditions.

Section 9(3), however, provides further that:

“Any change in ownership or control of the maintained investments contemplated in subsection (2) is subject to the applicable requirements of Part 4.”

Part 4 provides for instance that an investor or investment in “the natural resource sector” may not:

- (a) change the ownership or control of investment; or

- (b) transfer any licence, permit, authorisation or concession owned by the investor or investment, to a foreign investor through any form of merger, acquisition, direct sale or transfer without the approval of the Minister as required by subsection (2).

The Minister may give such an approval subject to conditions.

The meaning of “change in ownership” is not entirely clear and whether or not this would include the sale of a minority shareholding in an investor entity. The intention seems to be that these words should mean a change of control, which meaning is suggested by the use of the words “or control” following “change in ownership”.

A new investor acquiring equity in an investor entity may be required to comply with the provisions of the Namibia Investment Promotion Act, 2016. “Investment” is defined in section 1 as including the acquisition by means of a minority ownership interest constituting more than 10% of the share capital of a company, but subject thereto that the investor exercises effective management, or influence on the management of the investment.

Section 12(1) provides that a foreign investor may not:

- (a) invest in Namibia; or
- (b) acquire any licence, permit, authorisation or concession in Namibia,

through any form of merger, acquisition, direct or indirect sale or transfer without the approval of the Minister.

Section 17 deals with financing transactions. Subsection (2) provides that the transfer of ownership by a financier or creditor is subject to the Namibia Investment Promotion Act, 2016. This is a concern with regard to security in the form of, for example, a pledge of shares in favour of lenders. Subsection (3) seems to qualify this and its provisions suggest that a financier would be able to execute on the security but that a third party acquiring the pledged shares for instance would still need to comply with the provisions of the Namibia Investment Promotion Act, 2016.

NEEEF Bill

Article 23 of the Namibian Constitution prohibits discrimination, except under an act of Parliament expressly providing for the advancement of persons who have been socially, economically or educationally disadvantaged by past discriminatory laws.

On 11 November 2015, the Cabinet of the Republic of Namibia adopted the New Equitable Economic Empowerment Framework (“NEEEF”) which is a revision of an earlier framework which was approved on 19 October 2011. A draft National Equitable Economic Empowerment Bill, 2015 (“NEEEF Bill”) was made available to the public during February 2016 and a revised version following a public consultation process was distributed in July 2016. A public consultation process concerning the NEEEF Bill ended on 5 August 2016.

The object of the NEEEF Bill is to promote the achievement of the constitutional right to equality, bring about socio-economic transformation in order to enhance equity and empowerment of the previously disadvantaged majority Namibians, promote a higher economic growth rate, increased employment, and improved equitable income distribution, and to implement a national policy on the NEEEF.

The Bill provides, amongst others, that: a “private sector enterprise” which carries on business immediately before the commencement of the NEEEF Bill (if enacted), or is established after the commencement of the NEEEF Bill, must within a prescribed period sell at least 25% ownership, or such percentage as may be determined by the Minister (the particular Minister is still to be determined) to a previously disadvantaged person or persons.

“Private sector enterprise” means any business carried on for gain or reward by an individual, a body corporate, an unincorporated body of persons or a trust in the production, supply or distribution of goods or the provision of any service, but excluding private enterprises with a turnover of less than a monetary amount that is still to be determined.

Section 23(4) would provide, amongst other, that licences, and permits may only be issued by a government body to a private sector enterprise if they are in possession of a valid economic compliance certificate as determined by the economic empowerment standards. As these standards have not been set as yet, it is undetermined what requirements need to be complied with in order to be issued with such a certificate. Subsection (5) would provide for the possibility of a private sector enterprise who is either unable to comply with the provisions of section 23(1) or who does not hold a certificate, to apply to the Minister to be exempted from the requirements to either comply with section 23(1) or hold the said certificate. Subsection (6) provides that the Minister may grant an exemption “upon proof ... in accordance with criteria determined by the economic empowerment standards and upon being satisfied that the failure to comply ... is not due to such enterprise’s fault ...”. It is not clear on what basis the Minister would be able to grant an exemption.

It is further intended that an established “Economic Empowerment Advisory Council” would issue economic empowerment standards for each sector of the economy, setting out, amongst others:

- (a) qualification and accreditation criteria for preferential purposes for procurement and other economic activities;
- (b) economic transformation targets;
- (c) the definition and parameters of a scorecard determining:
 - (i) indicators to measure economic transformation and empowerment;
 - (ii) scores and weightings to be attached to the indicators referred to in subparagraph (i); and
 - (iii) economic empowerment targets and thresholds in respect of each pillar of economic empowerment against which compliance with the Economic Empowerment Framework is measured;
- (d) guidelines for stakeholders in different sectors of the economy to draw up sector-specific transformation charters for their sector; and
- (e) verification and certification criteria for rating the compliance status of private sector enterprises including the appointment of verification professionals and agencies.

It is the Prime Minister who would introduce the NEEEF Bill in the National Assembly of Namibia, which forms part of Parliament. The Law Reform and Development Commission (LRDC) is responsible in assisting with the drafting of the NEEEF Bill. The LRDC, on 31 August 2016, submitted its report to the Prime Minister advising on the responses received at the consultative meetings with the public and the stakeholders. At the time of writing this chapter, a further draft or final Bill had not been submitted.

3.3 Are there any change of control restrictions applicable?

Minerals Act

Other than a notification requirement, the Minerals Act does not provide for any change of control restrictions. The Minerals Act does stipulate that prior written approval from the Minister of Mines and Energy would be required if there is a transfer of a mineral licence, or the acquisition of any “interest” in such a licence. Other than that, there is simply a notification requirement if more than 5% of the shares in a company holding a licence is acquired by

any person, of which notification must be made within 30 days following such change.

The provisions relating to the requirement for the Minister’s approval in respect of a transfer of an interest in a mineral licence makes no reference to changes in shareholding of the holder of a mineral right and/or to changes in control by way of changes in holding companies. In fact, the whole Minerals Act contains no reference to changes in shareholding in the holder of a mineral right requiring the consent of the authorities, and there is only the aforementioned notification obligation when there is a change in shareholding. The term “interest” in a mineral licence is not so broad as to negate the separate legal existence of a shareholder from the company that holds the mineral licence.

The aforementioned provisions only relate to a transfer of mineral licences or a grant, cession or assignment of an interest in such licences and one cannot interpret these provisions to mean that they also relate to a change in the shareholding of a holder of a mineral licence. The contrary intention does not appear from the legislation. Accordingly, the acquisition of shares in a company that holds a mineral licence would not require approval from the Minister under the provisions of the Minerals Act. The same would also be true for the acquisition of shares in such licence holder’s holding company.

Competition Act, 2003

In terms of the *Competition Act, 2003*, a merger occurs when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking.

An undertaking is defined as being any business carried on for gain or reward by an individual, a body corporate, an unincorporated body of persons or a trust in the production, supply or distribution of goods or the provision of any service.

A merger may be implemented in any manner, including specifically a purchase of shares, or a purchase of an interest or assets of the other undertaking.

Approval is required to be obtained prior to implementation of a transaction that results in a change of control of an “undertaking”. A person, *inter alia*, controls an undertaking if it beneficially owns more than half of the issued share capital, if it has the ability to appoint the majority of the directors, or if it has the ability to materially influence the policy of the undertaking.

There exist divergent views on whether a company conducting exploration operations, but not otherwise involved in the supply or distribution of goods or services (for its gain), would constitute an undertaking within the definition of that term under the *Competition Act, 2003*. The Competition Commission did in respect of past transactions state that it is its view that the acquisition of control of a company conducting exploration operations constitutes a notifiable merger.

Further to the prior approval from the Namibian Competition Commission, we refer to the responses under the paragraph above concerning the *Namibia Investment Promotion Act, 2016*, the *Foreign Investments Act 27 of 1990* and the *NEEEF Bill*.

3.4 Are there requirements for ownership by indigenous persons or entities?

No. The Communal Land Reform Act, 2002 provides that every person who wants to carry out any prospecting or mining operations as contemplated in the Minerals Act, on communal land must notify, prior to the making of any application in terms of the Minerals Act, the Chief or Traditional Authority of the traditional community and the Communal Land Board, of its intention to

apply as aforementioned. The Chief or Traditional Authority and the Communal Land Board must provide their recommendations whether an application be granted or not, and the Minister of Mines and Energy would consider such recommendation but may disregard the same. The purpose of the aforesaid notification requirement is probably that the “beneficiaries” of the communal land, including the holders of any customary land rights and rights of leasehold, should be consulted and be heard, before a decision is taken which adversely affects their rights.

3.5 Does the State have free carry rights or options to acquire shareholdings?

The State does not have free carry rights. The Namibian Cabinet in 2011 declared uranium, gold, copper, coal, diamonds, and rare earth metals as constituting “*strategic minerals*”, further stating that licences in respect of these minerals may only be issued to a State-owned company, who would be allowed to enter into joint ventures with interested parties for exploration and development. Existing explorations and mining licences would not be affected. Applications for prospecting and mining licences, and applications for mining licences by the holders of prospecting licences, in respect of “strategic minerals”, may be granted on condition, requiring the licence holders: “to give the first rights of refusal of shareholding to the GRN before they can approach other parties”.

4 Processing, Refining, Beneficiation and Export

4.1 Are there special regulatory provisions relating to processing, refining and further beneficiation of mined minerals?

Standard Licence Conditions

The Minerals Act authorises the Minister of Mines and Energy to grant applications for mineral licences on such terms and conditions as may be determined by the Minister. In February 2016, new standard licence conditions were issued which are intended to apply in respect of all new exclusive prospecting licences and mining licences, and would be made applicable when such mineral licences are renewed.

In terms of the standard licence conditions, it is stipulated that an applicant for a mining licence or the renewal thereof would need to submit for approval of the Minister, its projected production profile for the first year, and for the following four years thereafter. It is further stipulated that an applicant would be obliged to: “*ensure that 30% of the final product from the mine is added value locally at commercial arm’s length transaction terms not less favourable than the applicant’s other customers*”, and further that: “*Where such a value addition project does not exist locally, the applicant shall establish such a value addition facility in Namibia. Where the applicant is unable to establish such a facility in Namibia, the applicant shall show good cause of its inability to establish such facilities.*” An applicant would also be required to: “*keep a production inventory and an updated resource statement at all times and shall make it available to the Minister ... upon request.*”

Further Royalty

The Minerals Act authorises the Minister of Mines and Energy to impose a further royalty if the Minister is of the opinion that, amongst others, an addition to the value of the mineral in question

is possible in Namibia. The Minister is obliged to afford a mineral licence holder the opportunity to make representations in respect of an intended imposition of such royalties prior to implementing them.

Joint Value Addition Committee

A Joint Value Addition Committee (JVAC) was sanctioned by the Committee of Ministers as per the Government’s national development plan objectives and has been tasked to develop a value addition strategy for Namibia. The JVAC is constituted by the Ministry of Trade and Industry, the Ministry of Mines and Energy, the Ministry of Finance, the National Planning Commission and the Chamber of Mines. The objectives of the JVAC are to limit the export of “raw” Namibian minerals, increase export revenue, create more job opportunities, and to diversify and stimulate economic growth. The goals of the JVAC are to propose necessary measures for the Government of Namibia to adopt in order to attract investments in manufacturing industries based on mineral beneficiation and value addition, to draft a “Value Addition Strategy for Namibia” and identify incentives to promote value addition locally.

Export Levy Act

The Export Levy Act, 2016 came into operation on 1 June 2017. One of the objectives of this act is to encourage further processing or beneficiation of or value addition to goods. The Export Levy Act, 2016 introduces an export levy at rates between zero and 2% depending on the type of raw materials exported calculated on the value of the export of raw minerals, which would be the “*free on board price*” of such goods. It is stipulated that “free on board” includes all profits, costs, charges and expenses up to the place where the goods would leave Namibia, including any agent’s commission calculated on such profits, costs, charges or expenses. The Export levy rate in respect of uranium oxide or yellow cake would amount to 0.25%.

4.2 Are there restrictions on the export of minerals and levies payable in respect thereof?

See question 4.1 above concerning export levies which are imposed under the Export Levy Act, 2016.

The export of minerals from Namibia requires the permission of the Mining Commissioner unless exemption is granted.

The import into or export from Namibia, or transportation of any radiation source or nuclear material, requires authorisation from the Director-General of the National Radiation Protection Authority. The Minerals Act further provides that the export of source material containing uranium or thorium of a certain content and weight requires the permission of the Minister of Mines and Energy.

The export of diamonds is separately dealt with under the Diamonds Act 13 of 1999.

5 Transfer and Encumbrance

5.1 Are there restrictions on the transfer of rights to conduct reconnaissance, exploration and mining?

Please see question 3.3.

The transfer of any interest in an exclusive prospecting licences, a mining licence and a mineral deposit retention licence requires the prior approval of the Minister of Mines and Energy.

5.2 Are the rights to conduct reconnaissance, exploration and mining capable of being mortgaged or otherwise secured to raise finance?

The rights in or to an exclusive prospecting licence, a mining licence and a mineral deposit retention licence could be ceded for purposes of raising finance, subject to the prior approval of the Minister of Mines and Energy, which would generally be structured as a cession *in securitatem debiti*. Although the Namibian courts have yet to pronounce themselves on the doctrinal basis of security cessions, it is very likely that the Namibian courts will follow the lead of the South African Supreme Court of Appeal which found that a security cession would be regarded as a pledge of the right in question: dominium of the right remains with the licence holder and vests upon its insolvency in its liquidator. The cessionary would be in the position of a secured creditor in the insolvent estate of the mineral licence holder.

6 Dealing in Rights by Means of Transferring Subdivisions, Ceding Undivided Shares and Mining of Mixed Minerals

6.1 Are rights to conduct reconnaissance, exploration and mining capable of being subdivided?

Subject to the prior approval of the Minister of Mines and Energy, it is possible to cede or assign any interest in a mining claim, an exclusive prospecting licence, a mining licence and a mineral deposit retention licence.

6.2 Are rights to conduct reconnaissance, exploration and mining capable of being held in undivided shares?

The Minerals Act expressly provides for a person to be joined as a joint holder of a mining claim, an exclusive prospecting licence, a mining licence and a mineral deposit retention licence.

6.3 Is the holder of rights to explore for or mine a primary mineral entitled to explore or mine for secondary minerals?

An exclusive prospecting licence and a mining licence entitle the holders thereof to carry on prospecting – and mining operations in the prospecting – a mining area to which such licence relates in respect of only the mineral or group of minerals specified in such licence. A licence holder is, however, allowed to remove any mineral (and with the permission of the Mining Commissioner, to remove minerals for the purpose of sale or disposal, from any place where it was found or incidentally won in the course of prospecting or mining operations.

6.4 Is the holder of a right to conduct reconnaissance, exploration and mining entitled to exercise rights also over residue deposits on the land concerned?

There is uncertainty in law as to whether a mining licence entitles the holder thereof to exercise its rights in respect of residue deposits on the relevant land. Any operations calculated to win any mineral from a mine or from any ore won from a mine, and any operations which are necessary for, or incidental to, such operations, constitute

mining operations in respect of which a mining licence is required. A literal interpretation of the words “win any mineral from any ore”, suggests that minerals that are extracted from deposits would require a mining licence to be issued since the ore could be contained in deposits. A counter argument may be that the ordinary meaning of “ore” is a naturally occurring mineral and that minerals that are contained in residue deposits do not occur naturally. A further argument that could be made out is that reconnaissance, prospecting and mining licences are required in relation to “minerals”. The definition for “*mineral*” refers to any substance “*occurring naturally in, on or under any land*”. The argument would be the same as with regard to the ordinary meaning of “ore”, namely that “minerals” which are contained in residue deposits cannot be said to occur naturally, and that therefore no mineral licence would be required in respect of minerals that occur in residue deposits.

6.5 Are there any special rules relating to offshore exploration and mining?

No. The Minerals Act would apply to offshore exploration and mining if such operations are conducted within the national territory of Namibia. There is an express provision in the Minerals Act, requiring the prior permission from the Minister of Mines and Energy to exercise any rights under a mineral licence and which would: “*in any way ... interfere with fishing or marine navigation*”.

7 Rights to Use Surface of Land

7.1 Does the holder of a right to conduct reconnaissance, exploration or mining automatically own the right to use the surface of land?

No. A person can be issued with a mineral licence or a mining claim, but if the reconnaissance, exploration or mining operations are conducted in, on or under any private land, the holders of such licences would first need to enter into an agreement with the owner of such land which is required to provide for the payment of compensation, unless the owner has waived the right to such compensation. If the owner of the land in question refuses to enter into an agreement as aforesaid, or demands terms and conditions that are unreasonable, the holder of the mineral licence or mining claim may apply to the Minerals Ancillary Rights Commission to grant a right to enter land in order to carry on operations authorised by its licence on such land.

We further refer to the responses to questions 2.4 and 3.4 above concerning prospecting and mining operations on, amongst other, a town and communal land.

7.2 What obligations does the holder of a reconnaissance right, exploration right or mining right have vis-à-vis the landowner or lawful occupier?

The Minerals Act does not properly deal with the interaction of the landowner's property rights vis-à-vis the mineral licence holders rights under its licences and in term of the Minerals Act.

The Minerals Act does provide for an obligation to pay compensation as is stated under question 7.1 above.

In terms of the Minerals Act, it is a term and condition of any mineral licence that the holder of such mineral licence is required to exercise any right under such licence reasonably and in such manner that the rights and interests of the owner of any land to which such licence relates are not adversely affected, except to the extent to which such owner is compensated.

The Minerals Act expressly provides further that “when, in the course of any prospecting operations or mining operations in any prospecting area, mining area or retention area, as the case may be, any damage is caused or done to the surface of any land or to any water source, cultivation, building or other structure therein or thereon as a result of such operations, the holder of the mineral licence in question shall be liable to pay compensation to the owner of the land, water source, cultivation, building or other structure, as the case may be, in relation to which such damage has been caused or done”.

7.3 What rights of expropriation exist?

Article 16 of the Constitution of the Republic of Namibia of 1990 grants all persons the right to acquire, own and dispose of all forms of immovable and movable property (which would include the rights afforded to the holders of mineral licences), provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens. The State may, subject to payment of just compensation in accordance with requirements and procedures to be determined by an Act of Parliament, expropriate property in the public interest.

8 Environmental

8.1 What environmental authorisations are required in order to conduct reconnaissance, exploration and mining operations?

The Environmental Management Act 7 of 2007 (“EMA”) provides that no person may undertake a listed activity without an environmental clearance certificate (“ECC”) having been issued by the environmental commissioner, unless an exemption has been granted. The aforesaid “List of Activities” requiring an ECC to be issued, includes, *inter alia*, mining and quarrying activities, waste management, water resource developments, hazardous substance treatment, storage and handling of hazardous substances, and the construction of certain infrastructure.

An ECC remains effective for a period not exceeding three years. The EMA does not provide for renewals except for stating that the Minister of Environment and Tourism may issue regulations concerning the form and content of an application for renewal of a Clearance Certificate. No such regulations have, however, been issued yet. Strictly speaking, one would be required to apply again for an ECC to be issued in order to be allowed to continue undertaking the listed activities for the period after the three-year validity period.

The applicant of a mineral licence would need to apply to the Minister of Mines and Energy for an ECC to be issued. The Minister would provide the application to the Environmental Commissioner (“EC”). The applicant would prepare a draft scoping report and in conducting a public consultation process, give interested and affected parties an opportunity to comment thereon. A final scoping report is then prepared after taking into consideration all objections and representations received from interested and affected parties. The applicant then submits to the Minister of Mines and Energy, the final scoping report, an environmental management plan, copies of representation, objections and comments received from interested and affected parties, minutes of meetings with interested and

affected parties, and the applicants responses thereto. The Minister of Mines and Energy would then forward the application for the ECC to the EC, who must register the application and either accept or reject the Scoping Report and decide whether a proposed activity requires a detailed assessment. If the EC decides that no detailed assessment is required, s/he must issue an ECC. If the EC decides that an assessment is required, s/he would notify the proponent of such decision and the procedure to be followed for submitting an assessment report. The applicant would need to instruct an Environmental Assessment Practitioner to prepare an environmental impact assessment. The EC would review the application and either refuse or grant the application to issue an ECC.

Under the Minerals Act, in addition to any terms and conditions contained in a mineral licence, it is deemed to be a term thereof that the holder shall prepare an environmental impact assessment for the approval of the Mining Commissioner indicating the extent of any pollution of the environment before any prospecting operations are being carried out and an estimate of any pollution likely to be caused by such operations, and if any pollution is likely to be caused, an environmental management plan indicating the proposed steps to be taken in order to minimise or prevent to the satisfaction of the Mining Commissioner any pollution of the environment in consequence of any prospecting operations and from time to time as circumstances change to revise such environmental management plan.

8.2 What provisions need to be made for storage of tailings and other waste products and for the closure of mines?

A “waste disposal site” constitutes “accessory works” in terms of the Minerals Act which requires the holder of an exclusive prospecting licence to obtain prior permission for the erection of any accessory works (“waste” is defined as meaning “any waste rock, tailings, slimes or other residue derived from any prospecting operations, mining operations or processing of any mineral or group of minerals”).

It should be noted that in 2003, the Ministry of Mines and Energy published a Minerals Policy aimed at amending the Minerals Act. Although not yet promulgated, it makes provision for mandatory mechanisms for the funding of final closure. The Minerals Policy states that before a mining licence is granted, there should be a Final Mine Closure Plan together with a funding mechanism that describes how the company will deal with matters like groundwater pollution, soil degradation, wind pollution and infrastructure. Unfortunately, the Minerals Policy does not elaborate and merely provides that “[the] Government will investigate the establishment of mandatory mechanisms for the funding of Final Mine Closure Plans.” It is, however, noted that no indication has been given by Namibian authorities as to when the Minerals Policy, and the mandatory mechanism, will be promulgated.

The Chamber of Mines of Namibia has drafted the ‘*Namibian Mine Closure Framework*’ (“NMCF”) for the purpose of providing guidance for the Namibian mining industry on how to develop relevant, practical and cost-effective closure plans and to lay down minimum requirements for the members of the Chamber bound by its code of conduct and ethics. The NMCF was developed by the Chamber’s Rehabilitation and Closure Committee based on the Australian Strategic Framework for Mine Closure (ANZMEC/MCA 2000, Australian and New Zealand Minerals and Energy Council, Canberra, and Minerals Council of Australia, Canberra).

8.3 What are the closure obligations of the holder of a reconnaissance right, exploration right or mining right?

See question 8.2 above.

8.4 Are there any zoning or planning requirements applicable to the exercise of a reconnaissance, exploration or mining right?

There are not any zoning or planning requirements applicable.

9 Native Title and Land Rights

9.1 Does the holding of native title or other statutory surface use rights have an impact upon reconnaissance, exploration or mining operations?

Yes. When applying for mineral licences concerning land that is situated on communal land, an applicant would be required to give prior notice to the Chief or Traditional Authority of the traditional community and the Communal Land Board, of its intention to apply as discussed under question 3.4 above.

The Communal Land Reform Act 5 of 2002 provides for the allocation of rights in respect of communal land. It establishes Communal Land Boards and provides for the rights and powers of traditional leaders and Communal Land Boards in relation to communal land.

All communal land areas vest in the State in trust for the benefit of the traditional communities residing in those areas and for the purpose of promoting the economic and social development of the people of Namibia.

The chief of a traditional community, or where the chief so determines, the traditional authority of that traditional community, has the power to allocate or cancel any customary land right in respect of any portion of land in the communal area of a traditional community.

Customary land rights that may be allocated are a right to a farming unit, a right to a residential unit, and a right to any other form of customary tenure that may be recognised and described by the Minister of Land Reform. The commonage in the communal area of a traditional community is available for use by the lawful residents of such area for the grazing of their stock, subject to the provisions of the act.

10 Health and Safety

10.1 What legislation governs health and safety in mining?

The regulations promulgated under the previous Labour Act 6 of 1992 relates to the Health and Safety of employees at work. Some of the mining companies choose to voluntarily comply with and implement comprehensive Safety, Security, Health, Environment and Quality systems in compliance with international safety standards (OHSAS 18001 and ISO 14001). The whole of the Mines, Works and Minerals Ordinance 1968 (Ordinance 20 of 1968) has been repealed by the Labour Act, 1992, insofar as it relates to the health and safety of workers employed in or in connection with mining and prospecting operations, and by the Minerals Act, except in so far as it relates to the appointment and powers, duties and

functions of the Chief Inspector of Mines and an inspector of mines, and the safety and health of persons employed in or in connection with mines and works.

10.2 Are there obligations imposed upon owners, employers, managers and employees in relation to health and safety?

In terms of the Labour Act 11 of 2007, an employer has certain duties to employees with regard to health and safety. These include that an employer or the person in charge of premises where employees are employed must, without charge: provide a working environment that is safe; is without risk to the health of employees; and has adequate facilities and arrangements for the welfare of employees. An employer is furthermore required to, amongst others, provide and maintain plant, machinery and systems of work, and work processes, that are safe and without risk to the health of employees, provide employees with adequate personal protective clothing and equipment if reasonably necessary and ensure that the use, handling, storage or transport of articles or substances is safe and without risk to the health of the employees. Furthermore, the Labour Act places certain obligations on an employer to report to a labour inspector in the prescribed manner, whenever there is an accident at any place where the employer's employees work or a prescribed disease is contracted at such place.

11 Administrative Aspects

11.1 Is there a central titles registration office?

In terms of the Minerals Act, the Mining Commissioner is required to keep a "Register of Mineral Licences". The register of Licences exists as a computer database at the Ministry, which can be inspected. The Minerals Act provides that an extract from the Register of Mineral Licences, certified by the Mining Commissioner to be true and correct, shall, unless the contrary is proved, be conclusive evidence of the facts mentioned therein. The correctness of the Register is thus not warranted in terms of the Minerals Act. This Register would reflect the names of the licence holders, the validity period of licences, the extent of the licence areas and the minerals in respect of which these had been issued.

11.2 Is there a system of appeals against administrative decisions in terms of the relevant mining legislation?

Any person who feels aggrieved with any action or decision taken or made by the Mining Commissioner in terms of any provision of the Minerals Act, may, within 30 days as from the date on which such action or decision was made known to such person, lodge an appeal against any such action or decision, and thereupon the Minister of Mines and Energy may confirm, set aside or amend any such action or decision.

The Constitution of the Republic of Namibia of 1990 provides that administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.

Thus, an administrative act can be set aside by a court on review upon the request of an aggrieved person where the administrative official failed to act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any

relevant legislation. Such person need not be a Namibian resident or citizen; if a foreign investor can prove legal standing such investor can bring a review application.

12 Constitutional Law

12.1 Is there a constitution which has an impact upon rights to conduct reconnaissance, exploration and mining?

Article 100 of the Constitution of the Republic of Namibia of 1990 provides that natural resources below and above the surface of the land and in the continental shelf and within the territorial waters of Namibia shall belong to the State if they are not otherwise lawfully owned. Article 100 forms part of Chapter XI of the Constitution, which sets out the principles of state policy. These principles, including the one stipulating that water shall belong to the State if not otherwise lawfully owned, are not of and by itself legally enforceable by any Court, but nevertheless would guide the Government in making and applying laws to give effect to such principles, and the Courts are entitled to have regard to the said principles in interpreting any laws based on them.

Since the passing of the Minerals Act, mining rights no longer vest in the owners of the land. The right to prospect or mine is granted by the State under licence. It is therefore more in the nature of a personal right than a real right which avails against the whole world. While the licence confers upon the holder a right to prospect or mine subject to the conditions of the Act, the holder is not a real property owner in the true sense of the word.

12.2 Are there any State investment treaties which are applicable?

Namibia has signed Bilateral Investment Treaties with Austria, France, Germany, the Netherlands, Spain, and Switzerland.

13 Taxes and Royalties

13.1 Are there any special rules applicable to taxation of exploration and mining entities?

Mining companies, other than diamond companies, are liable to pay 37.5% income tax. Diamond mining companies and diamond mining services companies are required to pay 55%. Natural oil, oil and gas extraction is dealt with separately under the Petroleum Taxation Act 1991, and would pay 35% plus additional profits tax, and companies that are not in the mining industry pay 33% income tax.

Under the Income Tax Third Amendment Act, 2011, the definition of 'gross income' has been amended to include any amount received or accrued from another person as consideration or the open market value by way of a sale, donation, expropriation, cession, grant or other alienation or transfer of ownership of a mineral licence as defined in the Minerals Act, or right to mine minerals in Namibia, and includes a sale of shares in a company for a licence or right to mine minerals in Namibia. Income tax would thus be payable on the income that is earned from a sale as referred to in the definition of 'gross income'.

13.2 Are there royalties payable to the State over and above any taxes?

There are three different types of royalty provided for in terms of the Minerals Act.

The Minerals Act provides for a royalty that is levied on the market value of the minerals at a rate as may be determined by the Minister from time to time: the Minister may impose different percentages of royalties on different mineral licence holders, irrespective of the type of mineral, without a limitation.

As of the date of writing this chapter, the percentage of market value of minerals leviable as a royalty holder is 3% in respect of precious metals, base and rare metals, and nuclear fuel minerals, and 2% in respect of semi-precious stones, industrial minerals, and non-nuclear fuel minerals.

If the Minister is of the opinion that an addition to the value of the mineral in question is possible in Namibia, the minerals are sold at less than their international market value, or the fees, charges or levies deducted from the selling price were not in conformity with the rates charged in international markets, s/he may impose a further royalty. The Minister must, however, afford a mineral licence holder an opportunity to make representations in respect of an intended imposition of royalties prior to its imposition.

A third royalty, called a 'windfall royalty', may be levied if the Minister is of the opinion that market prices have increased to such an extent that the operations have become significantly more profitable than similar operations are in normal circumstances or new technology or other unforeseen circumstances have made operations significantly more profitable. This royalty may only be imposed if the Minister gives notice to the affected licence holders of the intention to levy this royalty, and afforded them the opportunity to make representations in respect of proposals relating to the investment of such profits in new or improved operations or infrastructure.

14 Regional and Local Rules and Laws

14.1 Are there any local provincial or municipal laws that need to be taken account of by a mining company over and above National Legislation?

The Minister of Urban and Rural Development may, in terms of the Town Planning Ordinance 18 of 1954, establish "Town Planning Schemes" which may provide for various matters that may restrict or prohibit prospecting and mining operations. Every town planning scheme has as its general purpose a co-ordinated and harmonious development of the areas situated therein, to which it relates in such a way as will most effectively tend to promote health, safety, order, amenity, convenience and general welfare, as well as efficiency and economy in the process of development and the improvement of communications. A scheme contains such provisions as may be deemed necessary for regulating, restricting or prohibiting the development of the area to which the scheme applies and generally for carrying out any of the objects for which the scheme is made, i.e. a Town Planning Scheme would stipulate different "uses" being those uses for which land and buildings may be erected and/or used. The Schemes would also contain building restrictions, and provisions relating to safety, health, amenity and convenience.

A local authority may, in terms of the Local Authorities Act 23 of 1992 make regulations relating to the waste management and adopt and amend building regulations.

14.2 Are there any regional rules, protocols, policies or laws relating to several countries in the particular region that need to be taken account of by an exploration or mining company?

Namibia is a member of the Southern African Development Community (SADC) (SADC Member States: Angola; Botswana; the Democratic Republic of Congo; Lesotho; Madagascar; Malawi; Mauritius; Mozambique; Namibia; Seychelles; South Africa; Swaziland; United Republic of Tanzania; Zambia; Zimbabwe; a regional economic community; and the Southern Africa Customs Union (SACU) (SACU members: Namibia; Botswana; Lesotho; Swaziland; and South Africa), a custom union offering duty and quota-free access to the markets in South Africa and other countries. Through its membership, Namibia is afforded preferential trade links to the inhabitants in southern Africa.

15 Cancellation, Abandonment and Relinquishment

15.1 Are there any provisions in mining laws entitling the holder of a right to abandon it either totally or partially?

The Minerals Act refers to the abandonment of an area without stipulating whether or not it is possible to abandon only part of or the whole of an area. The holder of a mining claim may abandon such mining claim, and a holder of a mineral licence may abandon the reconnaissance area, prospecting area, retention area or mining area to which such licence relates by notice to the Mining Commissioner. The claim or licences would need to be returned whereupon the Commissioner would be obliged to cancel such mining claim or mineral licence.

The holder of the mining claim or mineral licence abandoned as aforesaid would be required to:

- (a) demolish any accessory works constructed in such area, and remove from such land all debris and any other object brought onto such land; and

- (b) take all such steps as may be necessary to remedy to the reasonable satisfaction of the Minister of Mines and Energy any damage caused by any prospecting operations and mining operations carried on by such holder to the surface of, and the environment on, the land in the area in question.

15.2 Are there obligations upon the holder of an exploration right or a mining right to relinquish a part thereof after a certain period of time?

In respect of the renewal of an exclusive prospecting licence, the prospecting area would be reduced to 75% of the area of the original licence, and 50% in respect of the second and subsequent renewals, unless approval is granted by the Minister of Mines and Energy for a larger area, granted in the interest of the development of the mineral resources of Namibia and on good cause shown by the holder of the licence. There are no similar provisions with regard to mining claims, mineral deposit retention licences and mining licences. A non-exclusive prospecting licence and a reconnaissance licence cannot be renewed.

15.3 Are there any entitlements in the law for the State to cancel an exploration or mining right on the basis of failure to comply with conditions?

In terms of the Minerals Act, the Minister of Mines and Energy may cancel a mineral licence if the holder thereof fails to comply with the terms and conditions of a licence or the provisions of the Minerals Act.

The Minister shall not, however, cancel a mineral licence, unless the Minister has given notice informing the holder of his intention to cancel calling upon such holder to make representations; and the Minister having considered such representations including any steps taken by such holder to remedy the failure in question.

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Axel Stritter was admitted as an attorney in Namibia in 2003 with Bachelor degrees in Arts and Laws (BA. LL.B.), and became a partner at Engling, Stritter and Partners in 2007.

He focuses primarily on mining, corporate and commercial work, and has gained extensive experience in mining projects and associated infrastructure challenges pertaining to power and water, and relating environmental matters.

He has advised on all aspects of general corporate law, including mergers and acquisitions and regulatory aspects, and has advised on transactions in various sectors, including mining, renewable energy, and financing.

Axel is frequently engaged in conducting due diligence reviews for petroleum and mineral exploration companies, and preparing legal reports and opinions on petroleum and mineral interests for the purposes of acquisitions and takeovers, capital raisings and initial public offerings.

He has also worked on a number of renewable energy and infrastructure projects, and advised bidders and lenders in respect thereof.

Engling, Stritter
and Partners

Engling, Stritter & Partners (ESP) can trace its roots back to as far as the 1920s and is one of the largest corporate and commercial law firms in Namibia, and has enjoyed year-on-year growth in each of the sectors in which it operates.

The firm enjoys a high profile in the Namibian legal and business community being primarily a commercial and corporate legal practice, representing a substantial number of sizeable Namibian and international companies both listed and unlisted.

The firm has a broad dealsheet, and recent highlights include project financings, M&A and numerous competition mandates. Product specialisations include: Mining; Corporate and Commercial Law; Competition Law; Mergers and Acquisitions; Energy and Environment; Project Finance; and Infrastructure Development.

Poland

Wolf Theiss

Ronald B. Given



1 Relevant Authorities and Legislation

1.1 What regulates mining law?

Mining law in Poland is regulated primarily by the Geological and Mining Law of 9 June 2011 and by the Ordinance of the Council of Ministers of 10 January 2012 on the tender for the establishment of a mining usufruct (the “**Ordinance**”). The Geological and Mining Law sets out the rules and conditions for undertaking, pursuing, and concluding: geological works; extraction of minerals from deposits; underground tankless storage of substances; underground storage of waste; and geological carbon dioxide storage as well as the requirements for the protection of mineral deposits; groundwater; and other aspects of the environment. The Ordinance sets out tender details and the procedure for organising and conducting a tender.

1.2 Which Government body/ies administer the mining industry?

Geological administration authorities include: the Minister of the Environment; marshals of voivodships; and heads of poviats.

State geological services are performed by the Polish Geological Institute – National Research Institute, which: initiates; coordinates; and fulfils responsibilities aimed at exploring the geological structure of the country; maintains a central geological archive; gathers and makes available geological information; maintains geological databases; draws up a national assessment of mineral deposit reserves; coordinates and performs geological cartography works (and performs related pilot works); maintains a register of mining districts and closed geological carbon dioxide repositories; and identifies and monitors geological risks.

Mining supervisory authorities are: the President of the State Mining Authority; directors of local mining authorities; and the Director of the Specialist Mining Authority. The President of the State Mining Authority is a government administration authority, acting under the supervision of the Minister of Energy.

1.3 Describe any other sources of law affecting the mining industry.

The mining industry is affected by:

- the Environmental Protection Law of 27 April 2001 which sets out the principles governing environmental protection and the use of environmental resources with regard to sustainable development requirements;

- the Act on preservation of the national character of the strategic natural resources of the country of 6 July 2001 which specifies Polish strategic natural resources;
- the Ordinance of the Minister of Environment of 24 April 2012 on the detailed requirements for projects for the development of deposits which specifies what should be included in projects for the development of deposits; and
- the Act on the function of hard coal mining of 7 September 2007 which sets out the principles for financial restructuring of mining enterprises, rules for liquidation of mines, rules for employment restructuring in liquidated mines, conditions for obtaining initial investment subsidies, and principles of corporate governance.

2 Mechanics of Acquisition of Rights

2.1 What rights are required to conduct reconnaissance?

The following activities require a concession under the Polish Geological and Mining Law: (i) prospecting for or exploration of mineral deposits covered by mining ownership (other than hydrocarbon deposits); (ii) prospecting for or exploration of a geological carbon dioxide storage complex; (iii) extraction of minerals from deposits; (iv) prospecting for or exploration of hydrocarbon deposits and extraction of hydrocarbons from deposits; (v) underground tankless storage of substances; (vi) underground storage of waste; and (vii) geological storage of carbon dioxide. The catalogue of specified activities is closed, meaning that the performance of other regulated activities (e.g., the search and recognition of therapeutic waters, brine and thermal waters) is exempt from the obligation to obtain a concession.

2.2 What rights are required to conduct exploration?

Please refer to question 2.1 above.

2.3 What rights are required to conduct mining?

The rights required for conducting mining (i.e., extraction of minerals from deposits, underground tankless storage of substances, underground landfilling of waste, and underground carbon dioxide storage) depend of the legal status of the deposit.

Mining usufruct contract

In the case of deposits covered by mining ownership, apart from obtaining a concession, it is necessary to conclude a written agreement with the State Treasury.

Mining ownership applies to deposits of certain minerals, which are always owned by the State Treasury, irrespective of their location. These deposits are: hydrocarbons; hard coal; methane existing as an accompanying mineral; brown coal; metal ores; with the exception of bog meadow iron ores and native metals; ores of radioactive elements; native sulphur; rock salt; potassium salt; magnesium-potassium salt; gypsum and anhydrite; and precious stones. In the case of these deposits it is necessary to conclude a written contract on the establishment of a mining usufruct. The establishment of a mining usufruct may be preceded by tendering, in particular if more than one interested party applies for it.

Concession

In the case of every deposit, in order to conduct mining, a concession is required. The concession is granted by:

- the Minister of the Environment in the case of extraction of minerals from deposits covered by mining ownership, extraction of minerals from deposits situated within the boundaries of the maritime areas of the Republic of Poland, underground tankless storage of substances, underground landfilling of waste, and underground carbon dioxide storage;
- *starosta* (a representative of a local authority, for example, of a city), if the area of a documented deposit which is not covered by mining ownership does not exceed two hectares, annual extraction of the mineral from the deposit does not exceed 20,000 cubic metres per calendar year, and the activity will be carried out by open-cast mining and without the use of blasting agents;
- the marshal of a voivodeship (a regional self-governing authority) for any other cases.

A concession is granted for a definite period of time, no less than 3 years and no more than 50 years (subject to certain exceptions) and details the scope of the permitted activities.

2.4 Are different procedures applicable to different minerals and on different types of land?

Yes, there are some differences. The authority granting a concession may be different, depending on the types of mineral and in the location, e.g., in the case of maritime areas.

Moreover, certain minerals and different types of land require special approvals, in particular:

- prospecting, exploring and extraction of ores of radioactive elements (the President of the National Atomic Energy Agency);
- prospecting, exploring and extraction of hydrocarbons in marine areas (the President of the Higher Mining Authority);
- extraction of minerals from land under inland waters (the authority competent for issuing water law permits); and
- extraction of minerals covered by mining ownership and underground storage of substances or carbon dioxide (the minister competent for the environment and, in the case of storage of substances or carbon dioxide, also of the European Commission).

Finally, in the case of a concession for underground storage of carbon dioxide, the establishment of collateral granted by the entrepreneur to the government is obligatory.

2.5 Are different procedures applicable to natural oil and gas?

In order to assess the ability of an interested entity to carry out the activities in the scope of prospecting for and exploration of hydrocarbon deposits and extraction of hydrocarbons from deposits,

the Minister of the Environment conducts an eligibility procedure. In the course of the eligibility procedure, it is ascertained whether the entity intending: (i) is under corporate control of a third party state, entity or citizen of a third party state, and, if so, whether such control can pose a threat to Polish national security; and (ii) has experience in prospecting for and exploration of hydrocarbon deposits or extraction of hydrocarbons from deposits. The experience should be documented and consist of exploration of at least one hydrocarbon deposit or continuously carrying out, for a period of at least three years, the extraction of hydrocarbons from deposits.

3 Foreign Ownership and Indigenous Ownership Requirements and Restrictions

3.1 What types of entity can own reconnaissance, exploration and mining rights?

Any type of legal entity (any legal form) can own a concession for reconnaissance, exploration, and mining.

3.2 Can the entity owning the rights be a foreign entity or owned (directly or indirectly) by a foreign entity and are there special rules for foreign applicants?

Yes, a foreign entity or an entity owned by a foreign entity may be the holder of the rights. However, when an application refers to hydrocarbons, the Minister of the Environment will assess whether the direct or indirect foreign ownership of a concession applicant would endanger Polish national security (see question 2.5).

3.3 Are there any change of control restrictions applicable?

Yes, in the case of a change of control, the entity has to apply to undergo the qualification proceedings described in question 2.5 again. If the Minister of the Environment gains knowledge of such a change, the qualification proceedings will be initiated *ex officio*.

3.4 Are there requirements for ownership by indigenous persons or entities?

No, there are not.

3.5 Does the State have free carry rights or options to acquire shareholdings?

No, it does not.

4 Processing, Refining, Beneficiation and Export

4.1 Are there special regulatory provisions relating to processing, refining and further beneficiation of mined minerals?

Extracting minerals from deposits requires a concession. Polish Geological and Mining Law does not directly cover processing, refining, and further beneficiation of mined minerals; however, such activities are likely to be addressed in the text of the concession and are also subject to the general provisions of Polish law (e.g., the Labour Code).

4.2 Are there restrictions on the export of minerals and levies payable in respect thereof?

There are no restrictions or special levies on the export (to non-EU members) or intercommunity trading of underground resources from Poland.

5 Transfer and Encumbrance

5.1 Are there restrictions on the transfer of rights to conduct reconnaissance, exploration and mining?

The transfer of rights to conduct reconnaissance, exploration, and mining is possible but would essentially involve going through the entire concession process again. The transferee must meet all the statutory requirements.

Contrary to the usual rules of the general succession of rights from one entrepreneur to another, a concession concerning reconnaissance, exploration, and mining does not transfer automatically in the case of:

- 1) transformation of the company (by merger, division, takeover, etc.);
- 2) acquisition of a bankrupt entrepreneurship; or
- 3) acquisition of an entrepreneurship by way of a composition of assets.

5.2 Are the rights to conduct reconnaissance, exploration and mining capable of being mortgaged or otherwise secured to raise finance?

The rights cannot be mortgaged or otherwise encumbered for collateral purposes.

6 Dealing in Rights by Means of Transferring Subdivisions, Ceding Undivided Shares and Mining of Mixed Minerals

6.1 Are rights to conduct reconnaissance, exploration and mining capable of being subdivided?

A joint concession is possible provided that each member of the group is qualified and party to a cooperation agreement. Consortium members are jointly and severally liable to the contracting authority under the concession. Any changes to the group will essentially involve going through the entire concession process again.

6.2 Are rights to conduct reconnaissance, exploration and mining capable of being held in undivided shares?

The Polish Geological and Mining Law does not expressly determine whether such rights are held in undivided shares. A concession for reconnaissance, exploration, and mining may be granted jointly to more than one entrepreneur. The cooperation agreement among the applicants should indicate the percentage share of each of them in cost and profit and will govern the legal relationship among the consortium members. However, they remain jointly and severally liable to the contracting authority under the concession.

6.3 Is the holder of rights to explore for or mine a primary mineral entitled to explore or mine for secondary minerals?

Generally, the scope of a concession determines what types of deposits may be explored or mined. However, the holder of rights to explore for or mine a primary mineral is also entitled – and obliged – to make use of the secondary minerals that are necessary to mine in order to use the primary minerals.

6.4 Is the holder of a right to conduct reconnaissance, exploration and mining entitled to exercise rights also over residue deposits on the land concerned?

As mentioned in question 6.3, the scope of a concession determines what types of deposits may be explored or mined. An entrepreneur is required to make use of the deposits that are necessary to mine the main deposit. In practice, if the residue deposit is unusable for the holder of a right, due to its lower value or commercial character, it may be disposed of as waste.

6.5 Are there any special rules relating to offshore exploration and mining?

Decisions concerning offshore exploration and mining require consultation with the director of one of three Polish governmental offices with various jurisdictions over inland waters and the territorial sea or with the Ministry of Maritime Affairs and Inland Waterways as regards the exclusive economic zone which includes up to 200 sea miles of the Baltic Sea from the shore. More restrictive assessment and procedures are implemented with respect to offshore exploration and mining of hydrocarbons. In such cases there are numerous consultations and safety obligations during the process of granting, changing, extending, and making use of the rights to offshore reconnaissance, exploration, and mining.

7 Rights to Use Surface of Land

7.1 Does the holder of a right to conduct reconnaissance, exploration or mining automatically own the right to use the surface of land?

The holder of a right to conduct reconnaissance, exploration or mining acquires the right to use the surface of land upon obtaining a concession. The decision on granting a concession indicates the area (geodesic plots of land) on which the reconnaissance, exploration, or mining may take place. However, before filing a motion for a concession, a future holder should secure the right to the relevant real estate by way of definitive agreement (or promise to use the land) with the native title holder (this obligation does not pertain to mining lignite).

In addition, for the purpose of exploitation of deposits which are subject to mining ownership of the government (i.e., hydrocarbons, black coal, methane existing as a secondary deposit, lignite, metals except turf iron ore, radiating elements, native sulphur, rock salt, potassium salt, potassium magnesium salt, gypsum and anhydrite, precious stones, therapeutic waters, thermal waters and brine) and which are separate from the land ownership, the future holder of rights should also conclude a mining usufruct agreement with the State Treasury. When an agreement is in place and a concession is granted, the holder of both may exclusively use the area of the usufruct.

7.2 What obligations does the holder of a reconnaissance right, exploration right or mining right have *vis-à-vis* the landowner or lawful occupier?

In the exploitation of its rights, the holder has the obligation to avoid unnecessarily harming the interests of the landowner or lawful occupier or impeding the lawful exercise of their own rights.

7.3 What rights of expropriation exist?

If a third party's real estate becomes necessary to conduct an in-scope activity, the concession holder may demand to be granted use for a limited period of time, in exchange for remuneration. If, as a consequence, the property is no longer fit for its previous purpose, the owner (or perpetual usufructuary) may demand that the concession holder buys the property. Under more limited and unusual circumstances, the concession holder may demand that the owner (or perpetual usufructuary) sell the land to the holder.

8 Environmental

8.1 What environmental authorisations are required in order to conduct reconnaissance, exploration and mining operations?

If concession may have a significant impact on the environment, then an environmental decision will always be required. If an environmental decision is not required, an applicant for a concession has to submit a list of all associated protected natural areas so as to facilitate the authorities' confirmation of that conclusion. An application for a concession for reconnaissance, exploration or mining operation rights must also contain proposed countermeasures for any negative impacts on the environment of a planned activity. The concession authority may also impose particular obligations in a concession decision itself, including but not limited to: requiring specialised safety equipment; conducting work only in certain times of the year; or re-cultivation.

8.2 What provisions need to be made for storage of tailings and other waste products and for the closure of mines?

Storage of tailings requires compliance with a number of general legal requirements, such as minimising the production of waste, minimising the impact on health and the environment and reusing the waste whenever possible. The waste must be selected, pressed, and divided and different types of waste should be stored separately. The storage holder is required to have a plan of waste management approved by a local authority and to update it every five years. Waste that may not be reused without delay must be transferred to the closest disposal facility. If the holder of the right to conduct reconnaissance, exploration and mining operations wishes to conduct its own disposal facility, it should comply with a number of additional requirements, including preparation of a formalised risk assessment, acquisition of consent from the local authority and appointing staff with necessary qualifications. The marshal of the voivodship may allow exceptions from these procedures with regard to non-dangerous waste.

A concession for reconnaissance, exploration and mining operations may itself set forth special storage rules.

A concession is also required for underground waste storage. Such concession should set forth the types and amounts of waste allowed to be stored, and the method of the monitoring of storage.

A liquidation fund must be prepared by each entrepreneur who acquires a concession for mining or underground waste storage. The fund may only be used to cover the cost of liquidation of a mining facility or redundant parts of the operation or particular assets.

8.3 What are the closure obligations of the holder of a reconnaissance right, exploration right or mining right?

In the case of a liquidation of a mining facility, in whole or part, the concession holder is obliged to:

- 1) secure or liquidate the excavations, devices, and objects;
- 2) undertake measures securing neighbouring deposits and neighbouring excavations; and
- 3) undertake measures to protect the environment and cause the re-cultivation of land.

Exploitation and closure of underground storage should be done in a way guaranteeing public security and in a way which guarantees the prevention of a negative impact on the environment.

If a usufruct agreement does not provide otherwise, the holder, before the expiration of the mining right, should secure or liquidate objects, devices, and installations erected in the space subject to the usufruct.

8.4 Are there any zoning or planning requirements applicable to the exercise of a reconnaissance, exploration or mining right?

Exercising a right of reconnaissance, exploration, or mining is only possible if it does not infringe upon the permitted use of a property as set forth in a local zoning plan (or preparatory studies for such a plan).

9 Native Title and Land Rights

9.1 Does the holding of native title or other statutory surface use rights have an impact upon reconnaissance, exploration or mining operations?

Provided that the licenced activity is conducted legally, the native title holder or surface rights holder should not have an impact on reconnaissance, exploration or mining operations.

10 Health and Safety

10.1 What legislation governs health and safety in mining?

The Constitution of the Republic of Poland is the basic legal act which provides for the right to safe and healthy working conditions. The means of implementing this right is defined by the Polish Labor Code.

However, health and safety in the mining sector is also ruled by additional and more specific regulations for the operation of underground mining plants issued by the Minister of Energy. Certain regulations of the Minister of Economy are also applicable. These regulations list the specific requirements for health and safety, traffic safety, and fire protection in mines ("**Mining Regulations**")

e.g., the Regulation of the Minister of Economy of 28 June, 2002 on occupational safety and hygiene, traffic and fire protection services in mining operations for the extraction of common minerals.

10.2 Are there obligations imposed upon owners, employers, managers and employees in relation to health and safety?

According to Polish Labor Law, employers are responsible for health and safety at work. It is the employers' duty to ensure safe working conditions, including measures to prevent accidents at work, occupational diseases, and other work-related diseases.

Employers are required to evaluate and document occupational risk associated with work performed, apply necessary preventative measures to minimise risks, and inform employees about occupational risks and the guidelines on protection against such risks. Additionally, employers must provide employees with free personal protection equipment if it is necessary to protect them against dangers in the working environment. The Mining Regulations impose a wide range of additional duties and obligations on managers, operators, owners, employers, employees and workers relating to health and safety at mines.

11 Administrative Aspects

11.1 Is there a central titles registration office?

The Polish Geological Institute – National Research Institute maintains the information system 'Geofonet' which includes information about: geological data and samples, and results of their examination; submitted geological studies; granted concessions for prospecting or exploration of mineral deposits; concessions for prospecting and exploration of hydrocarbon deposits and extraction of hydrocarbons from deposits; investment decisions; and concessions for the extraction of minerals from deposits; as well as approved or submitted geological operations plans; mining districts and mining areas; and parameters regarding the extraction of hydrocarbons from a deposit.

11.2 Is there a system of appeals against administrative decisions in terms of the relevant mining legislation?

The appellate proceeding described in the Code of Administrative Proceeding applies to all administrative decisions, including administrative mining law decisions. According to the Code of Administrative Proceeding, a public administration authority is competent to consider an appeal if it is of a higher level administratively than the authority which issued a decision. An appeal must be submitted to the competent appellate authority via the authority which issued the decision within 14 days of the day the decision was served upon a party, or if the decision was announced orally, within 14 days of the day the decision has been announced to the parties. The appeal requires no detailed substantiation. It is sufficient if it is evident from the appeal that the party is dissatisfied with the decision issued. With some exceptions, the marshal of the voivodeship is a geological administration authority of first instance to whom, within the meaning of the Administrative Procedure Code, the minister in charge of the environment is a superior authority.

12 Constitutional Law

12.1 Is there a constitution which has an impact upon rights to conduct reconnaissance, exploration and mining?

The Polish Constitution has an indirect impact on mining by referring to other acts in its article 86: "Everyone is obligated to care for the quality of the environment and shall be held responsible for causing its degradation. The principles of such responsibility shall be specified by acts". Such acts include the Act on preservation of the national character of the strategic natural resources of the country of 6 July 2001, which lists mineral deposits which are owned by the State Treasury and are not generally subject to private ownership. Public authorities managing natural resources are obliged to use mineral deposits in accordance with the principle of sustainable development.

12.2 Are there any State investment treaties which are applicable?

Poland has concluded 54 treaties with different countries on the promotion and mutual protection of investments. According to the general rule of such treaties, each contracting party must promote on its territory investments by investors of the other contracting party, and must allow the performance of such investments in accordance with its internal legislation. A number of these treaties refer to the right to explore and extract natural resources. For example, the treaties with Greece, dated 14 October 1992, with Denmark of 1 May 1990, with Macedonia of 28 November 1996, as well as the treaty with Sweden of 13 October 1989 list concessions for the exploration, cultivation, extraction and utilisation of natural resources as an investment.

13 Taxes and Royalties

13.1 Are there any special rules applicable to taxation of exploration and mining entities?

There are several specific taxes in Poland which are applicable to exploration and mining entities.

Tax on extraction of some minerals

Starting from April 18, 2012, extraction of copper and silver in Poland is subject to tax. Starting from 1 January, 2020, extraction of petroleum and natural gas in Poland will also be subject to this tax (entities extracting petroleum and natural gas in Poland have been subject to certain evidencing requirements since 1 January, 2016).

In general, the taxpayers are the entities (notwithstanding their legal form) extracting the minerals – i.e., copper, silver, petroleum or natural gas – in the course of their business activities.

In the case of copper and silver, the tax base is the amount of copper (tonnes) or silver (kilograms) within the produced concentrate, or, where a taxpayer does not produce concentrate, the amount of copper and silver within the ore output. The tax rate depends on the monthly average price of copper on the London Metal Exchange and of silver as announced by the London Bullion Market Association.

In the case of petroleum and natural gas, the tax base is the value of the petroleum or natural gas extracts. The tax due is a product of the rate and the value of petroleum (tonnes) and natural gas (megawatthours), in the case of petroleum, based on the average

monthly price set by OPEC, and, in the case of natural gas, based on the monthly price on the Polish Power Exchange. The rates of the tax vary depending on the type of the deposits. Extraction of natural gas and petroleum from low-productivity wells is tax exempt. The taxes are payable on a monthly basis.

Special hydrocarbon tax

Starting from 1 January, 2020, income resulting from extraction of certain hydrocarbons (i.e., petroleum, natural gas and their natural derivatives, except from methane found in hard coal deposits and methane found as an accompanying mineral) within the territory of Poland will be subject to a special hydrocarbon tax. The special hydrocarbon tax act has been in force since 1 January 2016. Since that time there are certain evidencing obligations for taxpayers; however, the tax will only be payable starting from 1 January, 2020. Taxpayers of the special hydrocarbon tax are, in general, the entities (notwithstanding their legal form) extracting, exploring, and prospecting hydrocarbons in Poland in the course of their business activities.

The special hydrocarbon tax is payable on a yearly basis (with monthly tax advances) and the tax year corresponds with the tax year for the taxpayer's corporate income tax (CIT), or for personal income tax (PIT).

The tax base is the income resulting from extracting, exploring and prospecting of the hydrocarbons, which is calculated as a difference between revenues from extracting, exploring and prospecting of the hydrocarbons and the qualified costs. The revenue is the amount of cash or other benefits obtained as remuneration for the sale of hydrocarbons. Qualified costs are expenses incurred by the taxpayer for the purpose of earning revenue or retaining or securing a source of revenue (which are not expressly excluded as non-tax deductibles), including expenses resulting from, for example: prospecting; exploring; extracting; storage; and delivery of the extracted hydrocarbons and termination of the activity. Furthermore, certain public law obligations, such as the amount of CIT/PIT payable (in connection with extracting, exploring or prospecting of the hydrocarbons), the amount of the tax on extraction of some minerals, etc., are also constitute qualified costs. Any tax loss resulting from extracting, exploring and prospecting of the hydrocarbons may be deducted in next tax year.

The tax rate varies from 0% to 25% of the tax base and depends on the profitability of the business activity.

Excise tax

Entities selling certain minerals (e.g., coal, natural gas) to a non-final buyer have an obligation to impose the required excise tax on the sale price. Verification of whether there is a necessity to impose an excise amount on the sale price is on the seller's side. Excise tax rates vary by product type.

Other taxes

Entities extracting minerals are also taxpayers of regular taxes resulting from business activities – CIT (or PIT), value added tax (VAT), and real estate tax (RET).

13.2 Are there royalties payable to the State over and above any taxes?

There are several royalties which are payable by exploration and mining entities.

Concession fee

The entity which was granted with a concession for:

- prospecting and exploring of mineral deposits;
- prospecting and exploring of an underground carbon dioxide storage complex; and
- prospecting, exploring and extraction of hydrocarbons,

is obliged to pay a one-time fee for the concession, which is a product of the rate and the land area covered by a concession. The rate varies and depends on the type of minerals and scope of activities covered by a concession.

Extraction fee

An entity granted a concession for extraction of mineral deposits or for prospecting, exploring and extraction of hydrocarbons, is obliged to pay, on a half-year basis, an extraction fee which is a product of the rate and amount of the minerals extracted within the settlement period. The rate of the extraction fee varies and depends on the type of minerals extracted.

Storage fee

An entity granted a concession for: (i) underground tankless storage of substances; (ii) underground carbon dioxide storage; or (iii) underground waste storage, is obliged to pay a fee which is a product of the amount of the substance introduced into the ground and a rate which varies depending on the type of material introduced into ground within a half-year settlement period.

Remuneration for establishment of mining usufruct

A mining usufruct fee will also be payable. The amount of this remuneration is defined within the contract between the State Treasury and the extracting entity, is payable on a yearly basis, and consists of a fixed amount (which depends on the value of the deposit of the minerals and type of the minerals extracted) and a variable amount (which is a fraction of the extraction fee payable in the previous year).

There is also a necessity to pay varying amounts of remuneration for the establishment of a mining usufruct for activities such as: (i) prospecting and exploring of the mineral deposits; (ii) underground tankless storage of substances; and (iii) underground waste storage.

14 Regional and Local Rules and Laws

14.1 Are there any local provincial or municipal laws that need to be taken account of by a mining company over and above National Legislation?

Yes. Carrying out a mining activity specified by the Polish Geological and Mining Law is only allowed if it does not violate the purpose of the land specified in the local zoning plan. This is an act of local law adopted in the form of a resolution, specifying conditions of land development.

14.2 Are there any regional rules, protocols, policies or laws relating to several countries in the particular region that need to be taken account of by an exploration or mining company?

Yes. As Poland is a Member State of the European Union, legislation from the European Union may be applicable with regard to environmental concerns and health and safety standards.

15 Cancellation, Abandonment and Relinquishment

15.1 Are there any provisions in mining laws entitling the holder of a right to abandon it either totally or partially?

Yes, according to art. 38 of the Polish Geological and Mining Law,

the holder of a concession has a right to renounce the concession. In such case, the concession-granting authority declares a lapse of the concession by decision.

15.2 Are there obligations upon the holder of an exploration right or a mining right to relinquish a part thereof after a certain period of time?

Provided the holder is honouring the terms and conditions of the concession, there is no relinquishment obligation before the end of the concession's term (usually no less than three years and no more than 50 years).

A concession for the prospecting for and exploration of a hydrocarbon deposit and extraction of hydrocarbons from a deposit is granted on the condition that a security deposit is established for non-performance or undue performance of the conditions specified in the concession, as well as the funding of decommissioning of works if the concession expires, is revoked, or loses its binding force. The deposit is established for the period from the day on which the concession is granted to the day on which the stage of prospecting and exploration is completed. If the entrepreneur fails to present to the concession-granting authority proof of the establishment of the deposits, the concession expires.

15.3 Are there any entitlements in the law for the State to cancel an exploration or mining right on the basis of failure to comply with conditions?

Yes, according to art. 37 of the Polish Geological and Mining Law, if an entrepreneur violates the requirements of the act, or fails to

satisfy the conditions of the concession, the concession-granting authority may call for the removal of infringements and, in the case of failure, to comply with the command, also withdraw the concession.



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1 Relevant Authorities and Legislation

1.1 What regulates mining law?

The Portuguese legal system is integrated in the civil/continental law system, which means that the majority of the legal provisions are comprised and enacted by statutes, written law being its primary source. The legal system is structured hierarchically and the Constitution is the leading legal instrument. The political bodies empowered to pass legislation are Parliament and the Government. The Government has the power to legislate on all subjects that are not reserved for Parliament and enacts legislation under the form of Decree-Laws.

Until 2015, Mining Law was regulated by the Decree-Law 90/90 of March 16, which established the General Regime for the Discovery and Use of Geological Resources and by specific Regulations for each type of mineral resource (Decree-Law 84/90, of March 16, which established the Spring Waters Regulation; Decree-Law 85/90, of March 16, which established the Heavy Waters Regulation; Decree-Law 86/90, of March 16, which established the Mineral Waters Regulation; Decree-Law 87/90, of March 16, which established the Geothermic Resources Regulation; Decree-Law 88/90 of March 16, which established the Mineral Deposits Regulation and Decree-Law 270/2001, of October 6, which established the Quarries Regulation).

In June 2015, the Legal Framework for the Discovery and Use of the Geological Resources Located in Portugal (including National Maritime Space) – Law 54/2015 of 22 June – was enacted (the “Geological Resources Law”). The Geological Resources Law revoked Decree-Law 90/90 of March 16.

The creation of this new legal regime derived from the National Strategy for Geological Resources (“ENRG-RM”) – Council of Ministers Resolution 78/2012 – which envisaged the establishment of a new – more efficient – legal and institutional framework.

The Portuguese Government should have approved all complementary legislation within three months from the entry into force of the Geological Resources Law, notably the new mineral deposits legal framework. The passing of complementary legislation has, however, been delayed, taking into consideration (*inter alia*) that general elections took place and a new Government has been in office since the last quarter of 2015. In the meantime, the specific Regulations for each type of mineral resources mentioned above remain in force regarding everything which is not incompatible with the Geological Resources Law.

Other key statutes include the General Health and Safety at Work on Mines and Quarries Regulation (approved by Decree-Law 162/90, of May 22), the Regulation on Environmental Recovery of

Deteriorated Mining Sites (approved by Decree-Law 198-A/2001, of July 6), the Regulation on Waste Management of Mineral Deposits’ Exploitation (approved by Decree-Law 10/2010, of February 4) and the Regulation on Social Security for Employees in Mines (approved by Decree-Law 195/95, of July 28).

1.2 Which Government body/ies administer the mining industry?

The mining industry is currently administered by the Ministry of Economy and is under the direct supervision of the General Directorate of Energy and Geology (DGEG), save in relation to geological resources located in the national maritime space, which are supervised by the General Directorate of Natural Resources, Security and Maritime Services. Notwithstanding the above, specific matters governed by different authorities regarding health and safety, nature conservation and cultural heritage, may also apply.

The Autonomous Regions of Azores and Madeira are responsible for the granting of rights over geological resources located in those territories.

1.3 Describe any other sources of law affecting the mining industry.

As a Member State of the European Union, Portugal is subject to European legislation (please refer to question 14.2 below).

Mining activity must also take into account environmental, tax and health and safety regulations. Legislation with a regional scope further applies in connection with mining activities in the Azores and Madeira autonomous regions.

2 Mechanics of Acquisition of Rights

2.1 What rights are required to conduct reconnaissance?

The Geological Resources Law acknowledges and regulates the concept of reconnaissance. To conduct reconnaissance, an entity must hold a prior evaluation right over area/areas designed for the exercise of activities for the use of metallic mineral deposits. Such right is granted under an administrative contract (with a maximum non-renewable term of one year) and may be requested to DGEG by any entity with recognised technical, economic and financial suitability. Prior evaluation rights entitle the holder of such rights to develop studies to allow a better knowledge of the geological potential of the envisaged area, namely through the analysis of available information and samples taken from the area.

2.2 What rights are required to conduct exploration?

To conduct exploration of mineral deposits, one must hold a prospecting and research right or an experimental exploitation right. The procedure for obtaining prospecting and research rights may be initiated by the interested parties through the submission of an application, or by the Portuguese State through a tender procedure (subject to the provisions of the Public Procurement Code), while the experimental exploration rights are granted at the request of the interested parties. These rights may only be granted over available areas (except if there is no incompatibility between the concessions granted, or to be granted, and the prospecting and research rights) and to legal entities who give proof of suitability and financial and technical capacity to perform these activities. The contract for prospecting and research activities and for experimental exploitation rights has a maximum term of five years.

A prospecting and research title gives the right to develop activities aimed at the discovery of resources and the definition of their characteristics, until the determination of the economic value of any resources found.

If the discovered resources fail to have the necessary conditions to initiate their immediate and effective exploitation, the interested parties may submit an application for experimental exploitation rights. These rights are granted through an administrative contract, with a maximum legal term of five years, and entitle their holder to perform the same activities as those entrusted to a holder of an exploitation title.

2.3 What rights are required to conduct mining?

The right to exploit geological resources (mining) is granted by means of a concession (with a maximum term of 90 years), following a prior evaluation/prospecting and research/experimental exploitation agreement (if resources have been discovered) or, in case no such prior agreement exists, granted in respect of (i) available areas, or (ii) areas covered by prior evaluation, prospecting and research, experimental exploitation rights, in case these relate to different mineral resources and the different mining activities are compatible. The text of the exploitation concession agreement shall be published in the Official Gazette. This concession entitles its holder to the right of exploitation for economic use of resources.

2.4 Are different procedures applicable to different minerals and on different types of land?

Complementary legislation to be enacted shall regulate the legal framework for the discovery and use of mineral deposits, as well as other geological resources, as mentioned in section 1. To date, no different procedures have been applicable to the different mineral deposits or different types of land under the mining law.

2.5 Are different procedures applicable to natural oil and gas?

Yes. Oil and gas are expressly excluded from the Geological Resources Law (in line with the previous framework) and are regulated by specific laws, the main legal framework being set out in Decree-Law 109/94 of April 26 1994.

3 Foreign Ownership and Indigenous Ownership Requirements and Restrictions

3.1 What types of entity can own reconnaissance, exploration and mining rights?

Exploration concessions may only be granted to legal persons giving proof of technical, economic and financial suitability. Other than that, the law does not impose restrictions on the type of persons at stake. The Companies Code contemplates two forms of limited liability companies that are normally used for the purpose of developing mining projects in Portugal. Those corporate forms are the *sociedade anónima* (SA) and the *sociedade por quotas*.

3.2 Can the entity owning the rights be a foreign entity or owned (directly or indirectly) by a foreign entity and are there special rules for foreign applicants?

Yes, foreign entities or entities owned by a foreign entity can hold mining rights; there are no special rules for foreign applicants applying. Notwithstanding, under Portuguese corporate law, any foreign company not legally domiciled in Portugal that aims to undertake activity in Portugal for more than one year must create a permanent establishment in the Portuguese territory. Moreover, in what concerns tax representation before the Portuguese Tax Authorities, the Portuguese Corporate Income Tax Code establishes that an entity that has neither its head office or (place of) effective management in Portuguese territory, nor a permanent establishment situated therein, shall be required to appoint a person or entity with residence, head office or (place of) effective management in that territory as its tax representative before the Portuguese Tax Authorities, in case it generates income in this territory. As an exception, companies resident for tax purposes in a Member State of the European Union, or a Member State of the European Economic Area (in the latter case, the exception applies insofar as there is an administrative cooperation agreement in force between Portugal and the relevant EEA Member State) are not required to appoint a tax representative.

Foreign direct investment is not restricted under general Portuguese law. In respect of repatriation of profits and investment, there are no currency controls under Portuguese law and money can be freely transferred into or out of Portugal. Also, there are no restrictions on the remittance of profits or investments abroad.

3.3 Are there any change of control restrictions applicable?

No change of control restrictions are expressly provided for in mining law. However, there are rules on the assignment of contractual positions in prior evaluation, prospecting and research, experimental exploitation and exploitation agreements (please refer to question 5.1 below).

3.4 Are there requirements for ownership by indigenous persons or entities?

No, there are not.

3.5 Does the State have free carry rights or options to acquire shareholdings?

There are no free carry or similar rights under the law. However, the State may control or impose conditions on the exploitation of mineral rights in certain circumstances, notably for reasons of national or regional interest. Also, for public interest reasons, the Ministry of Economy may exercise preferential rights in the acquisition of mineral deposits.

4 Processing, Refining, Beneficiation and Export

4.1 Are there special regulatory provisions relating to processing, refining and further beneficiation of mined minerals?

Yes. Under mining law, any processing/commercialisation or beneficiation of products resulting from exploitation is subject to supervision by DGEG and/or by the relevant trading authorities (depending on the type of processing and trading at stake).

4.2 Are there restrictions on the export of minerals and levies payable in respect thereof?

The export, sale or any other means of transfer (even free of charge) of any products which do not come from authorised exploitations, or which were not legally imported, is forbidden. The export of minerals or land samples may be made under a prospecting and research agreement for industrial analysis and tests if previously authorised by the Ministry of Economy).

Although no restrictions arise from mining law, the export of ore or minerals must, at all times, be made in compliance with the terms of international treaties that Portugal is a party to, which may introduce restrictions thereto.

5 Transfer and Encumbrance

5.1 Are there restrictions on the transfer of rights to conduct reconnaissance, exploration and mining?

Pursuant to the Geological Resources Law, the contractual position under prospecting and research, experimental exploitation and exploitation agreements may be transferred with the express authorisation of the Ministry of Economy. Rights to conduct reconnaissance may not be transferred.

5.2 Are the rights to conduct reconnaissance, exploration and mining capable of being mortgaged or otherwise secured to raise finance?

In accordance with the Geological Resources Law, the creation of mortgages is only authorised over rights arising from a concession for exploitation – and over the physical facilities created for support of mining activities – as security of credits/loans for the exploitation works, and shall be previously communicated to DGEG.

The enforcement of said mortgage shall follow the rules of the Code of Tax Procedure and Proceedings and of the Civil Procedure Code until the moment of the auction, which shall be executed by DGEG through public tender.

6 Dealing in Rights by Means of Transferring Subdivisions, Ceding Undivided Shares and Mining of Mixed Minerals

6.1 Are rights to conduct reconnaissance, exploration and mining capable of being subdivided?

The option to subdivide rights to conduct reconnaissance, exploration and mining is not provided for, nor forbidden, in the mining laws.

6.2 Are rights to conduct reconnaissance, exploration and mining capable of being held in undivided shares?

The law does not prevent the association of entities for the purposes of acquiring mining rights and, in this context, joint undivided holdings may be considered to be permitted.

The Geological Resources Law introduced the possibility for holders of different concession titles to request the creation of a *Agrupamento de Concessões*, which will be allocated with the rights and obligations resulting from their capacity as concessionaires, based on neighbourhood or contiguity, ownership by the same economic group, the similarity or complementarity of the exploited geological resources and/or the benefits for the commercialisation or preparation of products.

6.3 Is the holder of rights to explore for or mine a primary mineral entitled to explore or mine for secondary minerals?

In general, yes, to the extent that concession agreements are usually not entered into for a specific type of mineral, but for the minerals available in the concession area. If the contract is granted for a specific mineral, the mining of a new mineral may only be made pursuant to an amendment to the concession agreement, which would be subject to approval by the competent authorities.

6.4 Is the holder of a right to conduct reconnaissance, exploration and mining entitled to exercise rights also over residue deposits on the land concerned?

The law does not establish any specific rights over the residue deposits and they may generally be explored if they have an economic value. There is, however, a legal obligation to adequately manage and ensure that the waste generated is treated at the site – by means of a specific licensing procedure – or alternatively, is sent to a duly licensed facility for final destination and treatment. A waste management plan, in order to guarantee that waste is adequately managed, must be drawn up.

6.5 Are there any special rules relating to offshore exploration and mining?

The Geological Resources Law is applicable to all discoveries and use of geological resources located within the national territory, including those located in the Portuguese National Maritime Space (which is defined under Law 17/2014 of April 10 and comprises the seashore, territorial waters, exclusive economic zone and continental platform beyond the 200 maritime miles). In the maritime space, mining activities shall be subject to the granting of a use licence.

7 Rights to Use Surface of Land

7.1 Does the holder of a right to conduct reconnaissance, exploration or mining automatically own the right to use the surface of land?

Prospecting and research and experimental exploitation right holders have the right to temporarily use the land necessary for the performance of works (and establishment of the facilities) and the granting of those rights is accompanied by the creation of an administrative easement over the relevant area. The holders of a concession agreement (exploitation right) may obtain, by means of an administrative act, the necessary administrative easements for the exploitation of resources. In certain circumstances, neighbouring land may be subject to said easement.

These administrative easements have the maximum legal term of seven years, without prejudice to the possibility of continuing occupying land with the consent of the owner of the land.

Also, the holders of a concession agreement have preference rights in the acquisition or transfer *in lieu* of the land located in the concession area, as long as the acquisition is necessary for the exploitation.

7.2 What obligations does the holder of a reconnaissance right, exploration right or mining right have vis-à-vis the landowner or lawful occupier?

The holder of a prospecting and research right must compensate any third parties for all damages directly caused by the research activities and implement the relevant security, environmental protection and landscape recovery measures, even after the end of activities.

The holders of experimental exploitation and concession exploitation rights shall compensate any third parties for the damages resulting from exploitation, and shall implement environmental protection and landscape recovery measures.

The temporary use of the necessary land by holders of experimental exploitation rights entails the payment of compensation to the owners of the land.

Also, the creation of administrative easements may give rise to the payment of compensation.

7.3 What rights of expropriation exist?

The holders of a concession exploitation agreement may request the urgent expropriation, by reasons of public utility, of the land necessary for the performance of works and installation of facilities, even if it is located outside the covered area.

8 Environmental

8.1 What environmental authorisations are required in order to conduct reconnaissance, exploration and mining operations?

The main environmental authorisations applicable to mining activities are: (i) a favourable environmental impact assessment declaration – issued under the environmental impact assessment legislation; or (ii) a favourable (more simplified) environmental assessment declaration – issued according to Natura 2000 legislation.

The type of authorisation shall depend on the size, location and area occupied by the operation at stake.

Specific authorisations, such as the licensing for the use of water resources, shall also be necessary.

8.2 What provisions need to be made for storage of tailings and other waste products and for the closure of mines?

Pursuant to the Geological Resources Law, a financial guarantee shall be delivered together with the prospecting and research, experimental exploitation and exploitation agreements in order to ensure compliance with the contract, the landscape recovery and the closure of mines.

In accordance with the Regulation on Waste Management of Mineral Deposits' Exploitation, the holder of the mining right must submit a waste management plan, which must be reviewed every five years. The facilities for the storage of tailings or other waste products are subject to a licensing procedure with DGEG or the Regional Directorate or Economy, depending on the type of the facility.

8.3 What are the closure obligations of the holder of a reconnaissance right, exploration right or mining right?

Closure obligations include the removal of all constructions and installations, the removal and delivery of all waste to a final destination in a duly licensed facility and the environmental recovery of the area according to an environmental and landscape recovery plan previously approved by the authorities.

8.4 Are there any zoning or planning requirements applicable to the exercise of a reconnaissance, exploration or mining right?

Mining operations may only be carried out in areas designated for these activities in the applicable municipal zoning plans or in areas where mining is considered compatible with the use foreseen in the municipal zoning plan. In some cases, the municipal plan may not be completely updated in relation to special zoning plans approved by the Government determining legal restrictions for environmental purposes and, therefore, said plans and restrictions must also be taken into account.

9 Native Title and Land Rights

9.1 Does the holding of native title or other statutory surface use rights have an impact upon reconnaissance, exploration or mining operations?

No, it does not.

10 Health and Safety

10.1 What legislation governs health and safety in mining?

Health and safety in mining is governed by Decree-Law 162/90 of May 22, which approves the General Health and Safety at Work in Mines and Quarries Regulation.

10.2 Are there obligations imposed upon owners, employers, managers and employees in relation to health and safety?

Both employers and employees shall comply with health and safety conditions set out in article 2 and 3 of Decree-Law 162/90 of May 22. The main obligations are imposed on the employer who is required to inform the employee (and in certain situations to publicise or make available easily accessible information) on all health and safety measures imposed by law.

11 Administrative Aspects

11.1 Is there a central titles registration office?

Yes. DGEG is the competent authority for this purpose.

11.2 Is there a system of appeals against administrative decisions in terms of the relevant mining legislation?

General law applies, meaning that, depending on the administration body and decision, administrative decisions may be subject to a claim or opposition against the public body that has taken the decision, in certain cases to an hierarchic appeal (within the public administration) and is generally subject to administrative appeals before judicial courts.

12 Constitutional Law

12.1 Is there a constitution which has an impact upon rights to conduct reconnaissance, exploration and mining?

The Portuguese Constitution determines which assets are to be considered public domain assets. Ordinary law regulates the terms and conditions and the limits for the use of such goods.

Under the Geological Resources Law, geological resources are divided into public domain goods (mineral deposits, mineral waters, mineral industrial waters, geothermic resources, geological resources located in the seabed and subsoil of the national maritime space) and private assets (quarries and spring waters). The granting of rights over the public domain goods is subject to the award of a concession contract, while the granting of rights over the private domain goods is subject to a licensing procedure.

12.2 Are there any State investment treaties which are applicable?

As mentioned above, Portugal is a Member State of the European Union and is subject to European legislation.

13 Taxes and Royalties

13.1 Are there any special rules applicable to taxation of exploration and mining entities?

No, there are not. Companies carrying out exploration and mining activities in Portugal will be subject to the general provisions foreseen in the Corporate Income Tax Code.

However, pursuant to the Company Tax Code, the provisions made retained against the costs in connection with the environmental damage of the mining site are tax deductible.

13.2 Are there royalties payable to the State over and above any taxes?

No, there are no specific rules in mining law concerning royalties payable to the Portuguese State. Royalties are nevertheless usually negotiated and established in concession agreements, on a case-by-case basis.

14 Regional and Local Rules and Laws

14.1 Are there any local provincial or municipal laws that need to be taken account of by a mining company over and above National Legislation?

Please note that municipal planning requirements form the basis of planning and zoning regulations (which, once adopted, constitute national law). In any case, the granting of rights regarding prospecting and research/experimental exploitation/exploitation shall occur following mandatory consultation with the relevant municipalities, which will be promoted by DGEG and the answers published on the DGEG website.

14.2 Are there any regional rules, protocols, policies or laws relating to several countries in the particular region that need to be taken account of by an exploration or mining company?

Yes, there are. Portugal has been a member of the European Union since 1986, and has been integrated in the eurozone since its implementation. Therefore, it is subject to European legislation. Accordingly, national law is in line with the European applicable common norms (principle of primacy of European law over internal law), and European Community laws are directly applicable without the need to be ratified by Parliament.

15 Cancellation, Abandonment and Relinquishment

15.1 Are there any provisions in mining laws entitling the holder of a right to abandon it either totally or partially?

The suspension of exploitation may be authorised by DGEG due to *force majeure* reasons or when it refers to resources considered to be an adequate reserve of other resources in exploitation by the concessionaire. The suspension is valid for one year and cannot be extended for more than five years.

15.2 Are there obligations upon the holder of an exploration right or a mining right to relinquish a part thereof after a certain period of time?

The holder of prior entitlement rights must, upon expiry of the administrative contract, inform DGEG if it wishes to relinquish the area or request the granting of prospecting and research/exploration rights, experimental exploitation rights or mining/exploitation rights.

At each extension of the contract for prospecting and research activities, the holder of the title shall be required to make available part of the area initially covered by that title, pursuant to the terms and conditions set out in each administrative contract.

15.3 Are there any entitlements in the law for the State to cancel an exploration or mining right on the basis of failure to comply with conditions?

Prospecting and research, experimental exploitation or exploitation agreements may be terminated by the State on the basis of failure to comply with legal and contractual obligations.



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Manuel joined VdA in 1991 and is the head partner of the Projects – Infrastructure, Energy & Natural Resources practice group. In such capacity, he has participated in or led the teams involved in the most relevant transactions carried out in Portugal to date in the power (including the renewable energies), oil and gas, road, transport, water and wastes sector. He has also actively worked in regulation and public procurement procedures of these sectors.



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Marília joined VdA in 2015. She is a senior associate in the Projects – Infrastructure, Energy & Natural Resources practice group and has wide experience in advising clients in the mining sector and energy sector (mainly upstream oil & gas and electricity), as well as on aviation, corporate and commercial matters in various jurisdictions, in particular in Angola and Portugal.

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Before joining VdA, Marília was an Associate with another law firm where she advised mining industry clients for seven years.

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Russia

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1 Relevant Authorities and Legislation

1.1 What regulates mining law?

Mining law in the Russian Federation is based on the provisions of the Constitution of the Russian Federation and is regulated by the applicable Federal Laws and by-laws. Principal Federal Laws include:

- Law No. 2395-1 dated 21 February 1992, “On Subsoil Resources”; and
- Federal Law “On Production Sharing Agreements” No. 225-FZ dated 30 December 1995.

Principal by-laws include:

- Regulations on the Procedure for Licensing the Subsoil Use as approved by Resolution of the Supreme Counsel [*Soviet*] of the Russian Federation No. 3314-1 dated 15 July 1992; and
- Resolution of the Russian Government No. 540 dated 3 August, 1992, “On Measures to Regulate Export of Geological Information on Subsoil Resources”.

Among the aforementioned regulations, the Law “On Subsoil Resources” prevails as it sets out the general principles of subsoil use.

1.2 Which Government body/ies administer the mining industry?

Government bodies administering the mining industry are as follows:

- **The Russian Government** implements a unified state policy in the field of environmental protection and safety, regulates activities related to subsoil use and development of Russia’s mineral resources base, etc.;
- **The Ministry of Natural Resources and Environment of the Russian Federation** establishes a procedure for keeping public records and maintaining a public register of activities related to the exploration of subsoil resources, subsoil plots allocated for mining activities, etc.;
- **The Federal Agency for Subsoil Use (*Rosnedra*)** arranges for tenders and auctions for the right to use subsoil resources, issues and registers subsoil use licences, adopts decisions for suspension, restriction and early termination of the right to use subsoil plots, etc.;
- **The Federal Service for Ecological, Technological and Nuclear Supervision (*Rostekhnadzor*)** exercises control and supervision to ensure safety of operations related to subsoil

use, industrial operations, as well as to prevent the negative man-made impact on the environment, etc.; and

- **The Federal Supervisory Service for Nature Management (*Rosprirodnadzor*)** exercises control and supervision over the use of natural resources, including supervision over exploration, sustainable use and protection of subsoil resources, etc.

1.3 Describe any other sources of law affecting the mining industry.

Other sources of law affecting the mining industry are the Russian Tax Code, the Customs Union Customs Code, the Russian Land Code, the Russian Forestry Code, and the Russian Water Code.

2 Mechanics of Acquisition of Rights

2.1 What rights are required to conduct reconnaissance?

Subsoil resources may be provided for use pursuant to a special permit issued by the government: a licence. According to the applicable laws (Articles 10.1 and 11 of the Law “On Subsoil Resources”; Federal Law “On Production Sharing Agreements”), the right to use subsoil resources may be granted by:

- holding a tender for the right to use subsoil plots;
- holding an auction for the right to use subsoil plots;
- the filing of an application by the interested party;
- entering into a production sharing agreement; and
- entering into a public procurement contract for subsoil exploration.

Subsoil users are required to have special qualifications and experience evidenced by a government licence for the relevant type of activity (surveying, prospecting, reconnaissance, etc.).

Federal subsoil plots may only be provided for exploration (a separate kind of subsoil use) subject to government funding and under a government contract for the exploration of subsoil resources. The applicable laws do not provide for the provision of subsoil plots for exploration to be carried out at the subsoil user’s expense; this may be done under a combined licence only (exploration, reconnaissance and mining).

The right to explore subsoil plots other than federal subsoil plots and local subsoil plots may be granted pursuant to a tender. A tender for the right to use subsoil resources is a competitive procedure for the allocation of subsoil plots. The winner is determined based on the scientific and technological level of the applicant’s

programmes for subsoil exploration and the use of subsoil plots, the level of contribution towards the social and economic development of the relevant territory, the implementation timeframes of such programmes, as well as the efficiency of subsoil and environment protection measures proposed by the applicant.

The right to explore subsoil resources (excluding federal subsoil plots) may be granted pursuant to an auction. The winner of the relevant auction will be the applicant who makes the highest bid.

Subsoil plots may be provided for exploration to be carried out at a subsoil user's own expense pursuant to the relevant application. A simplified procedure is currently in place for obtaining the right to use subsoil plots for exploration (including prospecting and valuing the deposits of solid minerals) at subsoil users' expense (including through raised funds) provided that no information is available as to whether the plot in question accommodates subsoil resources, and that such plots have not been part of programmes or lists of facilities [already] offered for use.

2.2 What rights are required to conduct exploration?

The right to use subsoil resources in the form of exploration and mining in respect of federal subsoil resources is granted to the subsoil user through an auction. The applicable laws do not provide for holding tenders for this purpose.

A distinctive feature of an auction for the right to explore and mine minerals on federal subsoil plots is that the Russian Government may, as advised by the Russian Ministry of Defence and/or the Russian Federal Security Service of the Russian Federation (FSB), restrict access to such auctions for legal entities with the participation of foreign investors established in accordance with the applicable Russian laws in order to ensure national defence and state security.

If a subsoil user has already explored a subsoil plot (other than federal subsoil plots), the plot may be provided to the subsoil user for exploration and mining without holding tenders or auctions, pursuant to an application of the interested party. The application should include an offer regarding the expected scope, types and timeframes of exploration works, the expected timeframes of reaching target production capacity, etc. The applicant should also provide evidence that it has all the necessary financial and technical resources.

It should be noted that the applicable Russian laws do not provide for the issuance of a separate subsoil exploration licence; instead, a combined licence is issued to grant the subsoil user the right to conduct mining.

2.3 What rights are required to conduct mining?

Subsoil plots are provided for use in mining activities in the form of a mining allotment. The mining licence is issued in respect of only those subsoil plots the geological information for which has undergone state expert review. The mining licence grants the right to develop deposits and process the waste of the mining facility and of associated processing facilities, unless otherwise provided for in the licence. The mining licence holder may explore, within its mining allotment, the subsoil resources related to the holder's mining operations.

The procedure for obtaining the mining licence is identical to the procedure for obtaining the exploration licence described in question 2.2.

2.4 Are different procedures applicable to different minerals and on different types of land?

Russian laws contain special licensing rules for the use of certain kinds of subsoil plots, such as, for example, radioactive deposits, – due to safety requirements. Namely, subsoil users of radioactive deposits may be legal entities established in accordance with the applicable Russian laws and licensed by the authorised federal executive body to mine and use radioactive substances.

The applicable Russian laws impose a number of restrictions on the provision of lands of high environmental, social and cultural value for subsoil use purposes. For example, agricultural lands may not be provided to subsoil users; a number of restrictions on subsoil use apply to lands accommodating cultural heritage plots.

2.5 Are different procedures applicable to natural oil and gas?

Issues relating to the provision of subsoil plots for prospecting, reconnaissance and production of natural oil and gas are governed by the Law “On Subsoil Resources”. Issues relating to the provision of federal subsoil plots containing natural gas are also governed by the Federal Law “On Gas Supply in the Russian Federation” that contains certain special rules. Firstly, such subsoil plots are provided for use in accordance with the list (approved by the Russian Government) of federal subsoil plots provided for use without holding auctions. Secondly, federal subsoil plots containing natural gas may be provided (on the grounds in question) only to those entities that meet the criteria set out by Article 12 of the Federal Law “On Gas Supply in the Russian Federation”, namely, to legal entities owning the Unified Gas Supply System or to legal entities owning the regional gas supply system.

3 Foreign Ownership and Indigenous Ownership Requirements and Restrictions

3.1 What types of entity can own reconnaissance, exploration and mining rights?

This answer was not available at the time of going to print.

3.2 Can the entity owning the rights be a foreign entity or owned (directly or indirectly) by a foreign entity and are there special rules for foreign applicants?

This answer was not available at the time of going to print.

3.3 Are there any change of control restrictions applicable?

According to the Federal Law “On the Procedure for Making Foreign Investments into Business Entities of Strategic Importance for National Defence and State Security”, changes in a legal entity's shareholding structure may constitute grounds for denying or terminating their licence or for imposing restrictions on the participation in the process of obtaining the subsoil use licence.

3.4 Are there requirements for ownership by indigenous persons or entities?

The applicable Russian laws do not provide for any such requirements.

3.5 Does the State have free carry rights or options to acquire shareholdings?

Generally, the Russian Federation does not have such rights.

4 Processing, Refining, Beneficiation and Export

4.1 Are there special regulatory provisions relating to processing, refining and further beneficiation of mined minerals?

According to the applicable Russian laws, subsoil users carrying out the primary processing of minerals extracted by them from beneath the surface must follow a number of procedures to ensure strict compliance with the relevant minerals processing technologies as well as rational and comprehensive extraction of commercial components from minerals, the fullest possible use of by-products and wastes as well as stock-keeping, accounting and storage of any temporarily unused products and wastes containing commercial components.

4.2 Are there restrictions on the export of minerals and levies payable in respect thereof?

Generally, there are no such restrictions. However, the export of certain kinds of minerals is subject to additional requirements. Namely, untreated precious metals (excluding gold and silver) may be exported under a licence and in accordance with the applicable quotas: this is a restriction for exporters. Quotas are assigned by the Russian Government and licences are issued by the Russian Ministry of Economic Development.

Natural diamonds and cut diamonds are also exported under a licence. Only the precious stones sorted in accordance with the requirements applicable in Russia to these products may be exported. Unique natural diamonds and diamonds weighing over 10 carats may be exported subject to the approval of the Russian Government.

The exporting of minerals constitutes a significant part of subsoil users' activities and is a substantial source of budget revenues in the form of customs duties imposed on exporters.

5 Transfer and Encumbrance

5.1 Are there restrictions on the transfer of rights to conduct reconnaissance, exploration and mining?

The right to use subsoil plots may only be transferred to another business entity in cases prescribed by the applicable laws. If the right to use subsoil is transferred, the relevant licence must be re-issued.

According to the Federal Law "On Production Sharing Agreements", the investor may only transfer all or some of its rights and obligations

under the relevant agreement to any legal entity or individual with the approval of such transfer by the state and subject to such legal entity or individual having the sufficient financial or technical resources and managerial experience necessary to carrying out the works under the agreement.

5.2 Are the rights to conduct reconnaissance, exploration and mining capable of being mortgaged or otherwise secured to raise finance?

The rights to use subsoil resources pursuant to the licence issued may be disposed of or transferred from one party to another to the extent permitted by Federal Laws. The applicable Federal Laws do not provide for a possibility to pledge/mortgage the right to use subsoil resources granted pursuant to the Law "On Subsoil Resources".

Such a possibility is provided for by the Federal Law "On Production Sharing Agreements": the investor may, with the approval by the state, pledge/mortgage its property and property rights to secure its obligations under contracts executed in connection with the performance of the agreement. So, the investor may raise additional finance by pledging/mortgaging the rights to use subsoil resources.

6 Dealing in Rights by Means of Transferring Subdivisions, Ceding Undivided Shares and Mining of Mixed Minerals

6.1 Are rights to conduct reconnaissance, exploration and mining capable of being subdivided?

The licence is a document evidencing the right of its holder to use the relevant subsoil plot within prescribed boundaries, in accordance with the purposes stated therein and for a prescribed period of time, subject to the holder satisfying the terms and conditions set in advance. Authorised public bodies and the subsoil user may execute a contract setting out the terms and conditions of use of such plot as well as the parties' obligations related to the performance of the contract. Licences for several kinds of use (exploration, reconnaissance and mining) of subsoil resources may be issued, but these rights to use the subsoil resources may not be subdivided.

6.2 Are rights to conduct reconnaissance, exploration and mining capable of being held in undivided shares?

The subsoil user granted a mining allotment has the exclusive right to use the subsoil resources within its boundaries under the licence issued to the subsoil user. Any activity related to the use of subsoil resources within the boundaries of a mining allotment may be carried out only with the consent of the subsoil user to which the allotment is granted.

The subsoil plot provided under the relevant licence for exploration subject to avoiding significant loss of integrity thereof qualifies as a geological allotment. Several subsoil users may operate simultaneously within the boundaries of one geological allotment.

6.3 Is the holder of rights to explore for or mine a primary mineral entitled to explore or mine for secondary minerals?

Yes. Subsoil users conducting exploration, reconnaissance and

mining of primary minerals within the boundaries of their mining allotments and/or geological allotments may mine, in the prescribed manner, secondary minerals for their own production or process needs and may extract underground water.

Subsoil users conducting exploration, reconnaissance and mining of raw hydrocarbons within the boundaries of their mining allotments and/or geological allotments may also dispose of, in the prescribed manner, associated waters and waters used for their own production or process needs into rock strata when conducting reconnaissance and mining of raw hydrocarbons.

6.4 Is the holder of a right to conduct reconnaissance, exploration and mining entitled to exercise rights also over residue deposits on the land concerned?

According to the applicable Russian laws, one of the basic rights of a subsoil user is the right to use mining wastes generated as a result of activities carried out by the subsoil user and associated processing facilities, unless otherwise provided for in the licence or production sharing agreement.

Subsoil users engaged in the primary processing of minerals extracted by them from beneath the surface must ensure the fullest possible use of by-products and wastes, stock-keeping, accounting and storage of any temporarily unused products and wastes containing commercial components.

Subsoil users are also required to ensure rational use and protection of subsoil resources, including the obligation not to pollute subsoil resources when carrying out subsoil use operations, the obligation not to dispose of production and consumption wastes into water-collecting areas of underground water bodies or into deposits of underground waters used for drinking or process water supply purposes.

6.5 Are there any special rules relating to offshore exploration and mining?

Activities carried out in Russia's offshore zones are regulated by the Russian Water Code, the Federal Law "On the Continental Shelf of the Russian Federation", the Federal Law "On the Exclusive Economic Zone of the Russian Federation", the Federal Law "On Internal Maritime Waters, Territorial Sea, and the Contiguous Zone of the Russian Federation" and by the 1982 United Nations Convention on the Law of the Sea ratified by the Russian Federation in 1997. According to the aforementioned laws, all waters are divided into five zones: the internal waters, the territorial sea, the exclusive economic zone, the continental shelf and the sea-bed area (or the international sea-bed area). The internal waters are divided into surface, internal, maritime and underground waters which, according to the Law "On Subsoil Resources" form part of subsoil resources.

The territorial sea, the airspace above it and its seabed and subsoil resources are under the sovereignty of the Russian Federation.

The exclusive economic zone is a sea area extending from the boundary of the territorial sea of the Russian Federation which enjoys special legal status governed by the applicable laws, international treaties of the Russian Federation and international law. The Russian Federation exercises its sovereign rights to explore the seabed and the resources thereof and exploit mineral and other non-living resources in the exclusive economic zone.

The peculiarity of granting the right to use subsoil plots located on the continental shelf of the Russian Federation is that, according to Article 10.1 of the Law "On Subsoil Resources", such plots intended

for reconnaissance and mining or for exploration, reconnaissance and mining of subsoil resources under a combined licence are provided pursuant to the resolution of the Russian Government, without holding the relevant actions. Legal entities established in accordance with the applicable Russian laws, with experience in developing subsoil plots on the continental shelf of the Russian Federation of at least five years, in whose authorised capitals the Russian Federation has a share (contribution) of over 50% and/or over 50% of the total number of votes attached to the voting stock (shares) in such legal entities' authorised capitals are directly or indirectly controlled by the Russian Federation qualify as subsoil users of subsoil plots located on the continental shelf of the Russian Federation.

7 Rights to Use Surface of Land

7.1 Does the holder of a right to conduct reconnaissance, exploration or mining automatically own the right to use the surface of land?

The land plot intended for carrying out the works relating to subsoil use is provided following the obtainment of the licence, the provision of the geological allotment and/or mining allotment, and the approval of the design documentation necessary to carry out these works.

According to the applicable land laws, for the purpose of carrying out the works relating to subsoil use, land plots may be provided on a leasehold basis, pursuant to the right of easement and under authorisation of competent bodies (in the case of lands owned by the state) without the provision of land plots and the establishment of an easement. Holding the title to, taking the lease of, or otherwise holding a land plot does not offer any advantage in terms of obtaining the right to use subsoil resources.

A subsoil user's scope of rights in respect of the land plot is directly linked to the grounds on which the land plot is held. If the holder of a land plot has all the rights in respect of the land plot, then, subject to establishing an easement, the subsoil user may use the land plot within the scope prescribed by the terms and conditions of the easement.

7.2 What obligations does the holder of a reconnaissance right, exploration right or mining right have vis-à-vis the landowner or lawful occupier?

The obligations of the subsoil user in respect of the land plot depend on the grounds on which the land plot is held. The subsoil user taking the land plot on lease must pay rent in accordance with the terms and conditions of the lease contract. If the permitted use of the relevant land plot is inconsistent with the purposes of the works relating to subsoil use, the permitted use must be modified accordingly. The leaseholder must also rehabilitate the mined land. Upon acceptance of the rehabilitated land plot the subsoil user's obligations under the lease contract are deemed fulfilled.

The subsoil user holding an easement must act in accordance with the terms and conditions of the easement agreement and may not prevent the owner from using the land plot according to its designation.

7.3 What rights of expropriation exist?

According to Article 49 of the Russian Land Code, the grounds for expropriation of land plots for state and municipal needs include,

among other things, the carrying out of works, accommodation and use of facilities related to subsoil use. A land plot may only be expropriated subject to prior and just reimbursement for the value of the land plot, of the real estate located thereon and for the damage caused to the owner by the expropriation. The amount of reimbursement is either agreed with the owner or, if the parties fail to reach an agreement, determined pursuant to a court ruling.

Where the owner objects to the expropriation of the relevant land plot for state or municipal needs or to the terms and conditions of expropriation, the land plot may be compulsorily acquired pursuant to a court ruling only.

8 Environmental

8.1 What environmental authorisations are required in order to conduct reconnaissance, exploration and mining operations?

According to Article 12 of the Law “On Subsoil Resources”, requirements as to the protection of subsoil and environment, safe practices as well as to the procedure and timeframes for preparing land rehabilitation projects must be included in the relevant licences. According to Article 22 of the Law “On Subsoil Resources”, a subsoil user is obligated to adhere to standards approved in the prescribed manner that regulate the protection of subsoil resources, the air, lands and water bodies and the putting of land plots and other natural resources disturbed by the use of subsoil resources into a usable condition.

The principal environmental requirements provided for in the applicable laws as to the use of subsoil resources are: the requirement to assess the environmental impact including, in a number of cases, the environmental impact of the projects related to the use of subsoil resources; the requirement to arrange for and exercise industrial environmental control and monitoring over the use of subsoil resources; and the requirement to rehabilitate the environment damaged as a result of subsoil use.

8.2 What provisions need to be made for storage of tailings and other waste products and for the closure of mines?

According to Article 26 of the Law “On Subsoil Resources”, mining enterprises and subsurface structures not related to mining operations must be dismantled or mothballed upon the expiry of the licence or the early termination of the use of subsoil resources. Mothballing of mines implies taking a number of measures to temporarily suspend the operations, subject to ensuring that all of the facilities are ready for future mining operations and that the mines are properly preserved for a long period of time.

To obtain the permission to mothball an enterprise, the subsoil user must submit a written application to the relevant representative authority (in accordance with the enterprise’s departmental subordination) that explains why the mothballing of the enterprise is needed. The application must be accompanied by a number of documents, including: copies of principal mining graphics; topographic, surveying and geologic documentation; a technical and economic assessment setting out the grounds for the mothballing; and a document setting out a list of measures to preserve the enterprise for the mothballing period. The enterprise is deemed mothballed upon the signing of the relevant mothballing certificate by the authorities that issued the licence and the state mining supervision body.

8.3 What are the closure obligations of the holder of a reconnaissance right, exploration right or mining right?

According to Article 26 of the Law “On Subsoil Resources”, in the event of partial or complete mothballing of an enterprise or a subsurface structure, the subsoil user is obligated to render the mines and bore wells into a state that ensures the health and safety of the population, the protection of the environment, buildings and structures and of the deposit mines and bore wells for the entire mothballing period.

It is therefore important to identify the party responsible for the mothballing expenses. If the mothballing is initiated by the subsoil user, the relevant expenses are borne by the subsoil user. If the use of subsoil resources is terminated because of a direct threat to the life or health of people working or living in the area affected by operations related to the use of subsoil resources (through no fault of the enterprise) or due to an emergency, the expenses are borne by the state. Mines and other structures related to the use of subsoil resources are mothballed at the expense of subsoil users.

Unlike the Federal Law “On Production Sharing Agreements”, the Law “On Subsoil Resources” does not guarantee that this obligation will be met. Namely, under a production sharing agreement, mothballing is done using the money from the fund established by the investor. The fund’s size and the procedure for making contributions to, and for using, the fund are specified in the agreement.

8.4 Are there any zoning or planning requirements applicable to the exercise of a reconnaissance, exploration or mining right?

Yes, there are. According to the applicable Russian laws, urban and rural settlements are zoned according to their designation. The specific feature of lands provided for mining purposes is that they are not zoned as a separate category of Russia’s lands and are not distinguished from other lands by their primary designation. Lands provided for subsoil use are zoned as lands of special designation (lands of industry, transport, communication and lands for other special purposes). That is why their legal status is governed by general provisions establishing the legal framework for this category of land. However, within their legal status, these lands are treated somewhat differently depending on the peculiarities of their subsoil resources.

Where a land plot with a permitted use other than subsoil use needs to be used for subsoil use, the permitted use must be changed accordingly. However, it should be remembered that, for example, the permitted use of agricultural lands may not be changed.

9 Native Title and Land Rights

9.1 Does the holding of native title or other statutory surface use rights have an impact upon reconnaissance, exploration or mining operations?

No, it does not. The applicable Russian laws do not provide for any special rights. It should be mentioned, however, that, according to the Federal Law “On Production Sharing Agreements”, the investor under such an agreement pays the damages caused as a result of its operations to the native minorities of Russia in areas of their traditional habitat and economic activities. The amount and payment timeframes are to be specified in the agreement.

10 Health and Safety

10.1 What legislation governs health and safety in mining?

These issues are governed by Federal Law No. 116-FZ dated 21 July 1997, “On Industrial Safety at Hazardous Production Facilities”, the Russian Labour Code and other regulations.

Subsoil use is an activity characterised by high rates of occupational injuries and accidents. That is why the Federal Law “On Industrial Safety at Hazardous Production Facilities” sets forth legal, economic and social foundations for ensuring safe operation of hazardous production facilities. According to Article 24 of the Law “On Subsoil Resources”, subsoil resources may only be used subject to the fulfilment of requirements as to ensuring the safety of lives and health of workers of the enterprises related to the use of subsoil resources and of the population living within the area affected by the relevant operations. The Russian Labour Code includes special requirements and guarantees to ensure the safety of lives and health of workers as well as additional guarantees for workers engaged in harmful and/or hazardous labour.

Special powers to control industrial safety are vested in the Federal Service for Ecological, Technological and Nuclear Supervision (*Rostekhnadzor*), such as the issue of licences to develop areas accommodating mineral deposits within the relevant mining allotment, approval of the terms and conditions of licences, subsoil use engineering designs, field-development (mining and primary processing) engineering designs.

10.2 Are there obligations imposed upon owners, employers, managers and employees in relation to health and safety?

The applicable Russian laws impose a number of occupational and industrial safety obligations on subsoil users and on their managers and employees. For example, subsoil users engaged in subsurface mining must be served by professional mine-rescue services; in reconnaissance and development of oil and gas fields, by professional services that prevent and kill open gas blowouts and oil spouters.

Managers of enterprises engaged in works related to subsoil use or other authorised officials are directly responsible for ensuring the safety of these works and are required to suspend such works as soon as they become a direct threat to the life and health of the enterprise’s workers and evacuate the latter to a safe place. Managers are also required to notify government bodies of the direct threat to the life and health of the population living in the area.

Requirements as to health and safety of subsoil users’ workers applicable in the Russian Federation include the requirement that the relevant works be performed by persons with special training and qualifications and be managed by persons with special education, as well as the requirement to obtain a special licence for the performance of high-risk works related to subsoil use.

11 Administrative Aspects

11.1 Is there a central titles registration office?

The authority to register various rights is distributed between government bodies in accordance with their competence. Registration of licences evidencing the rights to use subsoil

resources falls within the competence of the Federal Agency for Subsoil Use (*Rosnedra*); registration of rights to real estate, within the competence of the Federal Service for State Registration, Cadastre and Cartography of Russia.

11.2 Is there a system of appeals against administrative decisions in terms of the relevant mining legislation?

The applicable Russian laws allow the parties whose rights and/or legitimate interests in the field of mining industry are abused by an administrative decision to appeal against the decision through administrative or legal action.

Competent state courts resolve financial, property and other disputes over the use of subsoil resources and review appeals against decisions of government bodies, including resolutions denying the issue of subsoil licences or terminating the right to use subsoil resources early, and other kinds of disputes.

Subject to the parties’ consent, property disputes over the use of subsoil resources may be referred to an arbitral tribunal. It should be remembered, however, that if the relevant state court believes that the dispute is not subject to arbitration, the court may overturn the award of the arbitral tribunal or refuse to issue an enforcement order to enforce the award.

12 Constitutional Law

12.1 Is there a constitution which has an impact upon rights to conduct reconnaissance, exploration and mining?

According to Article 1.2 of the Law “On Subsoil Resources”, subsoil resources located within the Russian Federation, including mineral, energy and other resources contained in subsoil are state property. Issues related to ownership, use and disposal of subsoil resources fall under the authority of both the Russian Federation and regions of the Russian Federation. Subsoil plots may not be sold, purchased, gifted or otherwise disposed of.

Rights to use subsoil resources may be disposed of or transferred from one party to another to the extent permitted by the applicable laws. Minerals and other resources extracted from beneath the surface under the relevant licence may be publicly, municipally or privately owned.

12.2 Are there any State investment treaties which are applicable?

The Russian Federation is a party to a number of international treaties for the promotion, protection and mutual protection of investments entered into with the countries of Europe, Asia, Africa and North and Latin America.

Rights of foreign investors in the Russian Federation are protected by a special Federal Law “On Foreign Investments in the Russian Federation”. A dispute initiated by a foreign investor in connection with investments and business activities in the Russian Federation is resolved by a court, arbitrazh (commercial) court or international court of arbitration (arbitral tribunal) in accordance with the relevant international treaties signed by the Russian Federation and the applicable Federal Laws. Namely, the Russian Federation is a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), which is an additional guarantee that foreign investors’ rights will be protected.

13 Taxes and Royalties

13.1 Are there any special rules applicable to taxation of exploration and mining entities?

The applicable Russian laws are based on the principle that the use of subsoil resources must be paid for. The purpose of this principle is both to generate income and repair damage caused to the environment. The structure of subsoil users' payments is complex and includes both tax payments and other non-tax budget revenues:

- one-off payments for the use of subsoil resources upon the occurrence of certain events;
- regular payments for the use of subsoil resources;
- tender (auction) fee;
- mineral extraction tax; and
- state licence fee.

One-off payments for the use of subsoil resources

Events constituting grounds for making one-off payments are specified when the licence is issued. Such events may include registration of the licence, reaching a certain mineral production level, etc.

Regular payments for the use of subsoil resources

This payment is charged the provision of exclusive rights to search for and value mineral deposits, conduct reconnaissance of minerals, explore subsoil plots and assess whether they are suitable for construction and operation of structures not related to mining operations. Regular payments are levied on each subsoil plot in accordance with its characteristics.

Tender (auction) fee

This fee is levied as reimbursement and is determined based on expenses associated with preparing and holding the tender (auction) and deciding the winner.

Mineral extraction tax (MET)

Thanks to a graduated MET rate, the tax is levied on subsoil users virtually on a case-by-case basis, depending on the characteristics of the specific field. The main criterion for imposing the MET is mining for minerals. Also, the applicable laws specify a list of minerals not subject to MET, *i.e.* this tax is not imposed on the extraction of certain minerals.

State licence fee

This fee is paid for the issue of a licence or a duplicate licence and for the re-issue of a licence on a number of grounds.

13.2 Are there royalties payable to the State over and above any taxes?

According to the applicable Russian laws, subsoil taxes include mineral extraction tax and state licence fee (fee for the issue and re-issue of the relevant licence), though the latter is not a tax *per se* since this fee is collected for the provision of a service to the subsoil user.

14 Regional and Local Rules and Laws

14.1 Are there any local provincial or municipal laws that need to be taken account of by a mining company over and above National Legislation?

The applicable Russian laws also require that the subsoil user make other payments mentioned in question 13.1 above.

According to the Constitution of the Russian Federation, because of the federal form of government, issues related to ownership, use and disposal of subsoil resources fall under the authority of both the Russian Federation and regions of the Russian Federation (Article 71). According to Article 1.1 of the Law "On Subsoil Resources", local government bodies may regulate the relations associated with subsoil use within the limits set out by the applicable laws.

Therefore, mining companies should be guided by regulations of local government bodies adopted within the authority granted to them by the applicable laws.

The powers of local government bodies related to subsoil use include participation in issues related to ensuring that socio-economic and environmental interests of the population are taken into account when providing subsoil resources for use; development of mineral resources base for the local industry enterprises, etc.

14.2 Are there any regional rules, protocols, policies or laws relating to several countries in the particular region that need to be taken account of by an exploration or mining company?

The use of subsoil resources in the Russian Federation is carried out solely by the Russian Federation, regions of the Russian Federation and, in cases provided for by the applicable laws, by local government bodies.

At the same time, the Russian Federation is a party to a number of international agreements regulating issues relating to the use of subsoil resources; for example, the 1998 Agreement between the Russian Federation and the Republic of Kazakhstan Delineating the Seabed of the Northern Part of the Caspian Sea to Exercise Sovereignty over Subsoil Resources. In such cases, subsoil users must also consider international law implications.

The special status of Svalbard presents certain difficulties for subsoil users. The Svalbard Treaty executed in Paris in 1920 established Norwegian sovereignty over the archipelago. Russia did not participate in the execution of that treaty; however, the treaty provided that Russian nationals and companies had equal rights with representatives of other states that signed the treaty. Therefore, since Norway has sovereignty over the archipelago, Russian subsoil users must also comply with Norwegian laws applicable to the use of subsoil resources.

As regards customs issues, it should be noted that the Russian Federation is a Customs Union member (the other members of the Customs Union are Armenia, Belarus, Kazakhstan and Kyrgyzstan) and the Customs Union customs laws prevail over the customs laws of the Russian Federation.

15 Cancellation, Abandonment and Relinquishment

15.1 Are there any provisions in mining laws entitling the holder of a right to abandon it either totally or partially?

Yes, there are. According to the Law “On Subsoil Resources”, the right to use subsoil resources is terminated upon the licence holder’s waiver of the right to use subsoil resources.

Where subsoil resources are used under a production sharing agreement, the right to use subsoil resources may be terminated, suspended or limited in accordance with the procedures and terms set out in the agreement.

15.2 Are there obligations upon the holder of an exploration right or a mining right to relinquish a part thereof after a certain period of time?

Yes, there are. Upon the expiry of the licence, the right to use subsoil resources is terminated.

Mines and other structures related to the use of subsoil resources are mothballed at the expense of the subsoil users.

Mines and other structures related to the use of subsoil resources under production sharing agreements are mothballed using the money from the abandonment fund. The fund’s size and the procedure for making contributions to, and for using, the fund are specified in the production sharing agreement.

15.3 Are there any entitlements in the law for the State to cancel an exploration or mining right on the basis of failure to comply with conditions?

Yes, there are. According to the Law “On Subsoil Resources”, the use of subsoil resources may be terminated early, suspended or restricted by the authorities that issued the licence in cases where: there is a direct threat to the life or health of people working or living in the area affected by operations related to the use of subsoil resources; the subsoil user breaches material terms and conditions of the licence; the subsoil user fails to use subsoil resources to the extent prescribed; the enterprise or other business entity to which the relevant subsoil resources were provided for use is liquidated; the subsoil user fails to submit reporting information required by the applicable subsoil laws.

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MELNITSKY & ZAKHAROV
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Melnitsky & Zakharov, Attorneys-at-Law, was established on the basis of the renowned Iniurcollegia, Attorneys-at-Law and focuses on expert legal support and judicial protection for businesses.

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Senegal

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1 Relevant Authorities and Legislation

1.1 What regulates mining law?

First, it is to be noted that the Senegalese Mining Code has recently been amended.

Senegal is a member of WAEMU (West African Economic and Monetary Union). The laws regulating the mining sector are the following:

- Law n°2016-32 dated 8th November 2016 enacting the Mining Code (hereinafter the “**Mining Code**”).
- Decree n°2017-459 dated 20th March 2017 implementing the Mining Code (hereinafter the “**Decree**”).
- Regulation n°18/2003/CM/WAEMU dated 22nd December 2003 enacting the WAEMU Mining Code.

1.2 Which Government body/ies administer the mining industry?

- The Ministry of the Industry and of Mines.
- The Mines Authorities.
- Regional mines departments.

1.3 Describe any other sources of law affecting the mining industry.

They are as follows:

- The Civil Code.
- The revised Uniform Act relating to general commercial law dated 15th December 2010.
- Law n°2001-01 enacting the Environmental Code, dated 12th April 2001.
- Law n°98/03 dated 8th January 1998, enacting the Forest Code and its implementing decree, dated 20th February 1998.

2 Mechanics of Acquisition of Rights

2.1 What rights are required to conduct reconnaissance?

Any legal entity may carry out prospection activities on all, or part of the territory of Senegal subject to the granting of a prior authorisation of prospection.

Procedure:

The application for a permit for prospection is sent in three (3) original copies to the Administration of Mines (that acknowledges receipt). The authorisation is granted by the Administration of Mines for a period that may not exceed six (6) months, renewable once provided that the applicant has complied with its obligations.

Rights:

- Non-exclusive right of prospection within the authorised perimeter for the minerals specified in the permit.
- The permit for prospection may not be transferred and may not be the object of any form of pledge or guarantee.

Obligations:

- The holder of the permit must send a report setting out the results of the investigations to the mining authorities and any other document that enable a more in-depth knowledge of the site.

2.2 What rights are required to conduct exploration?

The exploration permit may be held by an individual or legal entity, whether or not incorporated under Senegalese law.

Procedure:

The application for an exploration permit is sent in three (3) original copies to the Ministry of Mines (that acknowledges receipt). Within a maximum period of fifteen (15) days, as from the date of the notification of admissibility, the applicant is summoned to the Mining Department for a joint study of the application. A mining convention is negotiated with the Mines Authorities for a period which cannot exceed three (3) months as from the notification of the admissibility of the file for the granting of the mining title. In the event of conclusive negotiations, the mining convention is sent to the Mines Authorities for consent. The mining convention can be signed by the applicant and by the Minister of Mines within a deadline of twenty-one (21) days as from receipt of the consent of the Minister of Finance, or upon the expiry of a period of twenty-one (21) days without any response from the latter. In the event of inconclusive negotiations, the application is rejected. After a period of twenty-one (21) days as from the signature of the mining title, the exploration permit is granted by order. The exploration permit is granted, subject to the payment of fixed duties, for a duration of no more than four (4) years, renewable twice for periods that may not exceed three (3) years and upon each renewal the surface area of the perimeter is reduced by half.

Rights:

The exploration permit confers on its holder, *inter alia*:

- Within its perimeter, surface and to an indefinite depth, the exclusive right to explore for the minerals for which it is granted.
- The right to take samples of minerals extracted during the exploration.
- The right to a mining permit if it has proven the existence of a commercially viable deposit during the period of the validity of the exploration permit.
- Priority for the granting of an exploration permit for any other substances than those included in its own mining title, and which are discovered within the scope of its own exploration permit.

Obligations:

The exploration permit confers upon its holder the following obligations, *inter alia*:

- To carry out during the initial period of the permit (and during any periods of renewal) the annual exploration works that are approved by the Minister of Mines.
- To spend the minimum amount that has been approved for the authorised works.
- To commence the exploration within six (6) months as from the date of notification of the granting of the exploration permit.
- To regularly inform the mining authorities of the works and results obtained.
- To notify the Minister of Mines of the discovery of new deposits.
- To carry out assessments, where a discovery has been made, to determine whether or not the deposit is commercially viable.
- To request a mining permit, or a mining concession, as soon as the existence of a commercially viable deposit has been established.
- To submit for approval to the Minister of Mines all contracts/documents in which the titleholder promises to assign, transfer, or transmit the rights and obligations arising under the exploration permit.

2.3 What rights are required to conduct mining?

Mining permit:

The mining permit must be held by a company incorporated under Senegalese law.

Procedure:

The application for a mining permit is sent in three (3) original copies to the Ministry of Mines (which acknowledges receipt). The application must be made at least four (4) months prior to the termination of the exploration permit. If all is in order, the mining permit will be granted by decree.

Mining concessions are granted for a minimum period of five (5) years and up to twenty (20) years (renewable).

Rights:

The mining permit confers on the holder, *inter alia*:

- The exclusive right to mine, and dispose of minerals for which the mining permit has been granted within the perimeter that has been attributed and to an indefinite depth.
- The right to renewal.
- The right to extend the rights and obligations attached to the mining title to other substances (where the request is made within six (6) months).

- The right to occupy the land necessary for carrying out mining activities.
- A real property right (distinct from the ownership of the land) registered as such and which may be mortgaged.
- The right to assign, transfer or farm-out the mining permit.
- The right to waive in whole, or in part, its rights subject to the provision of notice of one (1) year and the provisions of the Mining Convention.
- The right to transport the extracted substances to the point of storage, processing or shipment and to dispose of them either within Senegal, or in foreign markets.
- The right to the stability of the legal, administrative, financial and fiscal conditions of the mining operations.

Obligations:

- To mine the deposit.
- To regularly inform the Minister of Mines of the methods and results of the mining, the results of exploration, and of additional proven and potential deposits, as well as their specifications.
- To begin mining operations as soon as possible, and within one (1) year, failing which a penalty of fifty (50) millions FCFA per month for the first three (3) months which will be increased by fifteen (15%) per month from the previous month starting from the fourth month and lasting until twelve (12) month's delay. If the mining operations are not carried out within two (2) years following the granting of the permit, the latter can be cancelled.

- **Production sharing contract:**

Production sharing contracts can only be granted on promotional zones except if the titleholder of a mining title on a perimeter situated outside the promotional areas decides to carry out mining works by a production sharing contract. The beneficiary of a production sharing contract is not subject to the payment of a royalty.

Procedure:

On the basis of a model drawn up by the Mines Authorities, the production sharing contract is negotiated between the contractor and the Minister of Mines during a period that cannot exceed three (3) months. Once negotiated, the contract is sent to the Minister of Finances for assent. The Minister has twenty-one (21) days following receipt of the assent to render his opinion. The contract is then signed by the contractor and the Minister of Mines within twenty-one (21) days as from the notice of the Minister of Finance. The contract is granted by a decree.

Small mine:

Small mine applies to substances coming from primary or secondary flush or sub-flush deposits.

The perimeter of a small mine cannot exceed five hundred (500) hectares.

Procedure:

Application for a small mine is addressed in three (3) original copies to the Ministry of Mines (which acknowledges receipt).

If everything is in order, the authorisation will be granted by order of the Minister of Mines for a period that cannot exceed five (5) years (renewable).

Rights:

The exclusive right to carry out prospection and mining operations.

Obligations:

The holder has, *inter alia*, the following obligations:

- To delimit the area within two (2) months as from the grant of the authorisation.

- To respect the environment.
- To rehabilitate the site.
- To compensate third parties.
- To commence the exploration within three (3) months as from the granting of the authorisation.
- To notify the Minister of Mines of any new more important deposits found inside the area within a maximum period of one (1) month failing what the authorisation can be cancelled.
- **Semi-automatic mining:**
Small mine applies to substances coming from primary or secondary flush or sub-flush deposits.
The perimeter of a semi-automatic mining cannot exceed fifty (50) hectares.
Procedure:
Applications for a semi-automatic mining is addressed in three (3) original copies to the Ministry of Mines (which acknowledges receipt).
If everything is in order, the authorisation will be granted by order of the Minister of Mines for a period that cannot exceed three (3) years (renewable).
Rights:
The exclusive right to mine minerals for which the authorisation has been granted within the perimeter that has been attributed and to a maximal depth of fifteen (15) metres.
Obligations:
The holder has, *inter alia*, the following obligations:
 - To delimitate the area within two (2) months following the granting of the authorisation.
 - To commence the exploration within two (2) months as from the granting of the authorisation.
 - To rehabilitate the site.
 - To compensate third parties.
 - To notify the Minister of Mines of any new more important deposits found inside the area within a maximum delay of one (1) month failing what the authorisation can be cancelled.
- **Artisanal mining:**
Artisanal mining is granted to any individual who cannot ask for exclusivity.
Procedure:
The authorisation is granted by the Mine Authorities after consulting the administrative authorities and the local municipality. The authorisation is granted for a period that cannot exceed five (5) years (renewable).
Obligations:
 - To pay a fixed duty to the territorial communities.
 - To comply with the environmental obligations.
 - To personally carry out the artisanal mining activity.

2.4 Are different procedures applicable to different minerals and on different types of land?

There is a different procedure for quarries.

Private and public quarries can be temporary if the exploitation does not exceed one (1) year.

- **Private quarries**
 - **Permanent private quarry**
The application for opening and operating a permanent private quarry is addressed in three (3) original copies to the Ministry of Mines (which acknowledges receipt).

If everything is in order, the authorisation will be granted by order of the Minister of Mines for a period that cannot exceed three (3) years (renewable). The Mines Administration proceeds with the recognition of the perimeter in the presence of the applicant and the owner of the quarries concerned. If the applicant does not participate, a formal notice is sent to the latter by the Mines Administration. If during fifteen (15) days, the formal notice remains without effect, the Mines Administration will reject the application.

The authorisation is given by order of the Minister of Mines for a period that cannot exceed five (5) years (renewable). Three (3) months following the granting of the authorisation to open and to mine the permanent private quarry, the holder must limit the perimeter.

■ Temporary private quarry

The application for opening and operating a temporary private quarry is addressed in three (3) original copies to the Mines' Administration. The authorisation is granted for a period that cannot exceed one (1) year (renewable). If the application complies with the conditions of the Decree it will then be submitted for the opinion of the authorities in charge of the registry, land, water and forests, environment and the local authority concerned by the application. The Director of Mines and Geology (or his representative) may, during the examination of the application, carry out an inspection of the area concerned. The permit is granted by way of an order from the Minister of Mines for a period of five (5) years (renewable once).

■ Public quarries

The authorisation to mine is taken within seven (7) days after consulting the administrative authorities after notice given to the local communities concerned. The authorisation is given for a period that cannot exceed five (5) years (renewable).

■ Rock piles, rock dumps and process release

The application for the granting of the authorisation for the exploitation of rock piles, rock dumps and process release is addressed in three (3) original copies to the Minister of Mines (which acknowledges receipt). The authorisation is granted by an order of the Minister of Mines.

2.5 Are different procedures applicable to natural oil and gas?

The prospection, exploration and mining for hydrocarbons are governed by law n°98-05 enacting the Petroleum Code dated 8th January 1998.

Prospection: An authorisation for up to two (2) years to carry out prospection for hydrocarbons may be granted by order of the Minister in relation to those zones not covered by hydrocarbons mining titles, or by a service agreement.

Exploration: The exploration permit is granted by way of a decree for a maximum period of four (4) years.

Exploitation: Hydrocarbons deposits may only be operated under either a temporary operating licence, or under a concession.

3 Foreign Ownership and Indigenous Ownership Requirements and Restrictions

3.1 What types of entity can own reconnaissance, exploration and mining rights?

No, there are not.

3.2 Can the entity owning the rights be a foreign entity or owned (directly or indirectly) by a foreign entity and are there special rules for foreign applicants?

Where there is a total change in the control of the title holder, prior authorisation must be obtained. Where there is a partial change in control, it will be necessary to at least inform the mining authorities of the change.

3.3 Are there requirements for ownership by indigenous persons or entities?

See the answer to question 3.4 below.

3.4 Does the State have free carry rights or options to acquire shareholdings?

The State has a 10% free participation in the mining company and may negotiate for itself an additional participation in the capital of the mining company which cannot exceed 25% of the share capital of the mining company (article 31).

3.5 Are there restrictions on the nature of a legal entity holding rights?

There are no restrictions.

4 Processing and Beneficiation

4.1 Are there special regulatory provisions relating to processing, refining and further beneficiation of mined minerals?

No. Such processes are included with the definition of “mining operations” in the Mining Code.

4.2 Are there restrictions on the export of minerals and levies payable in respect thereof?

The title holder can freely export extracted mineral substances, their concentrates, their primary products and other derivatives (subject to completion of legal formalities).

5 Transfer and Encumbrance

5.1 Are there restrictions on the transfer of rights to conduct reconnaissance, exploration and mining?

A prospection permit, a small mine authorisation, a semi-automatic mining authorisation and an artisanal mining authorisation may not be transferred.

On the other hand, an exploration permit may be transferred, subject to the prior approval of the Minister of Mines. Similarly, a mining permit may be transferred but again, subject to the approval of the Minister of Mines and payment of fixed amounts.

5.2 Are the rights to conduct reconnaissance, exploration and mining capable of being mortgaged or otherwise secured to raise finance?

It is only possible to mortgage a mining permit.

6 Dealing in Rights by Means of Transferring Subdivisions, Ceding Undivided Shares and Mining of Mixed Minerals

6.1 Are rights to conduct reconnaissance, exploration and mining capable of being subdivided?

These are not provided for.

6.2 Are rights to conduct reconnaissance, exploration and mining capable of being held in undivided shares?

The rights under the mining permit and exploration permit are indivisible. (Article 19.)

6.3 Is the holder of rights to explore for or mine a primary mineral entitled to explore or mine for secondary minerals?

Mining permit: The title holder can ask for an extension of its permit so as to include other minerals. This extension is granted in accordance with the same conditions as for the initial mining title (article 25).
Small mine: The titleholder can ask for an extension of its permit to a secondary mineral if the minerals are not subject to another mining authorisation or mining permit.

6.4 Is the holder of a right to conduct reconnaissance, exploration and mining entitled to exercise rights also over residue deposits on the land concerned?

According to article 27 of the Mining Code, the titleholder has the exclusive right to dispose of the minerals for which the mining permit has been granted.

6.5 Are there any special rules relating to offshore exploration and mining?

No, there are not.

7 Rights to Use Surface of Land

7.1 Does the holder of a right to conduct reconnaissance, exploration or mining automatically own the right to use the surface of land?

The rights include the following:

- The right to occupy the land necessary for the carrying out of the exploration and mining works, the realisation of related activities and the construction of housing for personnel assigned to construction activities.

- The right to proceed with infrastructure works necessary for the realisation of operations relating to research and operations including the transportation of supplies, materials, equipment and products extracted.
- The right to carry out surveys and works required for the supply of water for the personnel.
- The right to explore and extract building materials needed for operations.
- The right to cut wood needed for the works.
- The right to use unused or unprotected waterfalls.

7.2 What obligations does the holder of a reconnaissance right, exploration right or mining right have vis-à-vis the landowner or lawful occupier?

The title holder is under an obligation to compensate the landowner in the event that the title holder's activities cause damage to the land owner. (Article 93.)

7.3 What rights of expropriation exist?

The State guarantees that installations and infrastructures built or acquired during the course of the mining operations may not be subject to any measures of expropriation, except in circumstances of “*Force Majeure*” or public necessity. In such a case, the State must pay a fair compensation.

8 Environmental

8.1 What environmental authorisations are required in order to conduct reconnaissance, exploration and mining operations?

For mining, or small mine, an environmental impact study (or “EIS”) is required.

8.2 What provisions need to be made for storage of tailings and other waste products and for the closure of mines?

There is an obligation to restore the site to its previous state upon the expiry of a mining title. In this regard, the holder of a mining title must open an account in a public institution designated by the State into which funds are to be paid to cover the costs of the implementation of the environmental management plan.

8.3 What are the closure obligations of the holder of a reconnaissance right, exploration right or mining right?

Please see the answer to question 8.2 above.

8.4 Are there any zoning or planning requirements applicable to the exercise of a reconnaissance, exploration or mining right?

Protected areas:

Protected areas may be created by order of the Minister of Mines, within which prospection, exploration and mining of mineral

substances are prohibited. This may be in order to protect, for example, buildings, and where it is in the general public interest.

In addition, it is to be noted that there are reserved zones within which only small-scale mining activities and artisanal mining activities may be authorised.

Promotional areas:

The State can create on all or part of the country promotional areas within which sufficient data and results are obtained and which have a mining interest that justify a competition procedure in order to promote investment.

Exploration permits or exploitation permits are granted in promotional areas according to the rules on competition.

9 Native Title and Land Rights

9.1 Does the holding of native title or other statutory surface use rights have an impact upon reconnaissance, exploration or mining operations?

A person does not need to acquire an interest in land in order to apply for a mining permit.

However, it is to be noted that the titleholder must compensate any individual or legal entity for any damage caused.

10 Health and Safety

10.1 What legislation governs health and safety in mining?

The Mining Code and law n°97-17 dated 1st December 1997, enacting the Labour Code.

10.2 Are there obligations imposed upon owners, employers, managers and employees in relation to health and safety?

The title holder must inform the Minister of Mines, as well as the competent administrative authority, the regional labour inspector, the social security and the public prosecutor of any accident or any identified danger that occurs during mining activities.

11 Administrative Aspects

11.1 Is there a central titles registration office?

The Mines Authorities keeps data regarding the soil and basement. (Article 7 of the decree.)

11.2 Is there a system of appeals against administrative decisions in terms of the relevant mining legislation?

Subject to specific provisions contained in a mining convention, all disputes relating to the implementation and the interpretation of the Mining Code are for the Courts of Senegal.

12 Constitutional Law

12.1 Is there a constitution which has an impact upon rights to conduct reconnaissance, exploration and mining?

The Senegalese Constitution has both a direct and an indirect impact on mining activities.

12.2 Are there any State investment treaties which are applicable?

State investment treaties apply to the Mining Code. Senegal has signed such treaties with: Argentina; Egypt; Germany; India; Morocco; the Netherlands; Romania; South Korea; Sweden; Switzerland; Tunisia; the United Kingdom; and the United States of America.

13 Taxes and Royalties

13.1 Are there any special rules applicable to taxation of exploration and mining entities?

Exploration phase:

Exoneration from custom duties, VAT and “COSEC” (COSEC: Senegalese Shippers’ Council) duties and taxes for, *inter alia*, the following:

- Equipment, materials, supplies, machines, as well as spare parts, neither produced, nor manufactured in Senegal, and specific materials required for exploration activities.
- Fuel.
- Oil products.
- Materials and spare parts and components required for exploration activities.
- Temporary admission to full exoneration from import and export taxes and duties in relation to, *inter alia*, materials, machines, equipment which, once used, may be re-exported or transferred.

Mining phase:

Total exoneration from all taxes and duties charged upon entry into Senegal, including COSEC relating to, *inter alia*, the following:

- Materials, machines, equipment required for the mining operations.
- Fuel to be used for the mining operations.
- Oil products to be used to produce energy for the purposes of the mining operations.
- Spare parts and components required for the mining operations.
- Exoneration from export tax regarding products derived from their mining operations.

13.2 Are there royalties payable to the State over and above any taxes?

The title holder must pay:

- Fixed fees for the granting, renewal, extension, prorogation, the processing, transfer or farming-out of exploration and mining titles:
 - For an exploration permit: 2,500,000 FCFA.
 - For a mining permit: 10,000,000 FCFA.

- Annual mining royalty:
 - For an exploration permit:
 - First period of validity: 5,000 FCFA/km²/year.
 - First period of renewal: 6,500 FCFA/km²/year.
 - Second period of renewal: 8,000 FCFA/km²/year.
 - For a mining permit: 250,000 FCFA/km²/year.
- A quarterly mining royalty on the market value of the marketed mineral or on the value of the FOB value of the exported mineral:
 - Cement: 1%.
 - Raw gold: 5%.
 - Gold refined in Senegal: 3.5%.
 - Gold refined outside Senegal: 5%.

14 Regional and Local Rules and Laws

14.1 Are there any local provincial or municipal laws that need to be taken account of by a mining company over and above National Legislation?

No, there are not.

14.2 Are there any regional rules, protocols, policies or laws relating to several countries in the particular region that need to be taken account of by an exploration or mining company?

An exploration or a mining company should take into account:

- the West African Economic and Monetary Union regulation 18/2003/CM/UEMOA dated 23rd December 2003 enacting the Mining Community Code; and
- Directive C/DIR3/05/09 dated 26th–27th May 2009 relating to the harmonisation of guidelines and policies in the mining sector.

15 Cancellation, Abandonment and Relinquishment

15.1 Are there any provisions in mining laws entitling the holder of a right to abandon it either totally or partially?

The holder of an exploration permit can abandon all or part of its rights if it has satisfied all its obligations and provided it has given one (1) months’ notice addressed to the Minister of Mines.

The holder of a mining permit can abandon all or part of its rights after giving one (1) year’s notice addressed to the Minister of Mines and subject to the provision of the mining convention.

15.2 Are there obligations upon the holder of an exploration right or a mining right to relinquish a part thereof after a certain period of time?

Not to our knowledge.

15.3 Are there any entitlements in the law for the State to cancel an exploration or mining right on the basis of failure to comply with conditions?

The Minister of Mines can cancel an exploration permit in the event

that a formal demand has not been complied with within three (3) months. The withdrawal is not subject to any compensation from the State.

The mining title can be revoked by a decree after a formal demand from the Minister of Mines has not been complied with by the title holder within three (3) months. This withdrawal is pronounced, *inter alia*, in the following situations:

- persistent inactivity;
- suspension or serious restriction of the exploitation without a valid reason;

- non-compliance with the obligations and commitments provided in the mining convention and its potential addendum;
- non-payment of the rent and royalties due;
- non-fulfilment, without reason, of the work programme and annual budgets;
- the title holder does not hold its operating records, sales and shipping regularly and does not comply with standards set by the regulations; and
- assignment, or leasehold of the rights conferred by mining title without the prior approval of the Minister for Mines.



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The firm was founded in 1995. An independent French business law firm that covers all areas of French law with a domestic and international clientele. The firm has an entrepreneurial style and seeks to build long-term relationships with its clients through an in-depth understanding of their needs and objectives. The firm has expanded over recent years and continues to do so in order to meet the needs of its clients.

South Africa

Fasken Martineau

Godfrey Malesa



Nicola Jackson



1 Relevant Authorities and Legislation

1.1 What regulates mining law?

In South Africa, the primary legislation which regulates mining is the Mineral and Petroleum Resources Development Act, 28 of 2002 (“MPRDA”), which came into force on 1 May 2004. Other important pieces of legislation include the Mineral and Petroleum Resources Royalty Act, 2008, the Mining Titles Registration Act, 1967, Mine Health and Safety Act, 1996, the National Environmental Management Act, 1998, the National Water Act, 1998, the Precious Metals Act, 2005, and the Diamonds Act, 1986.

1.2 Which Government body/ies administer the mining industry?

The mining industry in South Africa is regulated by the Department of Mineral Resources (“DMR”). The DMR is responsible for overseeing the implementation of all mining laws and regulations in South Africa. There is a DMR regional office in each of the nine provinces of South Africa. The Minister of Mineral Resources is the competent authority responsible for, among other things, receiving applications for permits and rights and evaluating such applications.

1.3 Describe any other sources of law affecting the mining industry.

The common law is also applicable to the mining industry and insofar as the common law is inconsistent with the MPRDA, the MPRDA prevails. South Africa’s common law is composed of the foundational Roman-Dutch legal principles as modified and interpreted by judicial precedent.

Other laws affecting mining include, amongst others, the law of delict and administrative law, as any administrative process conducted or decision taken in terms of the MPRDA must be conducted or taken, within a reasonable time and in accordance with the principles of lawfulness, reasonableness and procedural fairness.

2 Mechanics of Acquisition of Rights

2.1 What rights are required to conduct reconnaissance?

Under the MPRDA, reconnaissance operation “means any operation carried out for or in connection with the search for a mineral or

petroleum by geological, geophysical and photo geological surveys and includes any remote sensing techniques, but does not include any prospecting or exploration other than acquisition and processing of new seismic data”.

In order to conduct reconnaissance operations, an applicant must apply for a reconnaissance permission to the Minister of Mineral Resources in a prescribed manner. The Minister must issue the reconnaissance permission if the applicant complies with the requirements as set out in section 14(1) of the MPRDA. The reconnaissance permission is valid for a period of one year and is not renewable or transferable. The reconnaissance permission does not entitle the holder an exclusive right to apply for or be granted a prospecting right or mining right.

2.2 What rights are required to conduct exploration?

Under the MPRDA, a party can acquire mineral and petroleum rights. Petroleum relates to any liquid, solid hydrocarbon or combustible gas but does not include coal, bituminous shale or other stratified deposits. Prospecting relates to intentionally searching for any mineral other than petroleum. A prospecting right enables the holder to undertake prospecting operations in respect of minerals, while an exploration right enables the holder to undertake exploration operations in respect of petroleum.

In order to conduct prospecting operations, an applicant must apply for a prospecting right in the prescribed manner. A prospecting right will be granted if, amongst others: the applicant has access to financial resources and the technical ability; the estimated expenditure is compatible with the proposed prospecting operation; the prospecting will not result in unacceptable pollution, ecological degradation or damage to the environment; and an environmental authorisation is issued. Prospecting rights are valid for a period specified in the right, which period may not exceed five years and are renewable once for a period not exceeding three years.

In order to conduct exploration operations in respect of petroleum, an applicant must apply for an exploration right in terms of Chapter 6 of the MPRDA. An exploration right enables the holder to undertake exploration operations in respect of petroleum. An exploration right will be granted if, amongst others, the applicant has access to financial resources and the technical ability, the Minister has issued an environmental authorisation, and the granting of such right will further the objects of substantially and meaningfully expanding opportunities for historically disadvantaged persons.

An exploration right is subject to prescribed terms and conditions and is valid for the period specified in the right, which period may not exceed three years, is renewable and grants the holder the

exclusive right to apply for and be granted a production right in respect of the petroleum and the exploration area.

Applicants for prospecting and exploration rights are required to apply for an environmental authorisation and consult with interested and affected persons, including landowners and lawful occupiers.

Both prospecting and exploration rights are limited real rights in respect of the mineral in question or petroleum and the land.

2.3 What rights are required to conduct mining?

In order to conduct mining operations for minerals (other than petroleum), an applicant must apply for a mining right or mining permit in terms of what is prescribed in the MPRDA. An applicant for a mining right must simultaneously apply for an environmental authorisation. The applicant must also consult in the prescribed manner with the landowner, lawful occupier and any interested and affected party. The applicant must also submit a mining work programme and a social and labour plan.

The Minister must grant a mining right if, amongst others, the mineral can be mined optimally in accordance with the mining work programme, the applicant has access to financial resources and has the technical ability to conduct the proposed operations optimally, the operations will not result in unacceptable pollution, ecological degradation or damage to the environment and an environmental authorisation is issued, the applicant has provided for a prescribed social and labour plan and the granting of such right will substantially and meaningfully expand opportunities for historically disadvantaged persons.

Mining rights are valid for a period specified in the right, which period may not exceed 30 years and is renewable for further periods, each of which may not exceed 30 years at a time.

A person who wishes to conduct mining in respect of minerals may also apply for a mining permit in the prescribed manner. A mining permit may only be issued if the mineral in question can be mined optimally within a period of two years and the mining area in question does not exceed 5.0 hectares in extent. An applicant for a mining permit must also apply for an environmental authorisation and consult with the landowner, lawful occupier and any interested and affected party.

A mining permit is valid for the period specified in the permit, which may not exceed a period of two years and may be renewed for three periods, each of which may not exceed one year, and is not transferable.

Both a mining right and a mining permit are limited real rights in respect of the mineral and the land.

2.4 Are different procedures applicable to different minerals and on different types of land?

There are no different procedures applicable to different minerals or different types of land. Applicants for different types of minerals (e.g. chrome or gold) must meet the same requirements. The MPRDA makes a distinction between minerals and petroleum.

2.5 Are different procedures applicable to natural oil and gas?

The MPRDA distinguishes between rights for minerals and petroleum (natural oil and gas). The procedures applicable to petroleum (natural oil and gas) are dealt with separately in Chapter 6 of the MPRDA.

3 Foreign Ownership and Indigenous Ownership Requirements and Restrictions

3.1 What types of entity can own reconnaissance, exploration and mining rights?

Under the MPRDA, any person (natural or juristic) may hold rights granted in terms of the MPRDA. Normally, private or public companies are utilised by parties carrying on mining operations in South Africa.

A party may also utilise an external company, which is a foreign company that carries on business within South Africa.

Private and public companies are seen as separate legal entities and as such are taxed in their own right and offer the shareholders protection against liabilities.

Parties can also utilise joint ventures or partnerships to carry on mining operations in South Africa.

3.2 Can the entity owning the rights be a foreign entity or owned (directly or indirectly) by a foreign entity and are there special rules for foreign applicants?

The MPRDA does not draw a distinction between local and foreign applicants. All applicants for rights are required to comply with the same requirements set out in the MPRDA, which includes complies with the provisions of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry 2010 ("2010 Mining Charter"), which, amongst others, requires ownership by historically disadvantaged South Africans.

A foreign company is required to register as an "external company" with the Companies and Intellectual Property Commission if it conducts or intends to conduct business in South Africa.

There are no special rules in the MPRDA for foreign applicants.

3.3 Are there any change of control restrictions applicable?

There are change of control restrictions applicable in terms of the MPRDA. The MPRDA contains a restraint against the disposal of a "controlling interest" in a company or close corporation holding prospecting rights, mining rights, exploration and production rights, unless the approval of the Minister of Mineral Resources is obtained.

The interpretation of the term "controlling interest" may refer to both a direct and indirect change of a controlling interest in the holder of a right.

Currently, Ministerial consent is not required in the case of a change of a controlling interest in a listed company and in respect of unlisted companies, ministerial consent is only required in case of a change of a controlling interest.

However, there are proposed amendments to the MPRDA in terms of the Mineral and Petroleum Resources Development Bill [B15D-2013] (the "Amendment Bill"), which is currently before Parliament. If this amendment comes into operation, cession, transfer, letting, subletting, assignment, alienation or other disposal of any interest (no longer only a controlling interest) in an unlisted company or close corporations holding a right or of a controlling interest in a listed company holding a prospecting or mining right, will require the prior written consent of the Minister.

3.4 Are there requirements for ownership by indigenous persons or entities?

There are no requirements for ownership by indigenous persons or entities in South Africa. However, in terms of the 2010 Mining Charter, applicants are required to have at least 26% ownership by historically disadvantaged South Africans.

It is worth noting that, on 15 June 2017, the Minister of Mineral Resources published a new Mining Charter (the Reviewed Broad Based Black-Economic Empowerment Charter of the South African Mining and Minerals Industry ("2017 Mining Charter"). The 2017 Mining Charter introduces a range of changes for the mining sector, which includes, amongst others, that a holder of a new prospecting right must have a minimum of 50% + 1 Black Person shareholding and that a holder of a new mining right must have a minimum of 30% Black Person shareholding.

Subsequent to the publication of the 2017 Mining Charter, the Chamber of Mines launched an urgent court application to interdict the implementation of the 2017 Mining Charter, pending a review application. On 14 July 2017, the Minister of Mineral Resources gave a written undertaking that the Minister and the DMR, will not implement or apply the provisions of the 2017 Mining Charter in any way, pending judgment in the urgent application. The parties have agreed to request for the application to be heard in September 2017. Therefore, the implementation of the 2017 Mining Charter is suspended until the Court rules on the Chamber of Mines' urgent interdict to have it suspended for the duration it will take to have the 2017 Mining Charter reviewed by a Court.

3.5 Does the State have free carry rights or options to acquire shareholdings?

The State does not have any free carry rights or options to acquire shareholding.

However, there are proposed amendments to the MPRDA, in terms of the Amendment Bill referred to above, to grant the State participation in exploration and production rights in respect of petroleum. In terms of the proposed amendments, the State will have a right to a 20% free carried interest in all new exploration and production rights, from the effective date of such rights. In addition to the free carried interest, the State will be entitled to a further participation interest in the form of acquisition at an agreed price or production sharing agreements.

4 Processing, Refining, Beneficiation and Export

4.1 Are there special regulatory provisions relating to processing, refining and further beneficiation of mined minerals?

The Minister of Mineral Resources is empowered to initiate or promote the beneficiation of minerals in South Africa and in promoting beneficiation the Minister may prescribe the levels required for beneficiation. In terms of the MPRDA, any person who intends to beneficiate any mineral mined in the South Africa outside of South Africa may only do so after written notice and in consultation with the Minister.

In addition, the Precious Metals Act, 2005 and Diamonds Act, 1986 regulate the processing of precious metals and diamonds and provide that the South African Diamond and Precious Metals

Regulator, when considering applications, must consider the promotion of equitable access to and local beneficiation of South Africa's diamonds.

There are proposed amendments in terms of the Amendment Bill, which will empower the Minister to designate any mineral or mineral product for local beneficiation.

Furthermore, the Amendment Bill provides that every producer of designated minerals must offer to local beneficiaries a prescribed percentage of its production of minerals or mineral products in prescribed quantities, qualities and timelines at the mine gate price or agreed price.

4.2 Are there restrictions on the export of minerals and levies payable in respect thereof?

Restrictions are imposed on the export of minerals in South Africa. Export permits are required for the export of certain minerals and export levies are imposed.

In terms of the Amendment Bill no person, other than a producer (or an associated company of such producer) in respect of its own production and who has offered local beneficiaries a prescribed percentage of its production of minerals or mineral products in prescribed quantities, may export designated minerals or mineral products without the Minister's prior written approval.

5 Transfer and Encumbrance

5.1 Are there restrictions on the transfer of rights to conduct reconnaissance, exploration and mining?

In terms of the MPRDA reconnaissance permissions, mining permits, retention permits, reconnaissance permits or technical cooperation permits, are not transferable.

In terms of the MPRDA prospecting rights, mining rights, exploration rights and production rights or an interest in any such right or a controlling interest in a company or close corporation, may not be ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of without the written consent of the Minister of Mineral Resources, except in the case of change of controlling interest in listed companies.

The Minister is obliged to grant such consent where it is shown that the transferee, cessionary or assignee is capable of carrying out and complying with the obligations and terms and conditions of the right in question and satisfies the requirements for the granting of the right in question in terms of the MPRDA.

In terms of the MPRDA, the transfer of a right must be lodged for registration at the Mineral and Petroleum Titles Registration Office within 60 days of the relevant transaction.

5.2 Are the rights to conduct reconnaissance, exploration and mining capable of being mortgaged or otherwise secured to raise finance?

In terms of the MPRDA, reconnaissance rights are not capable of being mortgaged.

The MPRDA provides that prospecting rights, mining rights, exploration rights and production rights are capable of being encumbered by mortgage bonds as security to obtain a loan or guarantee for project funding or financing, by a bank as defined in the Banks Act, or any other financial institution approved for that purpose by the Registrar of Banks referred to in the Banks Act, on

request by the Minister, subject to an undertaking by the bank or financial institution that any sale in execution or any other disposal pursuant to the foreclosure of the mortgage will be subject to the consent of the Minister.

If the mortgage bond holder is not a bank or financial institution, prior written consent from the Minister is required.

All mortgage bonds created over rights granted under the MPRDA must be registered in the Mineral and Petroleum Titles Registration Office.

6 Dealing in Rights by Means of Transferring Subdivisions, Ceding Undivided Shares and Mining of Mixed Minerals

6.1 Are rights to conduct reconnaissance, exploration and mining capable of being subdivided?

Reconnaissance rights are not capable of being subdivided. Under the MPRDA, prospecting and mining rights as well as exploration and production rights are capable of being subdivided, subject to the prior consent of the Minister of Mineral Resources.

6.2 Are rights to conduct reconnaissance, exploration and mining capable of being held in undivided shares?

Rights, permits and permissions granted in terms of the MPRDA can be held in undivided shares (e.g. by joint holders or co-holders). The Mining Titles Registration Act, 1967 further makes provision for the registration of rights to minerals by different persons in undivided shares.

6.3 Is the holder of rights to explore for or mine a primary mineral entitled to explore or mine for secondary minerals?

The holder of a right under the MPRDA to explore for or mine a primary mineral is not entitled to explore or mine for secondary minerals.

Under the MPRDA, different holders may be granted mining rights in respect of different minerals on the same land. In terms of the common law, where two different persons hold the rights to different minerals in the same land and where the different minerals can be separated upon extraction, the holder who mines its mineral must set aside the ores of the minerals to which it is not entitled.

6.4 Is the holder of a right to conduct reconnaissance, exploration and mining entitled to exercise rights also over residue deposits on the land concerned?

A holder of a mining permit or right granted under the MPRDA is entitled to exercise rights over residue deposits on the land concerned, provided that such residue deposits are produced by virtue of that right granted in terms of the MPRDA.

The MPRDA regulates mine dumps that fall within the definitions of 'residue stockpile' and 'residue deposit'. These definitions relate only to residues produced by virtue of rights or permits granted in terms of the MPRDA. Any residues created by the holder of a mining right or permit are considered as 'residue stockpiles' and are capable of being processed by the holder of such right or permit.

Upon the lapse of the right or permit, the relevant residues become residue deposits and third parties can apply for the rights to prospect or mine the residue deposits.

The proposed amendments in terms of the Amendment Bill propose changes to the current legal position. Currently, the MPRDA does not regulate mine dumps created prior to the coming into operation of the MPRDA.

The Amendment Bill aims to bring mine dumps created prior to the promulgation of the MPRDA under the ambit of the MPRDA.

Under the Amendment Bill, the holder of a mining right or mining permit who owns historic residue deposits or residue stockpiles which are located within the mining area has an exclusive right to apply for an amendment of the mining works programme to include such deposits and stockpiles into the right. In cases of historic residue deposits and residue stockpiles located outside the mining area and where the owner fails to apply for a mining right or mining permit within the said two-year period, the custodianship of the minerals in such historic residues and stockpiles shall revert back to the State and the State shall be entitled to invite applications thereon.

6.5 Are there any special rules relating to offshore exploration and mining?

There are no special rules relating to offshore exploration and mining.

Under the MPRDA, applications to conduct petroleum operations are dealt with separately in Chapter 6 of the MPRDA.

7 Rights to Use Surface of Land

7.1 Does the holder of a right to conduct reconnaissance, exploration or mining automatically own the right to use the surface of land?

The holder of a right to conduct reconnaissance, exploration or mining does not automatically own the right to use the surface of land. However, under the MPRDA, a prospecting right, mining right and an exploration right or production right granted in terms of the MPRDA and registered in terms of the Mining Titles Registration Act, 1967 is a limited real right in respect of the mineral or petroleum and the land to which such right relates.

The holder of such rights may, amongst others:

- enter the land to which such right relates together with his or her employees, and bring onto that land any plant, machinery or equipment and build, construct or lay down any surface, underground or undersea infrastructure which may be required for the purpose of prospecting, mining, exploration or production;
- prospect, mine, explore or produce for his own account on or under that land for the mineral or petroleum for which such right has been granted;
- remove and dispose of any such mineral found during the course of prospecting, mining, exploration or production;
- subject to the National Water Act, 1998, use water from any natural spring, lake, river or stream, situated on, or flowing through, such land or from any excavation previously made and used for prospecting, mining, exploration or production purposes, or sink a well or borehole required for use relating to prospecting, mining, exploration or production on such land; and
- carry out any other activity incidental to prospecting, mining, exploration or production operations, which activity does not contravene the provisions of the MPRDA.

The MPRDA grants entitlements to holders of rights, even though the landowner has ownership of his or her land. Under the MPRDA, the landowner is bound to allow the right holder to enter the land. The MPRDA does not require the right holder and the landowner to enter into an agreement regarding the surface use of the land. Therefore the right holder has a right of entry irrespective of whether or not an agreement has been concluded.

7.2 What obligations does the holder of a reconnaissance right, exploration right or mining right have vis-à-vis the landowner or lawful occupier?

The holder of a reconnaissance right, exploration right or mining right is required to consult with the landowner or lawful occupier and has to compensate the landowner for loss suffered as a result of the conduct of prospecting or mining activities. The MPRDA requires consultation with landowners, lawful occupiers and interested and affected persons before the Minister of Mineral Resources grants a right to an applicant. Consultation is required in regard to prospecting rights, mining rights, mining permits, exploration rights and production rights.

The consultative process within the ambit of the MPRDA does not impose obligations for an agreement to be concluded between the landowner and the applicant during the consultative process.

The MPRDA provides for the payment of compensation under certain circumstances and it prescribes what measures need to be taken if the landowner refuses access to his land. If no agreement is reached, the compensation will be determined by arbitration or a competent court.

Any right holder can purchase the land on which the right relates from the owner if the parties agree. Although the MPRDA does not require the right holder and the landowner to enter into an agreement regarding the surface use of the land, most mining companies enter into surface lease agreements with the landowners.

7.3 What rights of expropriation exist?

In terms of the MPRDA, and in accordance with the relevant provisions of the Constitution of South Africa, 1996, the Minister of Mineral Resources may, if it is necessary for the achievement of the objects of the MPRDA and for a public purpose or in the public interest, expropriate any land or any right therein and pay compensation in respect thereof.

8 Environmental

8.1 What environmental authorisations are required in order to conduct reconnaissance, exploration and mining operations?

The holder of a prospecting right or mining right is required to have an approved environmental authorisation before conducting any prospecting or mining operations. An application for environmental authorisation must be made in accordance with the Environmental Impact Assessment Regulations read with the National Environmental Management Act, 1998. Applications must be submitted to the DMR, which is the competent authority for applications for environmental authorisations relating to prospecting, mining, exploration, production or other incidental activities.

A holder of a mining right also requires a water use licence in terms of the National Water Act, 1998.

8.2 What provisions need to be made for storage of tailings and other waste products and for the closure of mines?

With effect from 24 July 2015, the establishment and reclamation of mine dumps and stockpiles of similar waste from or incidental to a mining operation, must comply with the regulations regarding the planning and management of residue stock piles and residue deposits from a prospecting, mining, exploration or production operation (Mining Residue Regulations) published under the National Environmental Management: Waste Act, 2008.

A waste management licence under the National Environmental Management: Waste Act, 2008, is required for the creation of a residue stockpile. Applicants for waste management licences must undertake an environmental impact assessment process in accordance with the National Environmental Management Act, 1998.

Financial provision for environmental rehabilitation and closure requirements of mining operations forms an integral part of the MPRDA. The holder of a right must provide the Department of Minerals Resources with sufficient financial provision for the rehabilitation, management and closure of environmental impacts. The Department of Minerals Resources assesses and approves the quantum of financial provision on an annual basis to ensure that the financial provision is sufficient to cover the environmental liability at that time and for closure of the mine at that time. This is done in terms of a deposit with a deposit with the DMR, a bank guarantee or a trust deed.

The requirement to maintain and retain financial provision remains in force until the Minister issues a certificate to the relevant holder, but the Minister may retain such portion of the financial provision as may be required to rehabilitate the closed mining operation in respect of latent or residual environmental impacts.

8.3 What are the closure obligations of the holder of a reconnaissance right, exploration right or mining right?

A holder of a right must, in terms of the MPRDA, apply for a closure certificate within 180 days of the occurrence of the lapsing, abandonment, cancellation, cessation, relinquishment or completion of the prescribed closing plan to which a right, permit or permission relates and must be accompanied by the required information, programmes, plans and reports prescribed in terms of the MPRDA and the National Environmental Management Act, 1998.

No closure certificate will be issued unless the Chief Inspector and each government department charged with the administration of any law which relates to any matter affecting the environment have confirmed in writing that the provisions pertaining to health and safety and management pollution to water resources, the pumping and treatment of extraneous water and compliance to the conditions of the environmental authorisation have been addressed.

Under the MPRDA, the holder of a prospecting right, mining right, retention permit, mining permit, or previous holder of an old order right or previous owner of works that has ceased to exist, remains responsible for any environmental liability, pollution, ecological degradation, the pumping and treatment of extraneous water, compliance to the conditions of the environmental authorisation and the management and sustainable closure thereof, until the Minister has issued a closure certificate.

8.4 Are there any zoning or planning requirements applicable to the exercise of a reconnaissance, exploration or mining right?

If there are zoning and planning restrictions applicable in the area in which the prospecting or mining operations are to be undertaken, the holder will be required to obtain zoning approvals over and above the prospecting or mining rights.

Holders of permits, permissions and rights granted in terms of the MPRDA must ascertain whether a town planning scheme has been promulgated over the land which is the subject of the relevant permit, permission or right, which restricts prospecting or mining operations without a rezoning application.

9 Native Title and Land Rights

9.1 Does the holding of native title or other statutory surface use rights have an impact upon reconnaissance, exploration or mining operations?

The holding of a native title or other statutory surface use rights does not have an impact upon the reconnaissance, exploration or mining operations. However, such native title or statutory surface rights holders must be consulted by the applicants of rights and they are entitled to receive compensation in the event that they have suffered loss or damage as a result of the reconnaissance, prospecting or mining operations.

Further, if an application for a prospecting or mining right relates to the land occupied by a community, the Minister may impose such conditions as are necessary to promote the rights and interests of the community, including conditions requiring the participation of the community.

Furthermore, communities have a preferent right to apply for a prospecting or mining right in respect of any mineral and land which is registered or to be registered in the name of the community concerned.

10 Health and Safety

10.1 What legislation governs health and safety in mining?

The Mine Health and Safety Act, 1996 is the primary legislation that regulates health and safety in the mining industry.

10.2 Are there obligations imposed upon owners, employers, managers and employees in relation to health and safety?

The Mine Health and Safety Act, 1996 provides the framework for mandatory and discretionary legal appointments at a mine. The Mine Health and Safety Act, 1996 requires certain mandatory appointments be made, where certain minimum threshold requirements are met.

The Mine Health and Safety Act, 1996 imposes a number of extensive obligations upon owners, employers, managers and employees in relation to health and safety, including in relation to statutory appointments.

11 Administrative Aspects

11.1 Is there a central titles registration office?

There is a central titles registration office, namely the 'Mineral and Petroleum Titles Registration Office', established in terms of the Mining Titles Registration Act, 1967. The Mineral and Petroleum Titles Registration Office is the sole registry office in regard to mineral and petroleum titles and is situated in Pretoria.

11.2 Is there a system of appeals against administrative decisions in terms of the relevant mining legislation?

There is a system of appeals against administrative decisions in terms of the MPRDA.

In terms of section 96(1) of the MPRDA, any person whose rights or legitimate expectations have been materially and adversely affected or who is aggrieved by any administrative decision in terms of the MPRDA may appeal within 30 days of becoming aware of such administrative decision in the prescribed manner:

- to the Director-General, if it is an administrative decision by a Regional Manager or any officer to whom the power has been delegated or a duty has been assigned by or under the MPRDA; or
- the Minister, if it is an administrative decision that was taken by the Director-General or the designated agency.

No person may apply to the court for the review of an administrative decision until that person has exhausted his or her remedies in terms of section 96(1) of the MPRDA.

12 Constitutional Law

12.1 Is there a constitution which has an impact upon rights to conduct reconnaissance, exploration and mining?

The Constitution of the Republic of South Africa, 1996, impacts upon rights to conduct reconnaissance, exploration and mining.

Section 24 of the Constitution guarantees a right to an environment that is not harmful to human health or well-being and to environmental protection for the benefit of present and future generations and directs the State to take reasonable legislative and other measures to prevent pollution, promote conservation, and secure the ecologically sustainable development and use of natural resources (including water and mineral resources) while promoting justifiable economic and social development.

Section 25 of the Constitution aims to protect the property rights of landowners whilst at the same time safeguarding the interests of society as a whole. In terms of section 25, property may be expropriated only in terms of the law of general application, for a public purpose or in the public interest, and subject to compensation the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

12.2 Are there any State investment treaties which are applicable?

South Africa has investment treaties with a number of countries. However, pursuant to the provisions of the Protection of Investment

Act, 2015, which Act will come into operation on a date determined by the President by proclamation in the Government Gazette, South Africa, has therefore, started terminating some of its existing bilateral investment treaties. It has already terminated investment treaties with some countries such as Luxembourg, Spain, Germany, Switzerland, the Netherlands and Denmark and will soon cancel the remaining treaties.

13 Taxes and Royalties

13.1 Are there any special rules applicable to taxation of exploration and mining entities?

There are special rules applicable to the taxation of prospecting and mining companies. Generally, the mining industry has a favourable tax regime in relation to capital expenditure on mining assets because the mining industry is capital intensive and requires large investments. In particular, taxpayers who derive income from mining operations qualify for deduction of their capital expenditure against income derived from mining operations.

13.2 Are there royalties payable to the State over and above any taxes?

There are royalties payable to the State over and above taxes. In terms of the Mineral and Petroleum Resources Royalty Act, 2008, royalties are payable to the State.

The rate of the royalty is variable and depends on the classification of a mineral as a refined or unrefined mineral resource. The royalty is levied on the transfer of minerals or petroleum on the basis of the value thereof at the time of transfer. The royalty is calculated by a tax formula.

The royalty is payable by any person that extracts a chargeable mineral resource from South Africa.

14 Regional and Local Rules and Laws

14.1 Are there any local provincial or municipal laws that need to be taken account of by a mining company over and above National Legislation?

Over and above the MPRDA which is national legislation, provincial and municipal laws must be taken into account by mining companies. All mining companies need to comply with provincial and municipal laws to the extent that they are applicable to the mining operations. As stated above, if there is a town planning scheme promulgated over the land which is the subject of the relevant permit, permission or right, which restricts prospecting or mining operations without a rezoning application, the mining company will be required to obtain zoning approvals over and above the permit, permission or right.

14.2 Are there any regional rules, protocols, policies or laws relating to several countries in the particular region that need to be taken account of by an exploration or mining company?

There are rules, protocols and policies relating to the Southern African Development Community (SADC) region, which govern preferential tariff treatment of goods, import duties, custom restrictions and the like which may assist companies operating in South Africa.

South Africa has signed a number of trade agreements with its trading partners.

15 Cancellation, Abandonment and Relinquishment

15.1 Are there any provisions in mining laws entitling the holder of a right to abandon it either totally or partially?

The MPRDA provides that any right, permit or permission granted or issued in terms of the MPRDA shall lapse, whenever it is abandoned. Furthermore, the prospecting right and mining right contain standard terms and conditions entitling the holder to abandon the right wholly or as to part or parts of the relevant area. Therefore, the holder of a right, permit or permission could abandon part of the area or the right insofar as it relates to some of the minerals. Upon the abandonment, written notification with details of the relinquishment must be submitted by the holder to the DMR and the holder must apply for a closure certificate.

15.2 Are there obligations upon the holder of an exploration right or a mining right to relinquish a part thereof after a certain period of time?

There are no obligations upon the holder of a prospecting or mining right to relinquish a part thereof after a certain period of time.

15.3 Are there any entitlements in the law for the State to cancel an exploration or mining right on the basis of failure to comply with conditions?

The State is entitled to cancel or suspend rights or permits granted under the MPRDA on the basis of failure to comply with conditions. Under the MPRDA, the Minister may cancel or suspend any right, permit or permission, if the holder:

- is conducting any reconnaissance, prospecting or mining operation in contravention of the MPRDA;
- breaches any material term or condition of such right, permit or permission;
- is contravening any condition in the environmental authorisation;
- has submitted inaccurate, false, fraudulent, incorrect or misleading information required to be submitted under the MPRDA; or
- has ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of a right or an interest in any such right, or a controlling interest in a company or close corporation without the written consent of the Minister.

However, the Minister must, prior to suspending or cancelling the right, permit or permission: give written notice to the holder indicating the intention to suspend or cancel the right; set out the reasons why he or she is considering suspending or cancelling the right; afford the holder a reasonable opportunity to show why the right, permit or permission should not be suspended or cancelled; and notify the mortgagee, if any, of the right or mining permit concerned of his or her intention to suspend or cancel the right or permit.

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Fasken Martineau is a leading international business law and litigation firm. With more than 700 lawyers, the firm has offices in Vancouver, Calgary, Toronto, Ottawa, Montréal, Québec City, London and Johannesburg. For additional information, please visit the firm's website at www.fasken.com/johannesburg.

Ukraine

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1 Relevant Authorities and Legislation

1.1 What regulates mining law?

The key items of legislation which govern mining activities in Ukraine include the following acts:

- the Subsoil Code of Ukraine (the “Subsoil Code”) dated 27 July 1994;
- the Law of Ukraine “On Production Sharing Agreements” (the “PSA Law”) dated 14 September 1999;
- the Mining Law of Ukraine (the “Mining Law”) dated 6 October 1999;
- the Law of Ukraine “On the State Geological Service of Ukraine” dated 4 November 1999;
- the Procedure for Issuance of Special Permits for Subsoil Use (Resolution No. 615 of the Cabinet of Ministers of Ukraine dated 30 May 2011); and
- the Procedure for Holding Auctions for the Sale of Special Permits for Subsoil Use (Resolution No. 594 of the Cabinet of Ministers of Ukraine dated 30 May 2011).

Generally, under the Ukrainian Constitution, all subsoil is “owned by the Ukrainian people” and, therefore, can only be provided into third parties’ use, and not ownership.

The provision of subsoil into third parties’ use is carried out by the State of Ukraine on the basis of a document called “the special permit for subsoil use” (the “Special Permit”). The Special Permits are issued for exploration, production, or both exploration and production. The term of Special Permits can reach up to 50 years.

1.2 Which Government body/ies administer the mining industry?

The main State authorities involved in governing the subsoil use in Ukraine include:

1. the Parliament – adopts primary legislation and develops strategic policy in the mining sphere;
2. the Cabinet of Ministers of Ukraine – adopts secondary legislation implementing the Parliamentary acts;
3. the Ministry of Energy and Coal Industry – implements the State energy policy;
4. the State Labour Service – implements the State policy in the area of industrial safety and labour protection;
5. the Ministry for Environment and Natural Resources – implements the State environmental policy and supervises rational use of the mineral resources; and

6. the State Service for Geology and Subsoil – issues Special Permits to subsoil users.

1.3 Describe any other sources of law affecting the mining industry.

The key principles of development of the Ukrainian mining industry are set forth in the State Programme for Development of the Natural Resources in Ukraine for a period up to 2030.

The other relevant legislative acts also include:

1. the Law of Ukraine “On Oil and Gas”;
2. the Law of Ukraine “On Coalbed Gas (Methane)”;
3. the Law of Ukraine “On Production and Processing of Uranium Ore”;
4. the Law of Ukraine “On State Regulation of Exploration, Production and Use of Precious Metals and Precious Stones and Control over Transactions with them”;
5. the Law of Ukraine “On Environmental Protection”;
6. the Law of Ukraine “On Public-Private Partnership”;
7. the Law of Ukraine “On Particularities of Granting State-Owned Fuels and Energy Facilities into Lease or Concession”;
8. the Tax Code of Ukraine (taxation of the subsoil use activities);
9. the Land Code of Ukraine (governing provision of the land plots for the subsoil use activities);
10. the Water Code of Ukraine (subsoil use issues for exploration of groundwaters); and
11. the Commercial and Civil Codes of Ukraine (basic rules regulating contractual and corporate activities of mining companies).

2 Mechanics of Acquisition of Rights

2.1 What rights are required to conduct reconnaissance?

Reconnaissance is not viewed as a separate phase of development of natural resources and is performed as part of exploration. A Special Permit is required to perform exploration.

2.2 What rights are required to conduct exploration?

A potential investor planning to conduct exploration may acquire respective rights through one of the following options:

- obtain the Special Permit (“Special Permit Option”);

- enter into a production sharing agreement (“PSA Option”);
- enter into a joint activity agreement (“JAA”) with the company that already holds subsoil use rights (“JAA Option”); or
- acquire shares in a company that already owns subsoil use rights (“Equity Acquisition Option”).

Special Permit Option

A Special Permit is granted by the State Service for Geology and Subsoil mainly via auctions.

PSA Option

The investor receives the subsoil use rights arising from a contract negotiated with the Ukrainian Government. In the majority of cases, PSAs are executed with the winners of public tenders.

Although an investor under the PSA option is not exempt from licences, permits and approvals, the State undertakes to facilitate their obtaining by the investor.

JAA Option

Under the JAA Option, a company, already holding the Special Permit, agrees to jointly develop its deposits with an investor and then share the obtained profits pursuant to an agreed proportion. Currently, this option is barely used because of the high rent payments.

Equity Acquisition Option

The acquisition of a Ukrainian company holding a Special Permit is a common approach for investing in mining projects. The reason is that no consent or conversion of the Special Permit is required as a result of the acquisition of a shareholding in a company holding the Special Permit. However, consent to such an acquisition would most likely be required in the event that the target was a party to a JAA or PSA.

2.3 What rights are required to conduct mining?

Ukrainian law uses the terms “production” or “extraction” for determining the commercial development of deposits and extraction of natural resources.

In addition to obtaining a Special Permit, the subsoil user must also obtain a “mining allotment” to proceed with the production of natural resources (following the exploration phase).

To obtain the mining allotment, a company will be required, among other things, to:

- approve the estimated reserves of natural resources for a specific field; and
- prepare a detailed extraction plan (usually performed by Ukrainian scientific institutes) and an environmental impact assessment study.

2.4 Are different procedures applicable to different minerals and on different types of land?

Generally, procedures are similar for all types of minerals. However, procedures for the exploration and production of oil and gas are more detailed.

It is possible to use land plots for the mining activities only if they are classified as “industrial land”. As a matter of practice, however, exploration (as opposed to production) of natural resources is often performed on agricultural lands on the basis of agreements with the land owners.

The practical problem with this is that most of land plots in Ukraine are classified as “agricultural”, and it is not possible to convert them from “agricultural” into “industrial”. This is due to an ongoing

moratorium on changing the designated purpose of agricultural lands until 1 January 2018, which is expected to be prolonged for another year. The above moratorium does not apply to the land plots granted for the investors’ activity under PSAs.

2.5 Are different procedures applicable to natural oil and gas?

No, procedures applicable to natural oil and gas are the same. However, this industry is also regulated by special laws and regulations, e.g., the Law “On Oil and Gas”, the Law “On the Natural Gas Market” and the recently adopted Rules of Exploration of Oil and Gas Deposits (Order No. 118 of the Ministry for Environment dated 15 March 2017).

3 Foreign Ownership and Indigenous Ownership Requirements and Restrictions

3.1 What types of entity can own reconnaissance, exploration and mining rights?

Exploration and mining rights can be owned by both Ukrainian and foreign legal entities irrespective of their legal forms.

3.2 Can the entity owning the rights be a foreign entity or owned (directly or indirectly) by a foreign entity and are there special rules for foreign applicants?

Special Permit Option

The Ukrainian legislation does not contain specific restrictions for foreign entities holding subsoil use rights.

PSA Option

The foreign entity must establish a representative office in Ukraine within three months after signing the PSA.

3.3 Are there any change of control restrictions applicable?

In general, no change of control approval is usually required.

However, for the JAA Option, a prior clearance of the Antimonopoly Committee of Ukraine (the “AMCU”) would usually be required if the JAA contemplates concerted actions. For the Equity Acquisition Option, the clearance may be necessary if 25% or more of the company is to be acquired.

For both of the above options the AMCU clearance is required when the below thresholds are exceeded:

- for a transaction, if it would result in the market share of the parties (including their affiliates) exceeding 35%; and
- for the acquisition of 100% of the shares in a company, if the parties to the transaction meet the following financial thresholds:
 - the worldwide assets or sales of all the parties to the transaction (including their group entities) exceed EUR 30 million in the financial year preceding the transaction; and the Ukrainian assets or sales of at least two parties to the transaction (including their group entities) exceed EUR 4 million; or
 - the Ukrainian assets or sales of the acquired party exceed EUR 8 million in the financial year preceding the transaction; and the worldwide sales of at least one other party to the transaction exceed EUR 150 million.

3.4 Are there requirements for ownership by indigenous persons or entities?

No, Ukrainian law does not provide any specific requirements for this.

3.5 Does the State have free carry rights or options to acquire shareholdings?

No, Ukrainian law does not provide such rights to the State.

4 Processing, Refining, Beneficiation and Export

4.1 Are there special regulatory provisions relating to processing, refining and further beneficiation of mined minerals?

Ukrainian law contains a number of industry standards applicable to processing of certain types of minerals, which are, for instance, the Law “On Production and Processing of Uranium Ore”, the Law “On State Regulation of Exploration, Production and Use of Precious Metals and Precious Stones and Control over Transactions with them”.

Moreover, special Labour Protection Rules for Crushing, Sorting and Processing Mineral Resources and Lumping Ores and Concentrates are approved by the Order No. 933 of the Ministry for Emergency dated 27 June 2012.

4.2 Are there restrictions on the export of minerals and levies payable in respect thereof?

Yes, for example, according to the Law “On Natural Gas Market”, commercial activity on the natural gas market, including its transportation, can be conducted only after obtaining an appropriate licence.

The Law “On International Economic Activity” establishes an obligation to obtain a licence for the export of gold, silver (except banking metals) and waste or scraps of precious metals or containing precious metals. The quotas remain the same as the previous year and are equal to zero.

For 2017, export of anthracite is also permitted after obtaining a licence.

5 Transfer and Encumbrance

5.1 Are there restrictions on the transfer of rights to conduct reconnaissance, exploration and mining?

Special Permit Option

The general rule is that holders of Special Permits cannot transfer their subsoil use rights to other persons, e.g., through a gift, sale, or include them in the authorised capital of its subsidiaries or the joint activity.

This, however, does not apply to the following cases:

- when the Special Permit is transferred to the legal successor of the permit holder as a result of the legal entity reorganisation; and

- separation of legal entity from the permit holder, if the below conditions are met:

- the newly established entity is at 50% or more owned by the permit holder;
- absence of tax liability of the permit holder; and
- compliance with conditions of subsoil use.

PSA Option

Rights for subsoil use can be transferred simultaneously with the transfer of rights and obligations under the PSA. This requires consent of the State, conclusion of an additional agreement, and conversion of Special Permits within 30 days after the assignment of rights. The assignee must have enough financial and technical resources and experience in organising activities provided by the PSA.

5.2 Are the rights to conduct reconnaissance, exploration and mining capable of being mortgaged or otherwise secured to raise finance?

Special Permit Option

Mortgage of rights may take place only when the owner of the right is entitled to dispose it. To the extent that the holder of the subsoil use right is not entitled to dispose it, the mortgage of the right is not permitted. A mortgage of mineral resources, including those which are to be produced in the future, is allowed.

PSA Option

The PSA Law does not contain a direct restriction on mortgage of the subsoil use right. To the extent that a transfer of this right is permitted, and on the basis of general civil legislation as applicable to relations governed by the PSA, it is assumed that mortgage of the subsoil use right is possible.

However, prior to production sharing, all the produced products are owned by the State. Therefore, it is not permitted to mortgage mineral resources before they are shared under the PSA.

6 Dealing in Rights by Means of Transferring Subdivisions, Ceding Undivided Shares and Mining of Mixed Minerals

6.1 Are rights to conduct reconnaissance, exploration and mining capable of being subdivided?

There are different types of Special Permits according to Ukrainian law. Such permit may cover:

- only exploration rights;
- only production rights; or
- both exploration and production rights.

6.2 Are rights to conduct reconnaissance, exploration and mining capable of being held in undivided shares?

Special Permit Option

A Special Permit holder has an exclusive right to use subsoil and is entitled to grant consent to other entities to use this subsoil. Subsoil users which are not holders of the Special Permit (e.g., subcontractors), are not liable for performing conditions of this permit. The liable entity would be the permit holder.

The Law “On Oil and Gas” also allows using subcontractors but only if they assume the environmental responsibility for their actions.

PSA Option

The PSA Law provides few ways of using subsoil by several entities:

- use of subcontractors within exploration and production activity; and
- PSA concluded with several investors, who can act simultaneously within the same subsoil boundaries. In this case the Special Permit is issued in the name of all of the investors.

6.3 Is the holder of rights to explore for or mine a primary mineral entitled to explore or mine for secondary minerals?

Yes, the Special Permit covers both exploration and/or production for primary and secondary minerals.

6.4 Is the holder of a right to conduct reconnaissance, exploration and mining entitled to exercise rights also over residue deposits on the land concerned?

The Mining Law only imposes obligations on the Special Permit holders:

- to use the mineral wastes of the mine dumps rationally for further recycling; and
- to apply modern technologies in doing so.

6.5 Are there any special rules relating to offshore exploration and mining?

According to the Law of Ukraine “On the Exclusive (Maritime) Economic Zone of Ukraine” dated 16 May 1995, Ukraine has sovereign rights with respect to exploration, development and protection of the natural resources located in its subsoil.

The maximum term for offshore exploration and production of oil and gas subsoil is 30 years, while for onshore activities this term is limited to 20 years.

The exploration and production activity must also comply with the Safety Rules for Performance of Exploration and Production Works at Oil and Gas Deposits in the Black and Azov Seas (Order No. 1423 of the Ministry for Emergency dated 14 December 2012).

7 Rights to Use Surface of Land

7.1 Does the holder of a right to conduct reconnaissance, exploration or mining automatically own the right to use the surface of land?

Special Permit Option

Special Permits cover only the permit holder’s rights to use the subsoil plot, not the land plot itself.

The Subsoil Code provides that a land plot can be allocated to a private entity into lease or ownership for the purposes of the exploration and/or production of natural resources only after the subsoil user obtains the Special Permit and a mining allotment (if necessary).

PSA Option

The State facilitates obtaining of documents for the land use rights by the PSA investors. PSA investors also enjoy the privilege of

absence of moratorium on change of the designated purpose of agricultural land.

7.2 What obligations does the holder of a reconnaissance right, exploration right or mining right have vis-à-vis the landowner or lawful occupier?

The most important obligations of a subsoil user are the following:

- to pay land tax, and lease payments (as provided by a lease agreement);
- to increase land fertility and conduct re-cultivation of the leased/owned land plots; and
- to comply with the environmental regulations, in particular, in respect of the maximum permitted concentrations of the pollutants in the soil.

7.3 What rights of expropriation exist?

The Ukrainian Government or the relevant local authorities may decide upon expropriation of land plots. A land plot may be expropriated only after some remuneration is paid to the land owner. Compulsory expropriation may be applied only as an exception under the court decision.

Land expropriation is not common for Ukraine. Expropriation of land plots within the occupied territories of Crimea, Donetsk and Luhansk regions of Ukraine is illegal.

8 Environmental

8.1 What environmental authorisations are required in order to conduct reconnaissance, exploration and mining operations?

According to Ukrainian law, an investor must obtain:

- an approval of a drilling programme;
- a permit for performance of hazardous works and use of hazardous equipment issued by the State Labour Service;
- a permit for waste management activities issued by local State administrations (currently not issued due to lack of procedure);
- air emission permit; and
- an environmental impact assessment (the newly adopted Law of Ukraine “On Environmental Impact Assessment” comes into force from 18 December 2017).

8.2 What provisions need to be made for storage of tailings and other waste products and for the closure of mines?

According to the Law of Ukraine “On Waste Products”, storage of tailings shall be made in accordance with the environmental safety rules and with the use of methods providing maximum use of waste. For each place of tailing, storage appropriate passport shall exist.

Despite the above, an investor providing storage of tailings shall obtain an appropriate permit for such activity.

The closure of mines is regulated by the following acts:

- the Subsoil Code;
- the Mining Law;
- the Procedure of Co-ordination of Liquidation and Conservation of the Mining Enterprises or their Land Plots dated 12 March 1999; and

- the Procedure on Liquidation of Oil, Gas and Other Wells and Recovery of Costs Spent on its Creation dated 27 December 1989.

Both liquidation and conservation require that mining sites be brought into the condition ensuring safety of the people, property, and the environment; while conservation should additionally ensure the preservation of deposits, excavations and wells for the entire conservation period.

8.3 What are the closure obligations of the holder of a reconnaissance right, exploration right or mining right?

Main requirements are as follows:

- closure activities shall be performed in compliance with the approved technical project documentation which is subject to various approvals including environmental and technical assessment;
- the subsoil user is required to draft a complex plan for the social protection of the employees and development of the social infrastructure; and
- no damage may be done to the people, property and the environment.

8.4 Are there any zoning or planning requirements applicable to the exercise of a reconnaissance, exploration or mining right?

Ukrainian law provides that exploration and production activities can be conducted only on industrial lands.

The Land Code determines also other categories of lands: 1) agricultural lands; 2) lands for housing and civil construction; 3) lands for environmental protection purposes; 4) lands for health-improving purposes; 5) recreational lands; 6) lands for historic and cultural purposes; 7) forest fund lands; and 8) water fund lands.

9 Native Title and Land Rights

9.1 Does the holding of native title or other statutory surface use rights have an impact upon reconnaissance, exploration or mining operations?

The right for the land plot consists of the right for its surface, area above and below the surface necessary for buildings construction. It does not cover the right for subsoil use and natural resources contained in it. Holding the right on the land plot does not automatically provide the land owner/user with the right for subsoil use.

Nevertheless, land owners and users are allowed to conduct exploration and production activities with regard to natural resources of local importance (such as sand) without obtaining Special Permits or mining allotment within their land plots. Using special equipment which may negatively impact the environment must be approved by local authorities.

10 Health and Safety

10.1 What legislation governs health and safety in mining?

Health and safety within mining spheres is covered by the following laws:

- the Mining Law;
- the Law of Ukraine “On Ensuring the Sanitary and Epidemiological Safety of the Population” dated 24 February 1994;
- the Code for Civil Protection dated 2 October 2012;
- the Law of Ukraine “On Labour Protection” dated 14 October 1992;
- the Labour Code of Ukraine dated 10 December 1971;
- the Law “On Mining and Processing of Uranium Ore”;
- the Safety Rules in Oil and Gas Mining Industry (Order of the State Committee of Ukraine on Industrial Safety, Labour Protection and Mining Supervision dated 6 May 2008); and
- the Labour Protection Rules for Crushing, Sorting and Processing Mineral Resources and Lumping Ores and Concentrates.

10.2 Are there obligations imposed upon owners, employers, managers and employees in relation to health and safety?

The Labour Code of Ukraine contains a general obligation for the employer to ensure safe and harmless working conditions. The owners/employers/managers are also obliged to ensure safe environment conditions.

11 Administrative Aspects

11.1 Is there a central titles registration office?

The main authority responsible for issuing Special Permits is the State Service for Geology and Subsoil.

PSA itself must be registered by the specialised Interdepartmental Commission. Furthermore, PSAs and JAAs shall be registered by the State Fiscal Service.

11.2 Is there a system of appeals against administrative decisions in terms of the relevant mining legislation?

The general procedure for appealing against administrative decisions of State authorities includes filing a lawsuit to district administrative courts and afterwards – to appellate administrative courts.

Due to the judicial reform, the last instance for appealing will be cassation; the existing Higher Administrative Court of Ukraine will be liquidated and replaced by the Cassation Administrative Court within the structure of the Supreme Court of Ukraine.

Currently the Higher Administrative Court is still functioning as a cassation court, while the Supreme Court of Ukraine is the last appealing instance for administrative lawsuits.

12 Constitutional Law

12.1 Is there a constitution which has an impact upon rights to conduct reconnaissance, exploration and mining?

There is no specific clause in the Constitution of Ukraine which has a direct impact upon the right to conduct exploration and production. However, Article 13 contains a general provision that the land, its mineral resources, atmosphere, water and other natural resources within the territory of Ukraine, the natural resources of

its continental shelf, and the exclusive (maritime) economic zone constitute the property of the Ukrainian people.

12.2 Are there any State investment treaties which are applicable?

Yes, Ukraine has signed bilateral investment treaties (“BIT”) with more than 70 countries. The latest BIT was executed between Ukraine and Japan in 2015. In February 2017, the Ukrainian Government approved a draft BIT between Ukraine and Qatar which has not yet been signed. The BITs are aimed at guaranteeing State protection of foreign investments in Ukraine.

13 Taxes and Royalties

13.1 Are there any special rules applicable to taxation of exploration and mining entities?

Legal entities conducting mining activities are subject to the below taxes:

- corporate profit tax (CPT) at 18%;
- value added tax (VAT) at 20%;
- rent payment; and
- land tax (both for land owners and land users).

The PSA can set different tax payments. The PSA investor is relieved from the obligation to submit financial statements related to the CPT.

13.2 Are there royalties payable to the State over and above any taxes?

The rent payment is considered a tax according to the Tax Code of Ukraine.

Other payments applicable to entities conducting mining activities are customs duties and fees for the issuance of the Special Permit.

14 Regional and Local Rules and Laws

14.1 Are there any local provincial or municipal laws that need to be taken account of by a mining company over and above National Legislation?

Based on the Subsoil Code, the local authorities are not entitled to adopt any mining laws, rules or procedures. The Cabinet of Ministers of Ukraine (as opposed to municipal authorities) is entitled to adopt procedures for subsoil use and its protection, and to develop and adopt appropriate rules and standards.

According to Article 9-1 of the Subsoil Code, the local authorities are entitled to:

- grant the subsoil plots for exploration of the mineral resources of local importance;
- approve the subsoil plots granted for geological exploration and development of the mineral resources of State importance;
- give prior approval for providing a land plot for subsoil use; and
- control the subsoil use and terminate the right for subsoil use in case of violations.

14.2 Are there any regional rules, protocols, policies or laws relating to several countries in the particular region that need to be taken account of by an exploration or mining company?

Yes, for instance, the CIS Agreement on Cooperation in the Sphere of Studying, Exploration and Use of the Mineral Resources, and bilateral treaties with Kazakhstan, Mongolia and the UK.

15 Cancellation, Abandonment and Relinquishment

15.1 Are there any provisions in mining laws entitling the holder of a right to abandon it either totally or partially?

The holder of a right for subsoil use may abandon this right when there is no need in using the subsoil. An agreement on subsoil use, which must be concluded at the time of obtaining of the Special Permit, will outline termination conditions.

The Law of Ukraine “On the Permitting System in the Commercial Activity” sets out general rules for the annulment of permits, i.e. based on an application of the permit holder.

In case of the PSA, conditions for termination of the PSA will be included in the PSA itself.

15.2 Are there obligations upon the holder of an exploration right or a mining right to relinquish a part thereof after a certain period of time?

Special Permit Option

The subsoil user may apply for reduction of the area of the licensed subsoil plot and conversion of the Special Permit (by way of amending it). The State Service for Geology and Subsoil may agree to such reduction, provided that the subsoil user is compliant with terms and conditions of the Special Permit and provided that the application documents are submitted in full (including the note explaining reasons for such reduction, as prepared by the applicant).

PSA Option

The geographic coordinates of the PSA subsoil plot can be altered by introducing amendments into the corresponding Special Permit. As a result, the PSA investor may relinquish parts of the PSA plot upon completion of certain phases of the PSA project in a manner provided in the PSA.

15.3 Are there any entitlements in the law for the State to cancel an exploration or mining right on the basis of failure to comply with conditions?

Special Permit Option

The State Service for Geology and Subsoil is entitled to refuse the renewal of the Special Permit if the permit holder has overdue rent payment.

The State Service for Geology and Subsoil is also entitled to suspend the validity of the Special Permit directly or by request of the State Labour Service, the Ministry for Environment, the Ministry of Health of Ukraine, the State Fiscal Service of Ukraine, or local authorities. The grounds for such termination are as follows:

- non-compliance with requirements for subsoil use provided by the Special Permit or the agreement for subsoil use;

- the lives or health of persons or the environment are under threat as a result of the mining activities; or
- failure to timely comply with the State authorities' instructions regarding elimination of violations in spheres of subsoil use or environmental protection.

Moreover, the State Service for Geology and Subsoil may revoke the Special Permit, if its holder fails to:

- use the subsoil according to the designated purpose; or
- commence the subsoil use activities within two years following the date of issuance of the Special Permit (for hydrocarbons – 180 calendar days), or suspends such activities for the same period without a valid reason.

PSA Option

The investor's subsoil use rights may be terminated only by the Ukrainian Government in the following cases:

- termination of the PSA;
- the lives or health of persons or the environment are under threat as a result of the PSA activities; or
- the investor has failed to commence subsoil use activities within the time periods established by the PSA.



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REDCLIFFE PARTNERS

Redcliffe Partners is an independent Ukrainian law firm created following the transformation of Clifford Chance's Kyiv office in December 2015. Redcliffe is a well-known legal adviser to multinational companies, investors, financial institutions and project developers operating or investing in Ukraine and the CEE.

With 30 domestic and internationally qualified lawyers, the firm operates across key practice areas: Antitrust; Banking & Finance; Capital Markets; Compliance; Corporate/M&A; Debt Restructuring & Insolvency; Intellectual Property; International Arbitration; Litigation; and Real Estate.

Redcliffe offers international and domestic clients the expertise of a top-ranked team in Ukraine's energy sector.

The firm's Energy group is regularly involved in the most high-profile, complex and innovative oil, gas, power and infrastructure projects in Ukraine. It has substantial experience advising corporations, governments, multilaterals, ECAs, sponsors and lenders.

According to *Chambers Europe 2017*, *IFLR 1000 2017* and *The Legal 500 2017*, the firm ranks as the top energy practice in Ukraine. It also ranks as a Top-3 law firm in Ukraine by a number of Ukraine's largest deals in 2015–2016, according to the Yuridicheskaya Praktika Deals Tables.

United Kingdom

Mayer Brown International LLP

Tom Eldridge



1 Relevant Authorities and Legislation

1.1 What regulates mining law?

There is no single UK regulatory regime for mining. Mining in the UK is governed by different sources of law, dependent upon the relevant aspect of mining activity which is being considered. Broadly, regulation for mining can be categorised by reference to specific minerals as follows: (i) gold and silver; (ii) coal; (iii) oil and gas; and (iv) all other minerals.

Gold and silver

At common law gold and silver belong to the Crown and gold and silver mines constitute ‘Mines Royal’ dating back to the Inclosure Awards and Acts of the early nineteenth century.

The Crown Estate grants exclusive options to take a lease of ‘Mines Royal’ for a specific area. Leases are obtained from Wardell Armstrong, the Crown Estate Mineral Agent. Permission of the Crown Estate is needed to remove gold in any form, in addition to the need for rights of access from the owner of the surface of the land. The option is in a standard form and is for a one-year period (two in Northern Ireland).

Coal

By statute (the Coal Industry Act), the vast majority of unworked coal and coal mines are owned by the Coal Authority. The Coal Authority is an executive, non-departmental public body, sponsored by the Department for Business, Energy & Industrial Strategy. The Coal Authority’s responsibilities include, among others, the licensing of coal mining operations in the UK and the administering of coal mining subsidence damage claims.

Oil and gas

Oil and gas in the UK (both onshore and in territorial waters and the UK Continental Shelf) also vests with the Crown pursuant to the Petroleum (Production) Act 1998 and the Continental Shelf Act 1964.

In order to conduct onshore exploration, a licence is required. The licence grants exclusive rights to exploit for and develop oil and gas onshore within Great Britain. The rights granted under such licences do not include any rights of access, and the licensees must also obtain any consent under current legislation, including planning permissions. The Oil and Gas Authority (“OGA”), was created in April 2015 as an Executive Agency of the DECC (as it was in 2015). In October 2016, OGA became a Government company limited by shares with the Secretary of State for the Department

for Business, Energy and Industrial Strategy as the sole shareholder. It is responsible for the regulation of offshore and onshore oil and gas operations in the UK, including licensing, exploration and production, and oil and gas infrastructure.

All other minerals

Other than in respect of gold and silver, coal and oil and gas, the Crown and/or the State do not own mineral rights in the UK (with the exception of Northern Ireland – see below). As such, mineral rights generally belong to the landowner. They are held in private ownership where the owner of the surface land is entitled to everything beneath or within it, down to the centre of the earth. The Land Registry holds information regarding minerals held in private ownership, along with details of the land surface ownership.

Although there is no specific UK licensing system for exploration and extraction activities in the mining sector, planning permission must be obtained from a mineral planning authority for the extraction of minerals, and a number of environmental consents and safety systems must be in place in order for any specific mining operation to be conducted lawfully.

In Northern Ireland, the Mineral Development Act (Northern Ireland) 1969 vested most minerals in Northern Ireland in the Department of Enterprise, Trade and Investment (“DETI”). This enables the DETI to grant prospecting and mining licences to commercial companies for exploration and development of minerals. There are three main exceptions: (1) gold and silver; (2) minerals which were being worked at the time of the 1969 Act; and (3) ‘common’ substances (including aggregates, sand and gravel).

1.2 Which Government body/ies administer the mining industry?

The primary bodies responsible for administering mineral rights which vest in the Crown, are the Coal Authority, the Crown Estate, and the Marine Management Organisation (“MMO”). The MMO is an executive, non-departmental public body sponsored by the Department for Environment, Food and Rural Affairs (“DEFRA”).

Planning authorities play a large part in the regulation of mines in the UK. This is both at a regional level (regional planning policies for mineral extraction) and at a project-specific level (granting permission for specific mining projects).

Environmental regulation is undertaken by independent Government regulators. The principal environmental regulator for England is the Environment Agency. However, in some cases, the regulator will be the relevant local authority or Natural England. As of 1 April 2013, Natural Resources Wales is the environmental regulator for Wales. The Scottish Environmental Protection Agency together

with Scottish Natural Heritage is the regulator for Scotland and the Northern Ireland Environment Agency is Northern Ireland's environmental regulator.

The Health and Safety Executive ("HSE") enforces health and safety law in England, Wales and Scotland, together with local authorities and other bodies authorised under statute. The Health and Safety Executive for Northern Ireland enforces health and safety at work standards in Northern Ireland.

1.3 Describe any other sources of law affecting the mining industry.

General principles of the law of nuisance will apply to the use of land as a mine or quarry. Examples of mining activities capable of creating a nuisance include emission of dust or noxious fumes, the discharge of polluting effluents into a river, the creation of noise and vibration, and the projection of debris by blasting. The emission of smoke or fumes and the lack of proper fencing of abandoned and disused mines and quarries are in certain circumstances a statutory nuisance.

An employer of workers at a mine or quarry owes a common law duty to each employee to take reasonable care for safety in all circumstances and exposure against unnecessary risk. Similarly, the occupier of a mine or quarry owes a common law duty of care to those lawfully visiting the premises under the Occupiers' Liability Act 1957.

With effect from 6 April 2015, the Mines Regulations 2014 replaced all previous legislation specifically relating to health and safety in mines. Where a person suffers injury by reason of a breach of any mining legislation creating a duty that person may be entitled to recover damages in a civil action for breach of statutory duty.

A mine or quarry owner may potentially be liable both in negligence and for breach of statutory duty as the Mines Regulations 2014 are not to be construed as derogating from the legal duties owed by an employer to his employees.

2 Mechanics of Acquisition of Rights

2.1 What rights are required to conduct reconnaissance?

See question 2.2 below.

2.2 What rights are required to conduct exploration?

Any onshore exploration activity will require access rights granted by the landowner or obtained through the acquisition of land.

For coal, an exploration licence from the Coal Authority is required, together with the necessary surface rights and any other necessary permissions or consents (i.e. planning consents). Exploration licence application forms can be found on the Coal Authority website and should be submitted along with the application fee to their Licensing & Permissions Department. Model exploration licences are also available on its website (as required by the Coal Industry Act 1994).

2.3 What rights are required to conduct mining?

Again, any onshore mining operator will require rights of access granted by the landowner, generally in the form of a lease, or obtained through the acquisition of land.

For coal, pursuant to the Coal Industry Act 1994, certain mining operations require a statutory licence from the Coal Authority. These are: (i) *"the winning, working, or getting of coal"* by surface or underground methods; and (ii) the treatment of coal in the strata and the winning, working or getting of coal resulting from such treatment – in any part of Great Britain, under the territorial sea adjacent to Great Britain or on the UKCS.

In order to commence mining operations, in addition to such statutory operating licence conferring the authorisation to mine, an operator would need a proprietary interest in the coal (which is likely to be vested in the Coal Authority, and therefore would be granted in conjunction with the licence), together with all the necessary surface rights, and any other permissions or consents (i.e. planning permission). Model licences and leases are available and published by the Coal Authority. These are required to be entered into to comply with the Coal Industry Act 1994.

There are different applications for surface and underground mining. All applications are published by the Coal Authority. When carrying out its licensing function, the Coal Authority's duties are broadly to act in a manner it considers best to secure that those authorised to carry out coal mining operations ensure that: (i) an economically viable coal mining industry is maintained and developed; (ii) they are able to finance both the proper carrying on of those operations and the discharge of liabilities arising from those operations; and (iii) they do not sustain loss as a result of historic subsidence damage (inherited from coal mining operations that failed to adequately fund their liabilities in this regard).

The Coal Authority may also grant a "conditional" licence and an option for lease of coal and any other minerals in its ownership, whereby the authorisation to mine is deferred until certain requirements have been met (i.e. the obtaining of planning consent).

In order to mine gold or silver, a licence for the exploration and development of the relevant mineral must be obtained from Wardell Armstrong, the Crown Estate Mineral Agent (as stated previously). There is no standard application form or licence: applications must be accompanied by a proposed work programme and details of the applicant's financial resources and technical ability. The exploration licence can be converted into a mining lease, subject to the applicant's progress and prospects. The exploration licence confers no rights of entry and the applicant has to negotiate access with the relevant surface rights owners and obtain planning permission from the local authority (if necessary).

The rights to other minerals in the UK are mainly in private ownership. Regardless of this fact, any onshore mining operator will require rights of access granted by the landowner, generally in the form of a lease, or obtained through the acquisition of land.

2.4 Are different procedures applicable to different minerals and on different types of land?

Yes. A range of different procedures are applicable for applying for mineral rights which vest in the Crown. The procedures relating to coal, gold and silver and other minerals are discussed above. However, the ability to mine for all minerals is contingent on achieving necessary planning approval and access rights, which will be influenced by the laws and regulations relating to the specific area.

2.5 Are different procedures applicable to natural oil and gas?

Yes. The Petroleum Act 1998 established the regulatory regime

applicable to oil and gas exploration and production in the UK (other than onshore in Northern Ireland) as well as the UKCS. Under the 1998 Act, all rights to petroleum including the rights to “search for, bore for, and get” petroleum, are vested in the Crown. The Act provides the licensing regime for oil and gas companies, as supplemented by environmental and health and safety regulation.

3 Foreign Ownership and Indigenous Ownership Requirements and Restrictions

3.1 What types of entity can own reconnaissance, exploration and mining rights?

Generally, mineral rights, whether they derive from the Crown or are leased from the landowner, can be held either by natural persons or corporate entities.

Direct ownership of mineral rights via land ownership is subject to a number of rules specific to landownership (e.g. land cannot be owned by minors) though generally both natural and corporate entities can own such rights.

3.2 Can the entity owning the rights be a foreign entity or owned (directly or indirectly) by a foreign entity and are there special rules for foreign applicants?

There are currently no special rules relating to foreign investment in the UK mining sector.

3.3 Are there any change of control restrictions applicable?

Any change in ownership or operatorship of a mine is likely to require a range of regulatory approvals, notifications, and landowner or third party consents (see section 5 for more details on transfers of operational rights).

For example, a change in name and/or address of the owner of a mine or quarry must be reported to the HSE within 28 days. The owner of a quarry must notify the HSE within 14 days of appointing or changing the operator.

3.4 Are there requirements for ownership by indigenous persons or entities?

There are no indigenous ownership requirements in the UK (except those relating to Crown reservation).

3.5 Does the State have free carry rights or options to acquire shareholdings?

Whilst there are currently no such rights in respect of equity shareholdings, the Crown Estate Commissioners have certain powers of sale over mines and minerals comprised in land which is the property of the Crown. Notably, the Crown automatically gains ownership of any gold and silver mined in the UK. Similarly, property in petroleum existing in its natural condition (in strata) is vested by statute in the Crown.

The Duchy of Cornwall may, either by way of absolute sale or for a limited period, dispose of any mines, minerals or rights of entry or other rights in respect of mines and minerals forming part of the possessions of the Duchy.

4 Processing, Refining, Beneficiation and Export

4.1 Are there special regulatory provisions relating to processing, refining and further beneficiation of mined minerals?

The processing of mined substances is likely to be subject to a range of operational controls relating to environmental protection and safety (see sections 8 and 10).

4.2 Are there restrictions on the export of minerals and levies payable in respect thereof?

Restrictions may apply depending on the class of mineral that is being exported. Licences are required for the export of certain controlled goods outside of the EU (only particularly sensitive goods require a licence for EU Member States).

An export licence is required in order to export specified goods with military uses, or for trade in strategically controlled goods between overseas countries. Mineral exporters may require an export licence for goods with a ‘potential military use’. These would include, for example, alloys with particular characteristics (such as the ability to withstand very high temperatures).

Certain substances, provided they are not chemically modified, are partially exempt from the requirements of REACH (the EU Regulation on the Registration, Evaluation and Authorisation of Chemicals). Very broadly, Annex V of REACH includes generic exemptions from registration requirements under REACH for minerals, ores, ore concentrates and coal that meet certain requirements. Even if an exemption applies, REACH may require certain information to be provided down the supply chain to enable the safe use of the substances. Chemically modified minerals, ores, ore concentrates and coal may be subject to registration requirements under REACH at the point of placing on the market (i.e. manufacture or import) within the EU. We are not currently aware of any restrictions on levies payable on the export of minerals.

5 Transfer and Encumbrance

5.1 Are there restrictions on the transfer of rights to conduct reconnaissance, exploration and mining?

Transfer restrictions will depend on the nature of the rights being transferred.

Where the owner of a freehold estate transfers that interest in the land to a third party, the third party buyer will inherit the full title to that property (including, subject to those exceptions already mentioned, any precious minerals therein). Planning Consents authorising various kinds of mining activities will run with the land, unless the consent expressly indicates otherwise. Where mineral rights are held through licences granted by Government bodies, there will generally be a formal statutory process to arrange for the licences to be transferred to a new entity.

Operational permits such as environmental permits authorising particular activities will also need to be transferred to any new operator. Again, there are statutory rules governing the permit transfer process.

5.2 Are the rights to conduct reconnaissance, exploration and mining capable of being mortgaged or otherwise secured to raise finance?

Where rights to conduct reconnaissance, exploration and mining arise by virtue of being the owner to the land under which the activity takes place, and on the condition that the requisite planning consents are obtained, the interest in the land will be mortgageable in the usual manner.

Where such rights arise by virtue of a Coal Authority licence, permit or lease they will be mortgageable, provided the instrument conferring the rights comprise a mortgageable interest. Terms of specific instruments should be consulted to determine if there are any restrictions in this regard.

6 Dealing in Rights by Means of Transferring Subdivisions, Ceding Undivided Shares and Mining of Mixed Minerals

6.1 Are rights to conduct reconnaissance, exploration and mining capable of being subdivided?

The ownership of mines under land may be severed from the ownership of the surface, by the sale of the mines and minerals themselves, or the reservation of them on a sale of the surface of the land to a third party. Further, the presumption arising from surface ownership may be rebutted by evidence showing that the ownership of the land has been severed from the mines beneath where this is stated in (a) a conveyance or demise of land excluding the mines, (b) a conveyance or demise of the mines excepting the surface, (c) an Act of Parliament, or (d) evidence of long and continuous enjoyment of the mines by a person other than the surface owner.

The different strata of a parcel of land may similarly be shown to be in different ownership, and proof of ownership of a mine under a parcel of land does not raise any presumption of evidence regarding ownership of the surface, or *vice versa*.

6.2 Are rights to conduct reconnaissance, exploration and mining capable of being held in undivided shares?

In relation to coal licences, only one party can be responsible for the conditions of the licences. In relation to aggregates, licences can be held by two entities for the same area (i.e. for joint development).

6.3 Is the holder of rights to explore for or mine a primary mineral entitled to explore or mine for secondary minerals?

In relation to coal, any rights to secondary minerals (owned by the Coal Authority) would need to be stipulated within the licence/lease application in order for the holder of the licence to be permitted to work that mineral.

6.4 Is the holder of a right to conduct reconnaissance, exploration and mining entitled to exercise rights also over residue deposits on the land concerned?

Mines, quarries and minerals (including any debris dumps, residue deposits, tailings and mine dumps) in their original position are part and parcel of the land. Consequently, the owner of the surface land is generally entitled to everything beneath or within it, down to the centre of the earth. This principle applies even where title to the surface has been acquired by prescription, but it is subject to exceptions.

Any minerals removed from land under a compulsory rights order for opencast working of coal become the property of the person entitled to the rights conferred by the order.

6.5 Are there any special rules relating to offshore exploration and mining?

There are special rules for offshore exploration and mining. Rights with respect to the sea bed (other than coal) are vested by statute in the Crown. Rights to exploit coal under the territorial sea, and designated areas of the continental shelf, are vested in the Coal Authority.

The majority of offshore mining in the UK relates to aggregates. Licence applications are made to the MMO, and require approval by the Maritime and Coastguard Agency (an executive Government agency sponsored by the Department for Transport) for navigational risk assessment.

7 Rights to Use Surface of Land

7.1 Does the holder of a right to conduct reconnaissance, exploration or mining automatically own the right to use the surface of land?

There are two main rights that are required to use the surface of land. First, there is governmental permission for the proposed land use which is governed by the UK planning regime (Town and Country Planning Act 1990). An operator will need to apply for planning permission which involves a public consultation process, a key part of which will be an Environmental Impact Assessment ("EIA").

Second, there are the necessary land rights, i.e. rights of access to conduct operations. These would be dependent on the terms of the deed or document that granted the rights to conduct reconnaissance, exploration or mining. Any mining company would have to ensure that the deed granting such rights also granted all suitable and necessary rights in respect of use of the surface land that the mining company would require. This, in effect, would be a discussion and negotiation of terms between the mining company and surface landowner.

7.2 What obligations does the holder of a reconnaissance right, exploration right or mining right have vis-à-vis the landowner or lawful occupier?

The deed or other documentation that granted such rights would specify the obligations owed to the landowner and these can be as the parties choose and agree. We would expect these obligations to include:

- a. payment for the grant of the rights either via a one-off payment or perhaps daily/weekly/monthly payments (in the

form of lease payments, royalties or otherwise) based on how long the rights are to be exercised;

- b. for the rights holder to make good any damage caused to the surface as soon as reasonably practicable or immediately and to the satisfaction of the surface owner;
- c. obligations on the rights holder to make good and make safe any excavations, shafts, etc.; and
- d. obligations on the rights holder to ensure support for the surface of the land and to excavate in a manner so as to ensure adequate surface support at all times.

Other general matters would be for the rights holder to comply with all relevant planning matters, statutes and applicable laws and there would possibly also be a general indemnity in favour of the landowner indemnifying it against any losses and costs it incurs as a result of the exercise of the rights by the rights holder. The rights holder may wish to prevent the surface owner from developing or building on the surface.

7.3 What rights of expropriation exist?

Compulsory acquisition of land and rights for mining and extraction is available. In England and Wales, the Mines (Working Facilities Support) Act 1966 is available, but does not appear to envisage the acquisition of freehold interests in land, only rights over land. The procedure involves an application to central Government, who will then instigate proceedings in the High Court. Rights under the Mines (Working Facilities Support) Act 1966 will not be granted unless the court is satisfied that the grant is “*expedient in the national interest*”. The local planning authority may also acquire land compulsorily for planning purposes. These powers can be used if the acquisition of interests in land will facilitate the carrying out of development (mining operations fall within the scope of “development” for these purposes), redevelopment or improvement on, or in relation to, that land and it is not certain that the land can be acquired by way of agreement. The authority must not exercise its powers of compulsory purchase unless it considers that the proposed development is likely to contribute to the achievement of the promotion or improvement of the economic and/or social and/or environmental wellbeing of its area.

In either case, compensation will be payable to landowners who have land taken from them, or otherwise suffered as a result of the compulsory acquisition, and there is a specialist tribunal to assess compensation if it is not agreed.

8 Environmental

8.1 What environmental authorisations are required in order to conduct reconnaissance, exploration and mining operations?

Regulatory environmental controls and restrictions are imposed on UK mining operations from a number of sources. Perhaps the most fundamental source is the planning regime. Any UK mine will require planning permission and the conditions imposed through such permissions generally include operational environmental controls: e.g. limitations on the numbers of vehicle movements; and limitations on total quantities to be extracted, etc. See question 8.4 for further discussion of the planning regime.

In addition to planning controls, a range of environmental permits are likely to be required. One of the most important environmental consents relating to mining operations is a mining waste permit to manage extractive waste. The legal requirement for such a

permit derives from the EU Mining Waste Directive (Directive 2006/21/EC) and is implemented in England and Wales through the Environmental Permitting (England and Wales) Regulations 2016 (“EPR”). In addition to mining waste, the EPR covers other operational aspects of onshore mining and quarrying including discharges to water, emissions to air, quarrying and mineral crushing processes.

If mining or quarrying operations require the abstraction of surface and/or ground water, or for water to be moved from one location to another without intervening use, a licence may be required under the Water Resources Act 1991.

Mining and quarrying projects may also give rise to the need for licences to disturb species or habitats protected by conservation legislation including the Wildlife and Countryside Act 1981, the Conservation of Habitats and Species Regulations 2010, the Protection of Badgers Act 1992 and the Offshore Marine Conservation (Natural Habitats, &c.) Regulations 2007.

8.2 What provisions need to be made for storage of tailings and other waste products and for the closure of mines?

Coal mining leases and licences issued by the Coal Authority contain provisions relating to the provision of financial security in various forms such as bonds, charges, deposits, guarantees, indemnities, mortgages or trusts. For example, the Coal Authority’s model underground mining lease requires the tenant to provide security to cover its lease obligations which include yielding up the site in a satisfactory condition.

An application for a mining waste permit under the EPR will need to include details of a financial guarantee or equivalent that will need to be in place prior to the commencement of any extractive waste operations.

Restoration bonds may also be required in connection with planning consents.

8.3 What are the closure obligations of the holder of a reconnaissance right, exploration right or mining right?

Closure obligations are regulated by environmental legislation as well as contractual arrangements (which could contain more onerous requirements than statute) such as leases of land. Planning permissions are also likely to include site restoration programmes that need to be complied with.

To surrender certain environmental permits including those for mining waste operations, the operator will need to satisfy the regulator that necessary measures have been taken to avoid a risk of pollution and to return the site to a satisfactory state.

As required by the Directive 2006/21/EC, operators managing extractive waste will need to include a closure plan (dealing with rehabilitation, after-closure procedures and monitoring) in their waste management plan delivered by an environmental permit.

Clean up, investigation, mitigation and monitoring of contamination may also be required if the regulator identifies land as contaminated and serves a remediation notice.

8.4 Are there any zoning or planning requirements applicable to the exercise of a reconnaissance, exploration or mining right?

Planning permission is required in order to extract minerals. In

England and Wales, planning permission is granted by the mineral planning authority (“MPA”). This means that in areas where there is a County Council, the County grants planning permission for mineral working. In unitary areas, metropolitan districts and London Boroughs, the local planning authority grants permission. In Scotland, mineral planning permissions are granted by the local planning authority and in Northern Ireland, the strategic planning unit deals with applications for planning permission for mineral working centrally. If permission is refused, there is a right of appeal to central Government, which also has the power to recover jurisdiction of certain applications where it considers them to have more than local importance.

All four countries operate what is called a ‘plan-led’ system, which means that permission for mining should be granted in accordance with the minerals development plan for the area unless there are material considerations which indicate otherwise. These ‘other considerations’ can be wide-ranging, which does not help with certainty, but in the majority of cases will relate to the impact of the development, particularly on protected natural assets (e.g. countryside of protected value, or on watercourses). Most minerals-related developments will require assessment under the respective domestic applications of the EU-wide environmental impact assessment regime.

Planning Permissions granted for the working of minerals will almost always include conditions, which can regulate how the development is carried out and which will usually impose restoration and aftercare requirements. Conditions will, crucially, determine the life of the mineral planning permission by imposing a time limit. The body which granted the planning permission will be responsible for all aspects of development control including, for example, taking steps to enforce any breach of planning conditions imposed.

9 Native Title and Land Rights

9.1 Does the holding of native title or other statutory surface use rights have an impact upon reconnaissance, exploration or mining operations?

There is no concept of native title in English law.

In certain circumstances some entities (such as services providers for gas and electricity) have statutory rights of access on to land including privately-owned land.

10 Health and Safety

10.1 What legislation governs health and safety in mining?

The Mines Regulations 2014 and the Quarries Regulations 1999 constitute the primary legislation governing health and safety in mines and quarries.

Further, the Health and Safety at Work Act 1974 (“**HSWA**”) and the Management of Health and Safety at Work Regulations 1999 (“**MHSWR**”) govern health and safety in the workplace generally. The HSWA and the MHSWR establish a “goal setting” safety regime. Under this regime, employers have a statutory duty to ensure that risks associated with mining are reduced as low as reasonably practicable through a system of constant risk assessment.

In addition to this primary legislation, there is a wide range of industry-specific secondary legislation governing health and safety in mining. This includes regulations on: the control of noise, vibration, electricity and explosives at work; dangerous substances

and explosive atmospheres; the reporting of incidents, diseases and dangerous occurrences; and the provision and use of work equipment.

10.2 Are there obligations imposed upon owners, employers, managers and employees in relation to health and safety?

Health and safety obligations are imposed on owners, employers, managers and employees.

The HSWA imposes general duties on employers to ensure, so far as is reasonably practicable, the health, safety and welfare at work of their employees and that of non-employees who could be affected by their undertaking. It requires employees to take reasonable care for their own health and safety and that of others who may be affected by their acts or omissions.

Employers are required under the regulations to make, and implement, measures identified by a suitable and sufficient risk assessment considering risks to the health and safety of employees and third parties.

Regulations impose a wide range of additional duties and obligations on managers, operators, owners, employers, employees and workers relating to health and safety at mines and quarries.

11 Administrative Aspects

11.1 Is there a central titles registration office?

The Land Registry is the central title registration office in the UK and keeps a register of interests in land in England and Wales. In addition, the British Geological Survey, through its “BritPits” database, holds extensive information on mines and quarries in Great Britain, Northern Ireland, the Isle of Man and the Channel Islands. This information includes details of the name of the mines and quarries, their location and address, the geology and mineral commodities produced, the name of the operator and the responsible mineral planning authority.

11.2 Is there a system of appeals against administrative decisions in terms of the relevant mining legislation?

Legislation governing mining in the UK does not provide for any bespoke appeals system reserved solely for mining matters. Those wishing to challenge or appeal against administrative decisions are required to initiate court proceedings in the usual manner where an actionable cause of action arises. Where parties disagree with particular administrative decisions of Government regulatory bodies they may bring a claim for judicial review. Grounds for bringing judicial review claims include illegality, irrationality and procedural impropriety, each as regards the administrative decision being challenged. A successful judicial review claim will not result in the court substituting an alternative administrative decision. The authority in question will, however, be required to reconsider their decision with reference to those factors the court deems relevant.

12 Constitutional Law

12.1 Is there a constitution which has an impact upon rights to conduct reconnaissance, exploration and mining?

The UK does not have a formally-adopted written (codified)

constitution but rather it relies on foundational principles of common law and equity (together with certain key statutes) that provide a constitutional framework. Any restrictions affecting rights of reconnaissance, exploration and mining will be as set out in mining-specific legislation and case law.

12.2 Are there any State investment treaties which are applicable?

The UK has ratified a number of bilateral and multilateral investment treaties with other States that provide protections to foreign investors that are operating in the UK. These treaties are governed by public international law and provide companies with protections that are independent of any protections afforded by contractual relationships or domestic laws. For a list of the relevant treaties, see the UK Foreign & Commonwealth Office, International Centre for Settlement of Investment Disputes, and the United Nations Conference on Trade and Development websites.

13 Taxes and Royalties

13.1 Are there any special rules applicable to taxation of exploration and mining entities?

There are no special rules applicable to taxation of exploration and mining entities.

13.2 Are there royalties payable to the State over and above any taxes?

There are no royalties payable to the State over and above any taxes.

14 Regional and Local Rules and Laws

14.1 Are there any local provincial or municipal laws that need to be taken account of by a mining company over and above National Legislation?

In Britain, the legal framework for land use planning is largely provided by the Town and Country Planning Act 1990. The division of local Government responsibilities between England, Scotland, Wales and Northern Ireland is through regionalisation. Currently within England, nine regions are defined (North West, North East, Yorkshire and the Humber, East of England, East Midlands, West Midlands, South West, South East and London). This aims to secure the most efficient and effective use of land in the public interest and to reconcile the competing needs of development and environmental protection. Please also refer to the detail provided in question 8.4.

14.2 Are there any regional rules, protocols, policies or laws relating to several countries in the particular region that need to be taken account of by an exploration or mining company?

Yes. Particularly in the context of environmental and health and safety, legislation from the EU may be applicable.

15 Cancellation, Abandonment and Relinquishment

15.1 Are there any provisions in mining laws entitling the holder of a right to abandon it either totally or partially?

When granting a licence, the Coal Authority will agree to and include provisions for the transfer of the rights. Standard form licence provisions provide that a licensee may at any time surrender or determine the licence by giving one month's notice to the Coal Authority of its intention to do so.

The OGA seeks to avoid unworked licences. Licences to explore for oil and gas can be voluntarily surrendered, in part or in their entirety, at any time, provided that the surrender does not result in a failure to fulfil an obligation assumed at the time of the licensing. The abandonment of offshore installations and pipelines is controlled through the Petroleum Act 1998.

15.2 Are there obligations upon the holder of an exploration right or a mining right to relinquish a part thereof after a certain period of time?

Coal

The Coal Industry Act 1994 provides that the Coal Authority may grant a conditional licence to an applicant. This will make the right to explore conditional or further requirements, such as gaining access and planning permission, and will provide that the licence lapses after a specified period if these conditions are not met.

Oil and gas

When a licence is granted to explore for oil and gas, an agreement will be reached specifying a work programme for exploration over a specified period. The licence will expire at the end of this term unless the work programme has been completed. At this stage, the licence holder will be obliged to surrender a percentage of the land leased for the exploration.

15.3 Are there any entitlements in the law for the State to cancel an exploration or mining right on the basis of failure to comply with conditions?

Gold and silver

Whilst there is no clear guidance provided by the Crown Estate on this, it is assumed that the Crown Estate would be able to impose conditions on the lease, if granted, and that a material breach of these conditions would be grounds for the revocation of the lease by the Crown.

Coal

The Coal Industry Act 1994 permits the Coal Authority to impose conditions and obligations within mining licences, in pursuit of the Coal Authority's general duties to the UK coal industry. The Act makes provision for the authority to take enforcement action, including the removal of exploration and mining rights, if the licensee is in material breach of these conditions. If, after six months of the grant of an exploration licence, a licensee has demonstrated no intention to exercise the right granted, the Coal Authority may determine the licence.

Oil and gas

The model exploration licence clauses provided by the OGA list numerous circumstances that will give rise to a right to revoke a licence. The OGA reserves the right to immediately revoke a licence if it has been assigned to a third party without the express prior consent of the Secretary of State. This will apply equally to assignments made between companies within the same group.

Planning consent will also be subject to ongoing conditions, and non-compliance with those conditions will be grounds for cancellation of the relevant consents.

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Tom Eldridge is a partner in the Banking & Finance practice of Mayer Brown International LLP. He has 20 years' experience in UK and cross-border transactions. He has worked on a variety of lending transactions in the mining and metals sector including project and export credit finance, pre-export and prepayment (producer and trader) facilities, forfaiting and discounting arrangements, letters of credit, borrowing base and reserve base facilities, inventory and warehouse arrangements, royalty and streaming structures and other forms of offtaker finance.

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Mayer Brown's global mining group works throughout the world, advising clients on a wide variety of transactions including project finance, environmental, corporate, construction, insurance and commodities matters. Our lawyers have extensive experience of the day-to-day legal, financial and operational issues faced by mineral producers and those who provide finance to the industry sector. This enables us to get straight to the heart of what our clients need and for the assistance we provide to be given with a full appreciation of real and practical industry concerns. No matter how complex the deal or remote the operation, our mining team is likely to have worked on a similar assignment before and will therefore be familiar with the issues that have to be resolved.

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1 Relevant Authorities and Legislation

1.1 What regulates mining law?

The US legal system consists of many levels of codified and uncoded 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 multiple levels of regulation. Mining on federal lands, for example, is generally subject to multiple layers of concurrent federal, state, and local statutes and administrative regulations.

1.2 Which Government body/ies administer the mining industry?

Federal and state governments have developed comprehensive mining regulatory schemes. Although the US 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. See, e.g., 43 C.F.R. §§ 3000.0-5-3936.40 (US Bureau of Land Management ("BLM") minerals management regulations). 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). US mining law may originate from federal, state, and local laws, including constitutions, statutes, administrative regulations or ordinances, and judicial and administrative body common law.

Determining which level of Government has jurisdiction over mining activities largely depends on surface and mineral ownership. A substantial amount of mining in the United States occurs on federal lands where the federal Government owns both the surface and mineral estates. On these lands, federal law primarily governs mineral ownership, operations, and environmental compliance, with state and local Governments having concurrent or independent authority over certain aspects of 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 and real property 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, and in some cases local zoning ordinances.

1.3 Describe any other sources of law affecting the mining industry.

The General Mining Law of 1872 ("GML"), 30 U.S.C. §§ 21-54, 611-615, as amended, 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-metallic minerals (fluorspar, mica, certain limestones and gypsum, tantalum, heavy minerals in placer form, and gemstones) and metallic minerals including gold, silver, lead, copper, zinc, and nickel. Locating these mineral deposits entitles the locator to certain possessory interests:

- a. unpatented mining claims, which provide the locator an exclusive possessory interest in surface and subsurface lands and the right to develop the minerals; and
- b. patented mining claims, which pass full fee 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.

Other minerals on federal lands are "leasable" and are governed under separate statutes and regulations.

The Federal Land Policy and Management Act of 1976, ("FLPMA"), 43 U.S.C. §§ 1701-1787, governs federal land use, including access to, and exercise of, GML rights on lands administered by the BLM and the US Forest Service ("USFS"). FLPMA recognises 'the Nation's need for domestic sources of minerals', 43 U.S.C. § 1701(a)(12), and provides that FLPMA shall not impair GML rights, including, but not limited to, rights of ingress and egress. 43 U.S.C. § 1732(b). However, FLPMA also provides that mining authorisations must not 'result in unnecessary or undue degradation of public lands'. 43 C.F.R. § 3809.411(d)(3)(iii); see also 43 U.S.C. § 1732(b). BLM and USFS have promulgated extensive FLPMA mining regulations. See, e.g., 36 C.F.R. §§ 228.1-228.116, 43 C.F.R. §§ 3000.0-5-3936.40. The National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370m-12, requires federal agencies to prepare an environmental impact statement ("EIS") for all major federal actions significantly affecting the quality of the human environment. Mining operations on federal lands or with a federal nexus generally will involve an EIS or a less intensive environmental assessment ("EA") examining environmental impacts. The NEPA process involves consideration of other substantive environmental statutes.

The US 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 a declaration only of proven and probable reserves. In 2016, the SEC proposed new rules for its reporting classification system. If adopted, the new rules would require additional disclosures for mining companies, including exploration results, mineral resources, and mineral reserves and would bring the SEC disclosure requirements more in line with the disclosure standards of Canada's National Instrument 43-101 and the Committee for Mineral Reserves International Reporting Standards.

2 Mechanics of Acquisition of Rights

2.1 What rights are required to conduct reconnaissance?

As discussed in the response to question 1.3, the 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. The process for developing locatable mineral 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 notice 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).

Reconnaissance on federal lands with leasable minerals generally requires the issuance of an exploration permit or lease.

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 generally are no restrictions on foreign acquisition of these types of US mining rights through parent-subsidiary corporate structures.

2.2 What rights are required to conduct exploration?

Depending on the stage and extent of exploration work and the amount of ground that is disturbed, additional permits and licences required to conduct mining activities may include:

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

2.3 What rights are required to conduct mining?

Please see the response to questions 2.1 and 2.2.

2.4 Are different procedures applicable to different minerals and on different types of land?

The GML governs locatable minerals which include non-metallic minerals (fluorspar, mica, certain limestones and gypsum, tantalum, heavy minerals in placer form, and gemstones) and metallic minerals including gold, silver, lead, copper, zinc, and nickel.

The Mineral Lands Leasing Act of 1920, 30 U.S.C. §§ 181-287, as amended, establishes a prospecting permit and leasing system for all deposits of coal, phosphate, sodium, potassium, oil, gas, oil shale, and gilsonite on lands owned by the United States, including national forests. In addition, sulphur deposits found on public lands in Louisiana and New Mexico are leasable, as are geothermal steam and associated geothermal resources, uranium, and hardrock mineral resources. These same deposits found in some acquired federal lands, including acquired forest lands, are leasable under a similar statute.

The Materials Disposal Act of 1947, 30 U.S.C. §§ 601-615, as amended, 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.

Minerals on state-owned land are made available under the individual state's statutory and regulatory scheme.

2.5 Are different procedures applicable to natural oil and gas?

The Mineral Lands Leasing Act of 1920, 30 U.S.C. §§ 181-287, as amended, provides US citizens the opportunity to obtain a prospecting permit or lease for coal, gas, gilsonite, oil, oil shale, phosphate, potassium, and sodium deposits on federal lands. The process for obtaining a permit or lease involves filing an application with the federal agency office with jurisdiction over the affected land. Depending on the type of permit or lease applied for, applicants may be required to:

- pay rental payments;
- file an exploration plan;
- pay royalty payments 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.

3 Foreign Ownership and Indigenous Ownership Requirements and Restrictions

3.1 What types of entity can own reconnaissance, exploration and mining rights?

Only US citizens or companies can hold locatable and leasable minerals on federal lands, but foreign companies may form US subsidiaries to secure such rights. States do not generally restrict the ownership of mineral leases based on the type of entity.

3.2 Can the entity owning the rights be a foreign entity or owned (directly or indirectly) by a foreign entity and are there special rules for foreign applicants?

US mining laws generally do not restrict or limit foreign investment. 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. The Mineral Lands Leasing Act, Mineral Leasing Act for Acquired Lands and Reorganization Plan No. 3, require that the holder of a mineral lease or prospecting permit must be a citizen of the United States. 30 U.S.C. § 181, 352; 43 C.F.R. § 3502.10(a). Corporations organised under the laws of the United States or any state or territory of the US may qualify to hold leases or prospecting permits. While foreign persons are permitted to be shareholders, the citizenship of the shareholders is significant. The country of citizenship of each shareholder must be a country that does not deny similar or like privileges to U.S. citizens. 30 U.S.C. § 181 (Such countries are referred to as 'non-reciprocal countries'). Disclosure of foreign ownership is not required unless it meets the 10% threshold. 43 C.F.R. § 3502.30(b). Therefore, even foreign stockholders from non-reciprocal countries may own less than 10%.

Foreign investments are subject to US national security laws. The Committee on Foreign Investment in the US, 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. 50 U.S.C. § 4565. The President may exercise this authority if the President finds that the foreign interest might take action impairing national security and other provisions of the law do not provide the President with appropriate authority to act to protect national security. 50 U.S.C. § 4565(d)(4).

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. 8 U.S.C. § 1153(b)(3)(C).

3.3 Are there any change of control restrictions applicable?

The GML does not contain change of control restrictions.

3.4 Are there requirements for ownership by indigenous persons or entities?

The GML does not contain requirements for ownership by indigenous persons or entities. See the response to question 9.1.

3.5 Does the State have free carry rights or options to acquire shareholdings?

There are no carry rights or shareholding options under federal law, although production royalties are usually required on leasable minerals.

4 Processing, Refining, Beneficiation and Export

4.1 Are there special regulatory provisions relating to processing, refining and further beneficiation of mined minerals?

There are no specific provisions relating to processing, refining or beneficiating mined minerals in US law except for general environmental laws.

4.2 Are there restrictions on the export of minerals and levies payable in respect thereof?

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. Limitations on the export of crude oil from the US have recently been relaxed.

5 Transfer and Encumbrance

5.1 Are there restrictions on the transfer of rights to conduct reconnaissance, exploration and mining?

No, except that the transferee must be qualified to hold the interest. See the response to question 3.2.

5.2 Are the rights to conduct reconnaissance, exploration and mining capable of being mortgaged or otherwise secured to raise finance?

Yes, locatable and leasable minerals on federal lands can be used as security, subject to the underlying mineral ownership rights of the Government. Leasehold rights in state and privately owned minerals can also be used as security, subject to any restrictions in the lease.

6 Dealing in Rights by Means of Transferring Subdivisions, Ceding Undivided Shares and Mining of Mixed Minerals

6.1 Are rights to conduct reconnaissance, exploration and mining capable of being subdivided?

Under the GML, reconnaissance activities which do not cause surface disturbance can generally be conducted on any lands open for mining, and exploration and mining can occur after locating an unpatented mining claim. Unpatented mining claims provide the locator exclusive possessory surface and mineral interests. 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.

However, land ownership in the US can be severed into surface and subsurface estates, creating a split estate where the surface and mineral rights can be held by different parties. The ability to sever the unified estate depends on land ownership.

Federal land mineral interests are regulated by federal law and title cannot be generally transferred to private citizens until the minerals have been severed. Under the GML, locatable mineral claims may be patented, transferring the title to the locator, but there has been a patent moratorium in place since 1994.

Severance of private land estates is governed by state law, and generally, private citizens are free to split their surface and mineral estates. Once the mineral estate is severed and enters the private market, the title to the minerals can be bought, sold, leased or rented as a matter of contract and real property law, subject to reservations in the severance document and applicable laws. The federal Government, particularly in the western US, 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.

In some areas, it is common to have different minerals leased to different parties.

6.2 Are rights to conduct reconnaissance, exploration and mining capable of being held in undivided shares?

Yes, such rights may be held in undivided shares and this is a common practice.

6.3 Is the holder of rights to explore for or mine a primary mineral entitled to explore or mine for secondary minerals?

Generally, the holder of a mining claim or lease for a primary mineral is entitled to extract from a claim/lease those 'associated minerals' or secondary minerals which may be economically recovered along with the primary mineral(s).

Particular leasable minerals and minerals on state or privately owned land are made available depending on the terms of the lease.

6.4 Is the holder of a right to conduct reconnaissance, exploration and mining entitled to exercise rights also over residue deposits on the land concerned?

Generally, the holder of a mining claim or lease may exercise rights over residue deposits on the land concerned. However, certain residue deposits may be subject to ownership by another party and may not be contemplated by a mining lease.

6.5 Are there any special rules relating to offshore exploration and mining?

Yes. There are special federal and state rules relating to offshore exploration and mining, depending on whether exploration and mining are taking place in state-owned or federal waters. Generally, the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, *et seq.*, provides the US Bureau of Ocean Energy Management ("BOEM") and related agencies with the authority to manage minerals on the US outer continental shelf. Minerals may be offered for lease by the BOEM in accordance with federal regulations at 30 C.F.R. Parts 580–582.

7 Rights to Use Surface of Land

7.1 Does the holder of a right to conduct reconnaissance, exploration or mining automatically own the right to use the surface of land?

See the responses to questions 1.3, 2.1 and 6.1. FLPMA governs federal land use, including access to, and exercise of, GML rights on lands administered by the BLM and the USFS. FLPMA recognises 'the Nation's need for domestic sources of minerals', and provides that FLPMA shall not impair GML rights, including, but not limited to, rights of ingress and egress. However, FLPMA also provides that mining authorisations must not 'result in unnecessary or undue degradation of public lands'. BLM and USFS have promulgated extensive FLPMA mining regulations.

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.

Upon making a discovery of valuable minerals, the locator of a federal mining claim receives the 'exclusive right of possession and enjoyment' of all 'veins, lodes, and ledges throughout their entire depth' which have apexes within the mining claim. The locator also receives the exclusive right to possess all surface areas within the claim for mining purposes, but the United States retains the right to manage the surface of the property for other purposes. A locator's possessory rights are considered vested property rights in real property with full attributes and benefits of ownership exercisable against third parties, and these rights may be sold, transferred and mortgaged.

In most states, the owner of the mineral estate on private land has the right to use so much of the surface as is reasonably necessary to exploit the mineral estate, but such rights are usually qualified and limited in various ways.

7.2 What obligations does the holder of a reconnaissance right, exploration right or mining right have vis-à-vis the landowner or lawful occupier?

Federal mining laws do not require community engagement or corporate responsibility. Those projects that require NEPA review, however, will be subject to public notice and comment requirements and the review will involve consideration of the project's cultural, societal and economic impacts. State laws may impose a 'public interest' standard for projects requiring state approval. For example, mining operations that require state water rights may need to show that the use of the water is in the 'public interest', which may include consideration of wildlife, fisheries and aquatic habitat values.

The law governing split estates generally requires both the mineral estate owner and the surface estate owner to proceed with 'due regard' for the other, and to 'accommodate' the use of the other. The holder of mining rights is entitled to use as much of the surface and subsurface as is 'reasonably necessary' to exploit its interest in the minerals, but this entitlement must be balanced against the surface owner's right to use his property. Federal and state legislation has granted additional protections to surface owners.

7.3 What rights of expropriation exist?

There is little risk of expropriation of mining operations by Government seizure or political unrest. Rights may only be expropriated following due process and payment of due compensation to the holder.

8 Environmental

8.1 What environmental authorisations are required in order to conduct reconnaissance, exploration and mining operations?

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 its projects before action is taken. An agency must prepare an EIS for all major federal actions significantly affecting the quality of the human environment. An agency may first prepare an EA to determine whether the effects are significant. If the effects are significant, the agency must prepare the more comprehensive EIS. If the effects are insignificant, the agency generally will issue a finding of no significant impact, ending the process. NEPA does not dictate a substantive outcome, however, the analysis generally requires consideration of other substantive environmental statutes and regulations, including the Clean Air Act, 42 U.S.C. §§ 7401-7671q, the Clean Water Act, 33 U.S.C. §§ 1251-1388, and the Endangered Species Act, 16 U.S.C. §§ 1531-1544. NEPA is administered by the federal agency making the decision that may significantly affect the environment.

Mining projects on federal lands, or that otherwise have a federal nexus, will likely have to go through some level of NEPA environmental review. State laws may also require environmental analysis. Where analysis is required by different agencies, it may be possible to pursue an agreement among the agencies to allow the operator to produce one comprehensive environmental review document that all agencies can rely on.

There is no statutory deadline for federal agencies to complete their NEPA review. Small mine project reviews may take in excess of a year to complete. Larger project reviews likely will take longer. Third parties may sue the federal agency completing the review to ensure that the agency considered all relevant factors and had a rational basis for the decisions made based on 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.

The Clean Air Act regulates air emissions from stationary and mobile sources. The Clean Air Act is administered by the Environmental Protection Agency and states with delegated authority. The Clean Water Act regulates pollutant discharges into the 'waters of the US, including the territorial seas'. 33 U.S.C. § 1311(a). The Clean Water Act is administered by the Environmental Protection Agency, 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 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.

On January 11, 2017, the US Environmental Protection Agency ("EPA") issued a proposed rule establishing financial responsibility requirements for the hardrock mining industry to address environmental liabilities. However, the fiscal year 2018 budget for the EPA prohibits the use of funds to implement this rule.

State laws may also include closure and reclamation requirements, including, water and air pollution controls, re-contouring and re-vegetation, fish and wildlife protections, and reclamation bonding requirements. Mining projects often can address both federal and state requirements through a single closure and reclamation plan and financial guarantee.

8.2 What provisions need to be made for storage of tailings and other waste products and for the closure of mines?

FLPMA requires BLM and USFS to prevent 'unnecessary or undue degradation' of public lands. 43 U.S.C. § 1732(b). 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. 43 C.F.R. §§ 3809.320, 3809.500(b). Plan-level operations require a plan of operations that includes a detailed reclamation plan. 43 C.F.R. §§ 3809.11, 3809.401. BLM reclamation standards include saving topsoil for reshaping disturbed areas, erosion and water control measures, toxic materials measures, reshaping and re-vegetation where reasonably practicable, and rehabilitation of fish and wildlife habitat. 43 C.F.R. § 3809.420. Mining in BLM wilderness study areas additionally requires surface disturbances be 'reclaimed to the point of being substantially unnoticeable in the area as a whole'. 43 C.F.R. § 3802.0-5(d).

Mining activities on National Forest lands must be conducted 'so as to minimise adverse environmental impacts on National Forest System surface resources'. 36 C.F.R. § 228.1. 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 re-vegetation where reasonably practicable, and rehabilitation of fish and wildlife habitat. 36 C.F.R. § 228.8(g). State laws may also include closure and reclamation requirements, including, for example, water and air pollution controls, re-contouring and re-vegetation, fish and wildlife protections, and reclamation bonding requirements. Mining projects can often address both federal and state requirements through a single closure and reclamation plan and financial guarantee.

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.

8.3 What are the closure obligations of the holder of a reconnaissance right, exploration right or mining right?

See the response to question 8.2.

8.4 Are there any zoning or planning requirements applicable to the exercise of a reconnaissance, exploration or mining right?

Individual counties and municipalities may impose certain zoning

requirements on lands subject to their jurisdiction; however, zoning requirements are less likely to apply where mining operations are located away from residential areas.

9 Native Title and Land Rights

9.1 Does the holding of native title or other statutory surface use rights have an impact upon reconnaissance, exploration or mining operations?

The US contains numerous reservations comprised of federal lands set aside by treaty or an administrative directive for specific Native American tribes or Alaska Natives. Tribal reservation titles are generally held by the US 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 and two specific laws. The National Historic Preservation Act (“NHPA”), 54 U.S.C. § 300101, *et seq.*, requires an analysis that includes social and cultural impacts, and may require tribal consultation. Section 106 of NHPA requires federal agencies to inventorise historic properties on federal lands and lands subject to federal permitting, and to consult with interested parties and the State Historic Preservation Office. 54 U.S.C. § 306108. The Native Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013, imposes procedural requirements that apply to inadvertent discovery and intentional excavation of tribal graves and cultural items on federal or tribal lands. Locatable minerals found on American Indian reservations are subject to lease only. Under the Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101-2108, tribes may enter private negotiations with mineral developers for the exploration and extraction, subject to the Interior Secretary’s approval.

10 Health and Safety

10.1 What legislation governs health and safety in mining?

The Federal Mine Safety and Health Act, 30 U.S.C. § 801-966, requires the Mine Safety and Health Administration (“MSHA”) to inspect all mines each year to ensure safe and healthy work environments. 30 U.S.C. § 813. MSHA is prohibited from giving advance notice of an inspection, and may enter mine property without a warrant. 30 U.S.C. § 813. 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. *See, e.g.* 30 C.F.R. Part 56 (safety and health standards for surface metal and non-metal mines). MSHA regulations also establish requirements for: testing; evaluating and approving mining products; miner and rescue team training programmes; and notification of accidents, injuries, and illnesses at the mine. 30 C.F.R. §§ 5.10-36.50, 46.1-49.60, 50.10.

10.2 Are there obligations imposed upon owners, employers, managers and employees in relation to health and safety?

See the response to question 10.1.

11 Administrative Aspects

11.1 Is there a central titles registration office?

Yes. Both the BLM and individual counties maintain records concerning title to surface and mineral interests in federal lands. State agencies typically maintain records for state-owned minerals. Documents affecting a title to private minerals are typically recorded in the county records of the county in which the lands are located.

11.2 Is there a system of appeals against administrative decisions in terms of the relevant mining legislation?

Yes. Appeals may be made to administrative tribunals and to the judicial system.

12 Constitutional Law

12.1 Is there a constitution which has an impact upon rights to conduct reconnaissance, exploration and mining?

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 multiple levels of regulation. Mining on federal lands, for example, is generally subject to multiple layers of concurrent federal, state, and local statutes and administrative regulations.

12.2 Are there any State investment treaties which are applicable?

Many international treaties of general application apply to mining industry investment by foreign persons into the United States, but none specifically address investment in the mining industry or trading in various minerals. See the response to question 14.2.

13 Taxes and Royalties

13.1 Are there any special rules applicable to taxation of exploration and mining entities?

There are no federal taxes specific to minerals extraction. 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% of the sale’s price in cash with the US Internal Revenue Service as insurance against the seller’s income tax liability. The cash requirement can be problematic for a cash-strapped buyer that may have purchased the mine property with stock.

There are no federal tax advantages or incentives specific to mining. There are no federal duties on minerals extraction.

Taxation schemes in individual states vary widely.

Locatable minerals claimants must pay an annual maintenance fee of \$155 per claim *in lieu* of performing assessment work required pursuant to GML and FLPMA. 43 C.F.R. §§ 3834.11(a), 3830.21. Failure to perform assessment work or pay a maintenance fee will open the claim to relocation by a rival claimant as if no location had been made. 43 C.F.R. § 3836.15. 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. 43 C.F.R. § 3504.15. Prospecting permits automatically terminate if rent is not paid on time; the BLM will notify late lessees that they have 30 days to pay. 43 C.F.R. § 3504.17.

13.2 Are there royalties payable to the State over and above any taxes?

There are generally no royalties levied on the extraction of federally owned locatable minerals. Production royalties are generally required on fuel minerals and other minerals governed by the Mineral Leasing Act. Many states 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.

14 Regional and Local Rules and Laws

14.1 Are there any local provincial or municipal laws that need to be taken account of by a mining company over and above National Legislation?

As noted above, state and local governments having concurrent or independent authority over certain aspects of mining projects (e.g. permitting, water rights and access authorisations). Ownership of state-owned land and minerals is controlled by state law and varies by state. State laws generally are similar to federal laws in that a title remains with the state until the minerals are severed pursuant to statutory procedures.

State and local laws may impose a ‘public interest’ standard for projects requiring state approval. State laws may also include closure and reclamation requirements, including, for example, water and air pollution controls, re-contouring and re-vegetation, fish and wildlife protections, and reclamation bonding requirements. Many state laws require financial guarantees prior to commencing operations to cover closure and reclamation costs. In addition, some states charge royalties on mineral operations on state-owned lands and impose taxes that function like a royalty on all lands, such as severance taxes, mine licence taxes, or resource excise taxes.

14.2 Are there any regional rules, protocols, policies or laws relating to several countries in the particular region that need to be taken account of by an exploration or mining company?

The North American Free Trade Agreement (“NAFTA”) among the US, Canada and Mexico, in Chapter 11, requires equal treatment between the NAFTA country’s own citizens and those from another NAFTA country, and requires that the NAFTA country protect those investors and their investments. Among the most important protections are the broad prohibitions on ‘expropriation’ of the investor’s rights, including a prohibition on the NAFTA country implementing measures ‘tantamount to expropriation’ except in accordance with approved criteria, and requiring payment of compensation resulting from losses incurred by the investor. In August 2017, trade representatives from the US, Mexico and Canada conducted the first round of talks to renegotiate certain elements of NAFTA. Rules of origin issues and NAFTA’s dispute resolution mechanism are some of the key issues facing the negotiators.

15 Cancellation, Abandonment and Relinquishment

15.1 Are there any provisions in mining laws entitling the holder of a right to abandon it either totally or partially?

Under the GML, rights in unpatented mining claims can be abandoned by non-payment of annual maintenance fees. Minerals leased under federal law (energy minerals such as coal), minerals owned by states, and minerals owned by private entities can only be abandoned in accordance with the terms of the lease or other grant from the mineral owner to the holder of the right to develop the minerals.

15.2 Are there obligations upon the holder of an exploration right or a mining right to relinquish a part thereof after a certain period of time?

Under the GML, there is no obligation to relinquish an exploration or mining right after a certain period of time. The terms of federal mineral leases, state mineral leases or private leases may contain such provisions.

15.3 Are there any entitlements in the law for the State to cancel an exploration or mining right on the basis of failure to comply with conditions?

Yes. Under the GML, unpatented mining claims may be cancelled for failure to pay annual maintenance fees, or, in some instances, the federal government can challenge the validity of unpatented mining claims for failure to make a valid discovery of a valuable mineral. The terms of federal, state and private leases often contain default provisions allowing cancellation upon failure to comply with conditions of the lease.

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Mayer Brown's global mining group works throughout the world, advising clients on a wide variety of transactions including project finance, environmental, corporate, construction, insurance and commodities matters. Our lawyers have extensive experience of the day-to-day legal, financial and operational issues faced by mineral producers and those who provide finance to the industry sector. This enables us to get straight to the heart of what our clients need and for the assistance we provide to be given with a full appreciation of real and practical industry concerns. No matter how complex the deal or remote the operation, our mining team is likely to have worked on a similar assignment before and will therefore be familiar with the issues that have to be resolved.

Vietnam

Nguyen Hai Thao



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1 Relevant Authorities and Legislation

1.1 What regulates mining law?

The mining of minerals other than oil and gas is regulated by the 2010 Minerals Law and its implementing regulations.

The exploitation of oil and gas is subject to a different set of legislation under the Amended Oil and Gas Law and its implementing regulations.

1.2 Which Government body/ies administer the mining industry?

The mining industry is regulated by the Ministry of Natural Resources and Environment (“MONRE”) at the national level. People’s committees at all local levels also oversee mining activities within their jurisdictions.

Oil and gas activities are regulated by the Ministry of Industry and Trade (“MOIT”). People’s committees at all local levels also oversee oil and gas activities within their jurisdictions.

1.3 Describe any other sources of law affecting the mining industry.

Both the mining and oil and gas industries are subject to other sets of legislation such as:

1. The 2014 Investment Law (not applicable to investment in the oil and gas industry);
2. The 2014 Enterprise Law;
3. The 2014 Environmental Protection Law;
4. The 2013 Land Law;
5. The 2008 Corporate Income Tax Law;
6. The 2009 Natural Resources Tax Law; and
7. The 2012 Labour Code.

2 Mechanics of Acquisition of Rights

2.1 What rights are required to conduct reconnaissance?

The State controls and organises reconnaissance surveying activities via State-controlled agencies specialising in geology (the “**geology specialised entities**”) by promulgating a master

plan for reconnaissance surveying. Private sector investors (both institutional and individual) are allowed to *participate* in reconnaissance surveying of all minerals, except uranium and thorium, by way of making cash contributions for purposes of the survey. Investors are required to submit applications through a bidding process to the General Department of Geology and Minerals (“**GDGM**”) under the MONRE. Bidders are also required to post a bond of VND 1 billion (about US\$ 44,000) provided by an onshore bank to the GDGM. In limited circumstances, the Prime Minister may appoint an investor without an open tender. Selected bidders will enter into an agreement on reconnaissance surveying with the geology-specialised entities and pay the surveying contribution to the State. A bank bond is required to guarantee the investor’s payment obligations.

2.2 What rights are required to conduct exploration?

Investors wishing to conduct exploration, or investors who have obtained mining rights for a project, are required to obtain an exploration licence. The term of this licence is up to 48 months and it may be extended multiple times; provided, however, that the total extended time does not exceed an additional 48-month period.

Investors are required to pay a licensing fee. Investors are selected on a competitive basis and priority is given to those who (in the following order of priority):

- (a) have contributed to the reconnaissance survey;
- (b) hold equity of at least 50% of the total investment on the exploration project;
- (c) use advanced technology and equipment for the maximum recovery of minerals and comply with environmental protection regulations and payment obligations; and
- (d) commit to using the exploited minerals for purposes of domestic manufacturing needs.

Investors having exploration/mining rights can hire professional surveyors to conduct the exploration if they are not capable of doing so on their own.

Subject to certain conditions (see question 5.1), exploration rights are transferable.

2.3 What rights are required to conduct mining?

Investors wishing to conduct mining operations are required to obtain an exploitation licence, whose term is up to 30 years, subject to extension for another 20 years.

In order to obtain the exploitation licence, the investor is required to pay a licensing fee.

The exploitation licence is issued to investors who meet all of the following requirements and possess the following:

- (a) a project at a location where exploration and the assessed quarry reserves are aligned with the general mining master plans;
- (b) specialised staff and advanced technology and equipment;
- (c) a project approved by the Prime Minister (applicable to projects involving toxic minerals);
- (d) the environmental impact assessment report or the undertaking on environmental protection; and
- (e) equity of at least 30% of the total investment cost of the exploitation project.

Subject to certain conditions (see question 5.1), the mining right is transferable.

2.4 Are different procedures applicable to different minerals and on different types of land?

There are various land types. Land used for mining purposes is a sub-category of non-agricultural land. Investors in mining projects acquire access to their project land basically according to the same procedures as investors acquiring land use rights in non-agricultural land. Under this procedure, land will be leased by the State to the mining investors. The land use term will correspond to the term of the mining project.

2.5 Are different procedures applicable to natural oil and gas?

Investment in oil and gas follows a similar procedure promulgated under the Oil and Gas Law, under which an investor will enter into an agreement with the Vietnam Oil and Gas Group (“PetroVietnam”), a State-owned company having statutory control of all exploration and exploitation of oil and gas in Vietnam. PetroVietnam will conduct open or closed tendering to select a partner. In limited circumstances, the Prime Minister may select an investor through direct appointment. The selected partner will enter into a production sharing contract (“PSC”) or a joint venture agreement (“JVA”) with PetroVietnam. The standard term of a PSC is 25 years, with an exploration term of no more than five years. In limited circumstances, a PSC can have a term of no more than 30 years with a maximum seven-year exploration period. The contract term and the exploration period can be extended for five years and two years, respectively.

3 Foreign Ownership and Indigenous Ownership Requirements and Restrictions

3.1 What types of entity can own reconnaissance, exploration and mining rights?

Foreign investors are allowed to participate in the reconnaissance, exploration and exploitation/mining activities. The law is silent as to whether onshore incorporation is required for reconnaissance purposes, and expressly requires onshore incorporation for mining purposes. The law is ambiguous as to whether onshore incorporation is required for exploration purposes and therefore this would be advisable.

With respect to professional surveyors, although Vietnam’s WTO commitments allow foreign surveyors to provide the service (CPC 8675) on a cross-border basis without the need for onshore

incorporation, the Mineral Laws seem to allow only onshore service providers (including foreign-owned onshore surveyors) to provide the service.

3.2 Can the entity owning the rights be a foreign entity or owned (directly or indirectly) by a foreign entity and are there special rules for foreign applicants?

The entities owning the rights can be foreign-owned. Please see question 3.1 about the onshore incorporation requirements. In practice, foreign investors generally will establish onshore companies to hold the exploration and mining rights.

Foreign investors in mining projects must first apply for an investment registration certificate from the investment licensing authority. Incorporation (if required) and exploration/mining licences will follow.

3.3 Are there any change of control restrictions applicable?

There are no restrictions as to change of control of the entities conducting reconnaissance, exploration and mining activities under the Minerals Law.

In the oil and gas industry, a six-month notice to the MOIT and PetroVietnam is required in case of a change of control of an entity having an interest in a PSC/JVA. A new guarantee will be required from the new parent to replace any existing parent guarantees. A change of control may also result in amendment of the underlying PSC/JVA.

3.4 Are there requirements for ownership by indigenous persons or entities?

There are no requirements for ownership by indigenous persons or entities in mineral activities. However, entities conducting mining activities are required to:

- (a) provide support in the form of sharing the costs for the local infrastructure;
- (b) prioritise hiring local people; and
- (c) pay support for career displacement to the local people who are displaced or resettled due to the mining project.

3.5 Does the State have free carry rights or options to acquire shareholdings?

The law allows the State the right to maintain or acquire ownership/shareholding in a number of industries for the purposes of social benefits or national security. Mining and oil and gas are included among such industries.

4 Processing, Refining, Beneficiation and Export

4.1 Are there special regulatory provisions relating to processing, refining and further beneficiation of mined minerals?

Current regulations do not yet provide details on processing, refining and further beneficiation of minerals. A government decree providing on these activities is currently in draft form.

4.2 Are there restrictions on the export of minerals and levies payable in respect thereof?

Minerals for export purposes are subject to the following conditions:

- (a) they must be on the list of minerals eligible for export;
- (b) they must be from legitimate sources; and
- (c) they must have an export licence (applicable only to radioactive minerals).

Exported minerals are subject to export duties of 0–40%, and oil and gas products 0–10%.

Various types of minerals are VAT-free.

5 Transfer and Encumbrance

5.1 Are there restrictions on the transfer of rights to conduct reconnaissance, exploration and mining?

The law is silent as to whether the right to conduct reconnaissance is transferable. Although it is not expressly allowed under the Minerals Law, it may be transferable on the basis of a contractual assignment of the relevant agreement and the contribution payment obligation, if approved by the GDGM.

Transfers of the rights to conduct exploration and mining are expressly permitted but certain conditions will apply as follows:

- (a) transferors of exploration right must have completed at least 50% of the projected exploration project and transferors of mining right must have completed the major construction and commenced mining;
- (b) transferees of the exploration/mining right must meet the same conditions for obtaining the exploration/mining licence respectively;
- (c) the mining licensing authorities must have approved the transfer; and
- (d) the remaining term of the licence is at least 90 days.

5.2 Are the rights to conduct reconnaissance, exploration and mining capable of being mortgaged or otherwise secured to raise finance?

The Mineral Law is silent on whether entities conducting mineral reconnaissance, exploration or mining can mortgage or otherwise use these rights as collateral to raise financing. However, as these rights have monetary value, they may be considered as property rights under the Civil Code, and therefore may be collateralised.

On the other hand, the law expressly provides that land use rights for which land rent is paid upfront for the entire lease term are property rights and can be mortgaged. In practice, many mining project investors do mortgage their land use rights. It should also be noted that offshore lenders are not allowed to take mortgage over land use rights and immovable assets except in very limited circumstances.

6 Dealing in Rights by Means of Transferring Subdivisions, Ceding Undivided Shares and Mining of Mixed Minerals

6.1 Are rights to conduct reconnaissance, exploration and mining capable of being subdivided?

Although one entity/investor can have the rights to conduct all three activities, these are separate and distinct rights (reconnaissance, exploration, and mining) under Vietnamese laws.

6.2 Are rights to conduct reconnaissance, exploration and mining capable of being held in undivided shares?

Each and all of these rights are held in undivided shares.

6.3 Is the holder of rights to explore for or mine a primary mineral entitled to explore or mine for secondary minerals?

Holders of exploration/mining rights are obliged to mine secondary minerals. They are required to report on secondary minerals (for exploration right holders) and notify the licensing authorities prior to mining secondary minerals.

6.4 Is the holder of a right to conduct reconnaissance, exploration and mining entitled to exercise rights also over residue deposits on the land concerned?

Mining of residue deposits is a separate right. In order to conduct mining of residue deposits on the same land, a separate residue mining licence is required.

6.5 Are there any special rules relating to offshore exploration and mining?

There are no special rules under the Mineral Laws as to offshore exploration and mining. However, as the project is implemented in the sea and/or the seabed, the investor/developer does not lease land from the State – they will lease water surface or an ocean area instead. However, current regulations only provide that water surface/ocean area may be leased for aqua-culture purposes only.

7 Rights to Use Surface of Land

7.1 Does the holder of a right to conduct reconnaissance, exploration or mining automatically own the right to use the surface of land?

The right to use the land surface does not come automatically with the exploration/mining licences. After these licences are granted, the investor will lease land for the relevant area from the State to implement the project. A land use right certificate will be granted after the investor enters into a land lease agreement with the State. If land rent for the entire lease term is paid upfront, the land use right holder can mortgage the land use rights with onshore banks to raise financing.

7.2 What obligations does the holder of a reconnaissance right, exploration right or mining right have *vis-à-vis* the landowner or lawful occupier?

When a mining project is approved, residents/occupiers on the land will be resettled. Resettlement is the responsibility of the State. However, investors are encouraged to participate to expedite the relocation. The costs of relocation advanced by the investors will be applied against the land rent to be paid by the investors under the land lease agreement.

7.3 What rights of expropriation exist?

The Law on Expropriation allows the government to buy or take possession of an asset owned by Vietnamese or foreign owners on the grounds of national security or national interests. In that case, the government will pay the market price to the owner. The law does not provide a definition or method of determining the market price.

8 Environmental

8.1 What environmental authorisations are required in order to conduct reconnaissance, exploration and mining operations?

Entities conducting exploration and mining must have an approved plan on environmental protection and an environmental impact assessment (“EIA”) report, respectively. These plans or reports are to be approved by the environmental protection regulators.

8.2 What provisions need to be made for storage of tailings and other waste products and for the closure of mines?

Treatment of solid waste must be carried out by properly licensed entities.

Management of waste must be carried out during the entire process from being generated until it has been properly disposed. Regular industrial solid waste must be separated from hazardous waste. The collection, storage, and transportation of waste must ensure that no leaks will occur.

Liquid waste is to be properly treated on-site with a liquid waste treatment system before disposal into the common sewers or the ocean.

Owners of hazardous waste are required to register with the regulator for monitoring purposes.

8.3 What are the closure obligations of the holder of a reconnaissance right, exploration right or mining right?

When a quarry is closed, holders of the rights are required to:

- (a) submit a closure plan for approval by the licensing authorities;
- (b) remove all assets from the site within six months of the expiry of the licence; and
- (c) level the project site, and rehabilitate the environment and/or the land.

For oil and gas projects, besides the obligations above, prior to the decommissioning, the decommissioning party must execute an

environmental monitoring plan and produce a report to the MONRE, and submit to the MOIT certain documents in accordance with the safety rules for oil and gas activities. Within nine months of the completion of the decommissioning, the decommissioning party must produce a report on the decommissioning to the MOIT, and also execute a post-decommissioning environmental monitoring plan and produce the post-decommissioning environmental report to the MONRE.

8.4 Are there any zoning or planning requirements applicable to the exercise of a reconnaissance, exploration or mining right?

The government promulgates zoning/master plans for mineral projects for various locations throughout Vietnam. The granting of reconnaissance, exploration and mining rights must follow such zoning/master plans. The current master plan for mineral projects is envisioned for the period until 2030.

A similar master plan is also promulgated for oil and gas projects.

9 Native Title and Land Rights

9.1 Does the holding of native title or other statutory surface use rights have an impact upon reconnaissance, exploration or mining operations?

Residents/occupiers of the land will be resettled for mining projects and are entitled to compensation for their prior land use rights, and relocation support. These costs are to be borne by the State, but if advanced by the investors, will be applied against the land rent to be paid by the investors to the State.

10 Health and Safety

10.1 What legislation governs health and safety in mining?

Health and safety in all industries are regulated by:

- (a) The 2012 Labour Code; and
- (b) The 2015 Law on Occupational Safety and Hygiene.

10.2 Are there obligations imposed upon owners, employers, managers and employees in relation to health and safety?

Most mining jobs are considered hazardous and dangerous. Employers are required to provide safety training prior to and during the assignment, and a semi-annual health check for employees.

Employees working on hazardous/dangerous assignments cannot work more than six hours per day and are entitled to 14–16 leave days per year.

11 Administrative Aspects

11.1 Is there a central titles registration office?

There is not a central title registration office.

The investment registration certificates, and land use right certificates are granted by provincial people’s committees of the jurisdictions where the projects operate. Most exploration/mining

licences are granted by the MONRE, and some are granted by provincial people's committees.

Oil and gas projects are approved by the Prime Minister.

11.2 Is there a system of appeals against administrative decisions in terms of the relevant mining legislation?

Administrative decisions can be appealed under either of the following procedures:

- (a) appealing to the agency of higher authority of the agency issuing the decision under appeal; or
- (b) taking legal action against the agency issuing the decision under appeal before the administrative court.

12 Constitutional Law

12.1 Is there a constitution which has an impact upon rights to conduct reconnaissance, exploration and mining?

The 2013 Constitution provides that the land, and all natural resources are the under the ownership of the people and administered by the State. Therefore, there is no private ownership concept with respect to land and natural resources under Vietnamese laws.

12.2 Are there any State investment treaties which are applicable?

Vietnam currently has 51 bilateral investment treaties and 16 multi-lateral investment treaties, the most notable are:

1. WTO Commitments on Services;
2. ASEAN-EU Cooperation Agreement dated 7 March 1980;
3. ASEAN Investment Agreement dated 15 December 1987;
4. EC-Vietnam Cooperation Agreement dated 17 July 1995;
5. ASEAN Framework Agreement on Services dated 15 December 1995;
6. US-Vietnam Trade Relations Agreement dated 13 July 2000;
7. ASEAN-China Framework Agreement dated 4 November 2002;
8. ASEAN-Japan Framework Agreement dated 8 October 2003;
9. ASEAN-India Framework Agreement dated 7 March 2004;
10. ASEAN-Korea Framework Agreement dated 13 December 2005;
11. ASEAN-US Trade and Investment Framework Arrangement dated 25 August 2006;
12. US-Vietnam Trade and Investment Framework Arrangement dated 21 June 2007;
13. ASEAN-Japan Free Trade Agreement dated 28 March 2008;
14. Japan-Vietnam Economic Partnership Agreement dated 25 December 2008;
15. ASEAN Comprehensive Investment Agreement dated 26 February 2009 (ACIA);
16. ASEAN-Australia-New Zealand Free Trade Area Agreement dated 27 February 2009;
17. ASEAN-Korea Investment Agreement dated 2 June 2009;
18. ASEAN-China Investment Agreement dated 15 August 2009;

19. Korea-Vietnam Free Trade Agreement dated 5 May 2015; and
20. Eurasian Economic Union-Vietnam Free Trade Agreement dated 29 May 2015.

13 Taxes and Royalties

13.1 Are there any special rules applicable to taxation of exploration and mining entities?

Entities doing business in the mining industry are subject to the following taxes:

- (a) Natural Resources Tax of 1%–35%; crude oil, natural gas and coal gas are taxed at progressive tax rates depending on the daily average production output.
- (b) Non-Agricultural Land Use Tax: on par with other industries.
- (c) Corporate Income Tax: 32%–50% (as opposed to the standard rate of 20% for other industries).

13.2 Are there royalties payable to the State over and above any taxes?

Royalties of 1%–5% of the estimated value of the reserves apply to entities conducting mineral mining activities. Royalties do not apply to holders of residue mining right.

14 Regional and Local Rules and Laws

14.1 Are there any local provincial or municipal laws that need to be taken account of by a mining company over and above National Legislation?

Local provincial authorities are not allowed to make regulations that are inconsistent with national laws.

14.2 Are there any regional rules, protocols, policies or laws relating to several countries in the particular region that need to be taken account of by an exploration or mining company?

While a global (rather than regional rule), it is critical to be aware of the scope and limitations to Vietnam's WTO accession commitments; see question 3.1.

The regional Korea-Vietnam Free Trade Agreement dated 5 May 2015 also provides the same commitment as the WTO commitments with respect to professional surveying services.

15 Cancellation, Abandonment and Relinquishment

15.1 Are there any provisions in mining laws entitling the holder of a right to abandon it either totally or partially?

Under the Minerals Law, holders of exploration and mining rights are entitled to relinquish all or part of the area for which the licence is granted. There are no conditions/requirements for relinquishment. Oil and gas project owners can do so too, but are subject to the approval of the Prime Minister.

15.2 Are there obligations upon the holder of an exploration right or a mining right to relinquish a part thereof after a certain period of time?

Besides the obligations mentioned in questions 8.2 and 8.3 above, rights holders are required to return the granted licences to the licensing authorities, settle their outstanding tax obligations, and other financial obligations with third parties. In addition, if the entire project is abandoned, the investor may also need to wind up the project company.

An oil and gas contractor under a PSC/JVA abandoning the project may be required to pay PetroVietnam compensation for the committed but unfinished work.

15.3 Are there any entitlements in the law for the State to cancel an exploration or mining right on the basis of failure to comply with conditions?

Under the Minerals Law, the State can cancel exploration and mining rights by withdrawing the issued exploration/mining licence, if the licensed entity: (i) fails to implement the exploration project or the mining project within six months or 12 months of the licence date respectively; (ii) breaches its obligations under the laws and fails to remedy such breach/non-compliance within 90 days; or (iii) the area covered by the exploration licence is announced to be a prohibited or temporarily prohibited area.

Alternatively, the State can also revoke the investment registration certificate issued to the investor if the investor does not implement the project within 12 months (or 24 months, if extended) of the investment registration certificate being issued.



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Zambia

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1 Relevant Authorities and Legislation

1.1 What regulates mining law?

The primary law governing the mining sector in Zambia is the Mines and Minerals Development Act No. 11 of 2015 of the Laws of Zambia (MMDA) as read together with The Mines and Minerals Development (Amendment) Act No. 14 of 2016. The MMDA became effective on 1st July, 2015 although the date of assent is 14th August, 2015. It repealed and replaced the Mines and Minerals Development Act No. 7 of 2008. The MMDA deals with mining rights, licences, large-scale mining in Zambia, gemstone mining, health and safety, environmental protection, and geological services on analysis, royalties and charges. Other pieces of legislation, other than the Mines and Minerals Development Act, include: Mines Acquisition (Special Provisions) Act, Chapter 218, Volume 13 of the Laws of Zambia; and the Mines Acquisition (Special Provisions) (No. 2) Act Chapter 219, Volume 13 of the Laws of Zambia.

1.2 Which Government body/ies administer the mining industry?

The mining industry is administered by the Ministry of Mines and Minerals Development previously called Ministry of Mines, Energy and Water Development, specifically by the office of the Director of Mines. The MMDA gives primary power to the Director of Mines, Director of Mines Safety, Director of Mining Cadastre and Director of Geological Survey while the Minister enjoys an appellate and supervisory role over the respective Director's actions.

The aforementioned departments all have their head offices situated in Lusaka, except the Department of Mine Safety which is situated in Kitwe in the Copperbelt Province.

1.3 Describe any other sources of law affecting the mining industry.

Other than the Mines and Minerals Development Act, the Zambian mining industry is also affected by the provisions of The Mines and Minerals (Trading in Reserved Minerals) Regulations Statutory Instrument No. 110 of 1995, The Mines and Minerals (Application for Mining Rights) Regulations Statutory Instrument No. 123 of 1996, The Mines and Minerals (Application for Mining Rights) (Amendment) Regulations No. 29 of 1997, The Mines and Minerals (Environmental Protection Fund) Regulations Statutory Instrument No. 102 of 1998, The Mines and Minerals (Royalty) (Remission)

Order, 2000 Statutory Instrument No. 18 of 2000, The Mines and Minerals (Environmental) (Exemption) (Amendment) Order, 2000 Statutory Instrument No. 31 of 2000, The Mines and Minerals Development (General) Regulations Statutory Instrument No. 84 of 2008, The Mines and Minerals Development (Prospecting, Mining and Milling of Uranium Ores and other Radioactive Minerals Ores) Regulations Statutory Instrument No. 85 of 2008, The Mines and Minerals Development (Mining Rights and Non-Mining Rights) Order, Statutory Instrument No. 27 of 2009, The Mines and Minerals Development (Remission of Mineral Royalties) (Luanshya Copper Mines Plc) Regulations Statutory Instrument No. 66 of 2009, The Mines and Minerals Development (Mining Rights and Non-Mining Rights) Order Statutory Instrument No. 26 of 2010, Mines and Minerals Development (General) (Amendment) Regulations Statutory Instrument No. 34 of 2012, The Mines and Minerals Development (General) (Amendment) Regulations Statutory Instrument No. 17 of 2013, The Mines and Minerals Development (General) Regulations Statutory Instrument No. 7 of 2016, Income Tax, the Value Added Tax Act, the Environmental Management Act No. 12 of 2011, the Zambia Development Agency Act 2006, Pneumoconiosis Act Chapter 217, Volume 13 of the Laws of Zambia, The Medical Examination of Young Persons (underground work) Act Chapter 216, Volume 13 of the Laws of Zambia, Workers Compensation Act No. 10 of 1999, The National Pension Scheme (Amendment) Act No. 7 of 2015, Industrial and Labour Relations Act Chapter 269, Volume 15 of the Laws of Zambia, Ionising Radiation Protection Act No. 16 of 2005, The National Health Services Act No. 17 of 2005, The Factories Act Chapter 441, Volume 24 of the Laws of Zambia, Fire Arms Act Chapter 110, Volume 8 of the Laws of Zambia, Explosives Act Chapter 115, Volume 9 of the Laws of Zambia, The Employment Act Chapter 268, Volume 15 of the Laws of Zambia as read with Employment Act No. 15 of 2015, The Apprenticeship Act Chapter 275, Volume 15 of the Laws of Zambia, the Citizenship Empowerment Act 2006 as read with the Citizen Empowerment (Amendment) Act No. 44 of 2010, the Zambia Revenue Authority Act, the Zambia Wild Life Act 2015, the Lands Act, the Land and Deeds Act, and the Arbitration Act. In the event of a dispute, the courts also apply the English principles of Common Law and Equity.

English Common Law and doctrines of equity are applicable in this jurisdiction. When it gained independence in 1964, Zambia inherited the English legal system and certain pieces of English legislation are still applicable to Zambia through the English Law (Extent of Application) Act, Chapter 11, Volume 2, of the Laws of Zambia. The statutes that were in force in England on 17 August, 1911, as well as the Northern Rhodesia Order in Council, 1911 and the British Acts (Extension) Act, Chapter 10, Volume 2 of the Laws of Zambia which are statutes passed after 17th August, 1911, are

contained in the schedule. In applying common law to mining, Zambian courts have replicated decisions from Commonwealth and foreign countries with similar socio-economic conditions. For example, Zambia has looked more frequently to Commonwealth countries like England and Australia which equally have an active mining industry.

Customary law has some influence with respect to surface rights on land held under customary law tenure.

2 Mechanics of Acquisition of Rights

2.1 What rights are required to conduct reconnaissance?

In order to conduct reconnaissance, a person must apply to the Director of Mining Cadastre. Section 12 of the MMDA prohibits any person from undertaking any reconnaissance activity without a mining right, a mineral processing licence or a gold panning certificate. Section 18(2) of the MMDA provides that a holder of a mining right or a mineral processing licence shall, within one hundred and eighty (180) days of the grant of the licence, survey and demarcate the area covered by the licence in the prescribed manner and register a pegging certificate at the Mining Cadastre Office.

2.2 What rights are required to conduct exploration?

In order to acquire prospecting rights, the applicant has to apply for an exploration licence to the Director of the Mining Cadastre in the prescribed form upon payment of the prescribed fee. The Mining Licence Committee in the Ministry of Mines, which includes all the directors mentioned in question 1.2 above, grants, within sixty (60) days of receipt of an application, the applicant an exploration licence, in the prescribed form, if the application complies with the provisions of the MMDA. An exploration licence confers on the holder exclusive rights to carry on exploration in the exploration area for the minerals specified in the licence and to do all such other acts and things as are necessary for, or incidental to, the carrying on of those operations.

2.3 What rights are required to conduct mining?

A person wishing to conduct mining and dispose of minerals is required to first acquire a mining right or a mining licence granted under the MMDA. In order to acquire mining rights, the applicant has to apply for a mining right. The applicant is required to address the application to the Mining Cadastre Office. The Director of Mining Cadastre may, before issuing a mining right or mining licence, require that the land over which the mining right or mining licence is to be issued be properly surveyed in accordance with the provisions of the MMDA.

2.4 Are different procedures applicable to different minerals and on different types of land?

The procedure is the same for all other types of minerals and land held under either state land or customary land.

2.5 Are different procedures applicable to natural oil and gas?

The legal regime regulating natural oil and gas is different. The exploration and production of natural oil and gas is regulated by a

separate piece of legislation known as the Petroleum (Exploration and Production) Act No. 10 of 2008, which repealed and replaced the Petroleum (Exploration and Production) Act No. 13 of 1985.

3 Foreign Ownership and Indigenous Ownership Requirements and Restrictions

3.1 What types of entity can own reconnaissance, exploration and mining rights?

Both Foreign and Indigenous entities can own reconnaissance, exploration and mining rights.

3.2 Can the entity owning the rights be a foreign entity or owned (directly or indirectly) by a foreign entity and are there special rules for foreign applicants?

A prospecting permit, small-scale mining licence, small-scale gemstone licence and an artisan's mining right cannot be granted to a person who is not a citizen of Zambia or a company which is not a citizen-owned company. According to the MMDA, a citizen-owned company means a company where at least 50.1% of its equity is owned by Zambian citizens, and in which the Zambian citizens have significant control of the management of the company.

It is important to note that there are no restrictions with respect to foreign ownership with regard to holders of large-scale mining licences.

3.3 Are there any change of control restrictions applicable?

The MMDA prohibits the transfer or assignment of any mining right without the approval of the Minister of Mines through the office of the Director. In addition, the MMDA requires that any change in the controlling interest in the holder of a mining licence must be notified to the Minister not less than thirty (30) days before the date of the effective transfer.

Section 67 of MMDA further requires that a holder of a mining right or mineral processing licence shall not, after the date of the grant of the right or licence, without the prior written approval of the Minister: register the transfer of any share or shares in the company to any person, or that person's nominee, if the effect of doing so would give that person control of the company; or enter into an agreement with any person, if the effect of doing so would be to give that person control of the company.

3.4 Are there requirements for ownership by indigenous persons or entities?

Section 29 of the MMDA provides restrictive requirements; however, these restrictions only apply to artisanal mining, small-scale mining, mineral trading permit under Section 45(1) and gold panning certificate under Section 42(1). These cannot be granted to a person who is not a citizen of Zambia or a company which is not a citizen-owned company. Artisanal mining shall only be undertaken by a citizen or a co-operative wholly composed of citizens. Small-scale mining shall only be undertaken by a citizen-owned, citizen-influenced or citizen-empowered company. An applicant for artisanal mining or small-scale mining shall not be granted a mining licence in respect of radioactive minerals. A mining right over an area between a minimum of two (2) cadastre units and a maximum

of one-hundred-and-twenty (120) cadastre units in extent shall only be granted to the following companies:

- (a) a citizen-influenced company has the meaning assigned to it in the Citizens Economic Empowerment Act 2006;
- (b) a citizen-empowered company meaning a company where 25–50% of its equity is owned by a citizen; and
- (c) a citizen-owned company has the meaning assigned to it in the Citizens Economic Empowerment Act 2006.

There are no restrictions for exploration, large scale mining, mineral processing and mineral import and export permits.

3.5 Does the State have free carry rights or options to acquire shareholdings?

Free carry rights or options to acquire do not exist. However, mines that have been previously owned by the Government but sold to international mining houses feature what is referred to as ‘a golden share’. This is in respect to the minority shares the state continues to hold in these mines. Under the provisions of Section 27 of the Zambia Development Agency Act No. 11 of 2006, the Minister of Finance may retain a golden share in a state-owned enterprise.

4 Processing, Refining, Beneficiation and Export

4.1 Are there special regulatory provisions relating to processing, refining and further beneficiation of mined minerals?

A licence is required for any person who wishes to undertake the processing of any minerals under Section 38. In addition, under Section 13(2), a person may apply for a mineral trading permit, a mineral import permit, a mineral export permit and a gold panning certificate.

4.2 Are there restrictions on the export of minerals and levies payable in respect thereof?

Approval is required from the Director of Mines under the provisions of Section 47 for the export or import of minerals upon payment of statutory fees. Additional approval is required for the export of radioactive minerals. A mineral export permit requires a mineral analysis and evaluation certificate issued by the Director of the Geological Survey, a verification report from the Commissioner General of the Zambia Revenue Authority for the payment of mineral royalties, security clearance by the police, production returns and mineral right or mineral processing certificate of the source of the mineral, or the mineral product.

5 Transfer and Encumbrance

5.1 Are there restrictions on the transfer of rights to conduct reconnaissance, exploration and mining?

The MMDA provides for restrictions on the ability to transfer reconnaissance, exploration and mining rights. The transfer of these rights requires the prior consent of the Minister of Mines and the production of a tax clearance certificate. Upon satisfaction of the provided criteria in Section 66, the Minister is obliged to grant such consent unless the transferee is disqualified from holding a mining right or a non-mining right under the general provisions of the MMDA.

In addition, we must point out that a change of control of the company, either by way of shares or an agreement whose effect is to change control, is subject to approval by the minister of mines.

5.2 Are the rights to conduct reconnaissance, exploration and mining capable of being mortgaged or otherwise secured to raise finance?

The MMDA does not make specific provision for this; however, rights may be assigned to a financial institution subject to approval by the minister, under the provisions of Section 66 of the MMDA, who has to approve any assignment or encumbrance of any mining or mineral processing licence.

6 Dealing in Rights by Means of Transferring Subdivisions, Ceding Undivided Shares and Mining of Mixed Minerals

6.1 Are rights to conduct reconnaissance, exploration and mining capable of being subdivided?

No, they are not.

6.2 Are rights to conduct reconnaissance, exploration and mining capable of being held in undivided shares?

No, they are not.

6.3 Is the holder of rights to explore for or mine a primary mineral entitled to explore or mine for secondary minerals?

No, they are not.

6.4 Is the holder of a right to conduct reconnaissance, exploration and mining entitled to exercise rights also over residue deposits on the land concerned?

No, they are not.

6.5 Are there any special rules relating to offshore exploration and mining?

No, they are not.

7 Rights to Use Surface of Land

7.1 Does the holder of a right to conduct reconnaissance, exploration or mining automatically own the right to use the surface of land?

The holder of a right to conduct reconnaissance, exploration or mining does not automatically own the right to use the surface of land. However, the holder may have the following rights to use the surface of land:

- i) To enter the mining area and take reasonable measures on or under the surface for the purpose of mining operations.
- ii) To carry on mining operations and to do all such other acts and things as are necessary for carrying on of those operations.

- iii) To dispose of any mineral products recovered.
- iv) To stack or dump any mineral or waste product.
- v) To erect the necessary equipment, plant and buildings for the purpose of mining, transporting, dressing or treating the minerals recovered in the course of the mining operations.

7.2 What obligations does the holder of a reconnaissance right, exploration right or mining right have *vis-à-vis* the landowner or lawful occupier?

The holder of a reconnaissance, exploration or mining right has an obligation towards the landowner or the lawful occupier, subject to the mining right, to pay fair and reasonable compensation for any disturbance of the rights of the occupier, including any damage done to the surface of the land by the operations.

Where the holder requires exclusive or other use of the whole or any portion of the prospecting or mining area, he has an obligation to acquire a lease to use the same as agreed between such holder and the landowner or lawful occupier. This is referred to as an access agreement. Section 57 of the MMDA, however, provides for exceptions to the above statement. Any dispute with respect to compensation between the surface rights holder and holder of a mining right with the consent of the parties, may be resolved by the Director of Mining Cadastre, or the Director may require the parties to submit to arbitration in accordance with the provisions of the Arbitration Act.

7.3 What rights of expropriation exist?

The Lands (Compulsory Acquisition) Act allows the President of the Republic of Zambia to compulsorily acquire any real property (land), interest and personal property for the public benefit. The appropriation under the Constitution is subject to the granting of fair and reasonable compensation. There is also a provision for an Investment Protection Agreement.

The Constitution of Zambia (Amendment) Act No. 2 of 2016 has made special provision with regards to protection of international investment. In addition, Zambia has, through the provisions of Investments Disputes Convention Act Chapter 42, Volume 4 of the Laws of Zambia, domesticated into National Law the Convention on the Settlement of Investment Disputes between states and nationals (multinationals) of other states. Zambia has also ratified the SADC Protocol on Finance and Investment, the COMESA treaty and the investment agreement for the COMESA Common Investment Area (CCIA) Agreement. Zambia has bilateral investment treaties with the United Kingdom (2009), Mauritius (2015), the Netherlands (2003), the Belgium-Luxembourg Economic Union (2001), China (1996), France (2002), Germany (1996), Egypt (2000), Cuba (2000), and Switzerland (1994).

Under Section 69, the Director of Mines may consider the nature of mining operations if it is in the best interests of the Republic that the holders of artisanal or small-scale mining operations covering a neighbouring area will be improved by the coordination of the mining operations. This is only with respect to artisanal and small-scale mining operations.

8 Environmental

8.1 What environmental authorisations are required in order to conduct reconnaissance, exploration and mining operations?

The holder of a mining right is required to have approved

environmental authorisation from the Zambia Environmental Management Agency (ZEMA).

8.2 What provisions need to be made for storage of tailings and other waste products and for the closure of mines?

The Environmental Management Act No. 12 of 2011 provides for the issuance of a waste management licence.

Section 55(2) of the Environmental Management Act provides as follows:

55(2) of the Agency may, upon application, issue a hazardous waste licence to a person to allow the person to:

- (a) generate, pre-treat or treat hazardous waste;
- (b) handle, transport or store hazardous waste;
- (c) dispose of hazardous waste; or
- (d) transit, trade in or export hazardous waste.

A mine can only be closed upon the issue of a certificate of abandonment by the mining rights holder. The certificate will state the conditions to be satisfied for the mine to be closed. However, it is important to note that any liability incurred before the date on which the abandonment was effected in respect of the land, and any legal proceedings that might have been commenced or continued in respect of any liability against the holder of a mining licence for the certificate, may be commenced or continued against that applicant.

It is important that insurance and indemnities be identified prior to closure of the mine.

8.3 What are the closure obligations of the holder of a reconnaissance right, exploration right or mining right?

The mining rights holder is expected to give notice of the discovery of any minerals of possible commercial value, keep a full and accurate record of the prospecting operations and preserve records for the protection of the environment. The removal of any minerals without written permission is prohibited.

8.4 Are there any zoning or planning requirements applicable to the exercise of a reconnaissance, exploration or mining right?

A zoning map of the abandoned or closed mine is required by the Director of the Geological Survey. This is a prerequisite to the issue of a certificate of abandonment.

9 Native Title and Land Rights

9.1 Does the holding of native title or other statutory surface use rights have an impact upon reconnaissance, exploration or mining operations?

Yes; to the extent that permission is required from appropriate authorities, for example, if the land is a traditional burial site, is a village with land held under customary tenure, is a national heritage site, is located within ninety (90) metres of Government buildings or areas regulated by the Aviation Act, is a National Park or Game Protected Area by the Zambia Wildlife Authority, Railway Administration, etc.

10 Health and Safety

10.1 What legislation governs health and safety in mining?

The 1969 Mines and Mineral Act gave way for the Government to introduce the Mining Regulations 1971 and the Mining Regulations 1973. Further, these two regulations have been amalgamated to form the Guide to the Mining Regulations booklet currently being used in the copper mining industry.

The other Acts referred to also include the Medical Examination of Young Persons (Underground Work) Act, Chapter 216 of the Laws of Zambia, Pneumoconiosis Act, Chapter 217 of the Laws of Zambia, Occupational Health and Safety Act, Act 36 of 2010, the Workers' Compensation Act No. 10 of 1999 and either environmental-related or general medicine.

10.2 Are there obligations imposed upon owners, employers, managers and employees in relation to health and safety?

The Guide to the Mining Regulations has imposed obligations upon owners, employers, managers and employees regarding health and safety.

The Chief Inspector of Mines, under the Mines Safety Department (MSD), ensures that the Regulations are being followed. Note that any deviations to the regulations call for penalties such as fines or closure of the mines.

11 Administrative Aspects

11.1 Is there a central titles registration office?

There is a Central Mining Cadastre Office which is responsible for receiving and processing applications for mining rights.

11.2 Is there a system of appeals against administrative decisions in terms of the relevant mining legislation?

There is a system of appeals against administrative decisions in terms of the relevant mining legislation. An aggrieved person may appeal to the Minister of Mines against the decision of the Director of Mining Cadastre, Director of Mines Safety, Director of Mines, Director of Geological Survey or the Mining Licence Committee under MMDA. If said person is not satisfied with the decision made by the Minister, he can appeal to the Mining Appeals Tribunal. A person aggrieved with the decision of the Mining Appeals Tribunal can appeal to the High Court.

12 Constitutional Law

12.1 Is there a constitution which has an impact upon rights to conduct reconnaissance, exploration and mining?

The Zambian Constitution has an impact upon the rights to conduct reconnaissance, exploration and mining. Article 16 of the Bill of Rights of the Constitution provides for the protection of property from being deprived without just cause. Property

includes prospecting rights or mining rights. In addition, the recent amendments to the Constitution in Article 10 (3) has made special provision reconfirming the protection of investment in Zambia to promote foreign investment and to protect and guarantee such investments through agreement with investors and other countries and any compulsory acquirement of an investment may only be done under customary international law and is subject to Article 16(1) of the Constitution (Bill of Rights) of 1996 Constitution Amendment.

12.2 Are there any State investment treaties which are applicable?

There is a provision for treaties and for bilateral agreements to be signed and Zambia has entered into a number of multilateral and bilateral treaties. Zambia, as stated earlier in question 7.3 on expropriation, has entered into a number of bilateral and multilateral treaties which include: the Convention on the Settlement of Investment Disputes between states and nationals (multinationals) of other states; the SADC Protocol on Finance and Investment and the COMESA treaty; and the investment agreement for the COMESA Common Investment Area (CCIA) Agreement.

Zambia has bilateral investment treaties with the United Kingdom (2009), Mauritius (2015), the Netherlands (2003), the Belgium-Luxembourg Economic Union (2001), China (1996), France (2002), Germany (1996), Egypt (2000), Cuba (2000), and Switzerland (1994).

13 Taxes and Royalties

13.1 Are there any special rules applicable to taxation of exploration and mining entities?

Under the Income Tax Act, the corporate income tax rate applicable to companies carrying out mining operations will be 30%. Variable profits tax of up to 15% no longer applies; however, there is a limitation on the deduction of losses to 50% of taxable income.

Withholding tax on dividends declared by a company carrying out mining operations is charged at the rate of 0%.

13.2 Are there royalties payable to the State over and above any taxes?

Mineral royalties for holders of mining rights are payable at the rate of 5% on base metals (except copper) and energy and industrial minerals, and 6% for gemstones and precious metals. Where the mineral is copper, the mineral royalty rate will be: 4% when the price of copper is less than US\$4,500 per tonnes; 5% where the price of copper is more than US\$4,500 but less than US\$6,000 per tonne; and 6% where the price of copper is more than US\$6,000.

14 Regional and Local Rules and Laws

14.1 Are there any local provincial or municipal laws that need to be taken account of by a mining company over and above National Legislation?

Yes; the Common Market for Eastern and the Southern Africa (COMESA) and the Southern African Development Community (SADC).

14.2 Are there any regional rules, protocols, policies or laws relating to several countries in the particular region that need to be taken account of by an exploration or mining company?

Yes; the Common Market for Eastern and the Southern Africa (COMESA) and the Southern African Development Community (SADC).

15 Cancellation, Abandonment and Relinquishment

15.1 Are there any provisions in mining laws entitling the holder of a right to abandon it either totally or partially?

The Mines and Minerals Development Act provides for a provision entitling the holder of a right to abandon it either totally or partially, subject to the licence or permit, upon application to the Director of Mining Cadastre for a certificate of abandonment, not later than ninety (90) days before the date on which the holder wishes the abandonment to have effect.

15.2 Are there obligations upon the holder of an exploration right or a mining right to relinquish a part thereof after a certain period of time?

Yes, an exploration licence is valid for a period of four (4) years. It may be renewed for two further periods not exceeding three (3) years each but the maximum period from the initial grant of the licence shall not exceed ten (10) years. A holder of an exploration licence shall relinquish 50% of the exploration at each renewal. However, an exploration licence for small-scale exploration and gemstones, other than diamonds is not renewable.

15.3 Are there any entitlements in the law for the State to cancel an exploration or mining right on the basis of failure to comply with conditions?

Under the MMDA, the State has vested powers to the Mining Licensing Committee which consists of the the Director of Mines, Director of the Geological Survey, Director of Mines Safety, Director of Mining Cadastre and other representatives to cancel an exploration or mining right on the basis of failure to comply with conditions relating to mining rights or non-mining rights.

A mining right may be cancelled in the following circumstances, if:

- (a) it contravenes a condition of the mining right or non-mining right;
- (b) it fails to comply with any requirement of the MMDA relating to the mining right or non-mining right;
- (c) it fails to comply with a direction lawfully given under the MMDA;
- (d) it fails to comply with a condition on which any certificate of abandonment is issued or on which any exemption or consent is given under the MMDA;
- (e) there is a conviction on account of safety, health or environmental matters;
- (f) in the case of a large-scale mining licence or large-scale gemstone licence, the holder has failed to carry on mining operations in accordance with the proposed plan of mining operations, and the gross proceeds of sale of mineral from an area subject to such licence in each of any three (3) successive years is less than half of the deemed turnover application to that licence in each of those years; and
- (g) there is conviction on the giving of false information on recovery of ores and mineral products, production costs or sale.

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Mr. Eric Suwilanji Silwamba, S.C. is the Principal Partner and is a vastly experienced Practitioner who has been conferred with rank and dignity of State Counsel with 30 years at the *Zambian Bar*. He has several years' experience in both Private Practice and has held various public offices. He is the former Minister of Presidential Affairs and Minister of Justice and Government Chief Whip. Mr. Silwamba has had the opportunity of handling some of the most complex and high-profile litigation in Zambia that relate to mining, commercial law, tax, administrative, criminal and constitutional law. He is also a member of the Chartered Institute of Arbitrators of the United Kingdom and a qualified legal drafts person.

Eric Silwamba, Jalasi and Linyama Legal Practitioners

Eric Silwamba, Jalasi and Linyama Legal Practitioners is a Zambian law firm. The firm has been in existence for over 30 years as Eric Silwamba and Company. In 2013 it was rebranded to Eric Silwamba, Jalasi and Linyama Legal Practitioners following the admission to partnership of Joseph Jalasi and Lubinda Linyama. It has over the years developed to the level of being among the top law firms in Zambia. The renowned *Chambers and Partners* (www.chamberandpartners.com) describes the firm as follows:

"This well-known team maintains a solid foothold in the Zambian market, and continues to be a popular choice for dispute resolution. Key areas of focus include public law litigation, IP matters, commercial agreements and shareholder agreements. It has experience in advising clients from the mining, construction, agricultural and retail sectors. Sources say: 'It's a very professional firm with gravitas in the market.'"

"This firm enjoys a highly regarded reputation in public law litigation. Other key areas of expertise include intellectual property, commercial agreements and shareholder agreements. Market observers say: 'They have a solid practice and represent several multinational clients.'"

The *World Legal 500* describes the firm as follows:

"'Heavyweight litigation' firm Eric Silwamba, Jalasi and Linyama Legal Practitioners is strong in administrative, constitutional and tax-related matters. 'Noted practitioner' Eric Silwamba is 'well known for his court skills'. The firm also has expertise in commercial, mining, banking and finance work."

NOTES

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