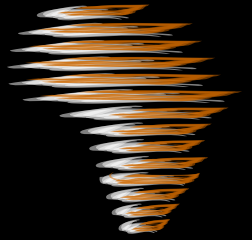


# LEXAfrica

Mining Lawyers for Africa  
Avocats spécialistes en droit de mine en Afrique  
Advogados africanos especialistas em minas



## Guide to Mining in Africa 2015



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Guide to Mining in Africa  
2015

## LEX AFRICA

### THE FIRST AND LARGEST AFRICA LEGAL ALLIANCE GUIDE TO MINING LAW IN AFRICA 2015

Mining in Africa is an integral and important part of the continent's economy. Many mining projects suffer extreme risks and difficult decisions and sound mining law is integral for an investment decision. The basic essence of mining law in most African countries is similar, being a state licencing system, but each country has its own local laws, customs, practices and guidelines.

LEX Africa has members in 24 African Countries, and is advising clients in Africa for more than 20 years and is rated by Chambers and Partners as a band 1 leading regional law firm network. LEX Africa members have a full understanding of mining law in their respective countries and the practice thereof.

This guide is designed to provide an overall indication of the essential basic principles of mining law in several important mining jurisdictions in Africa, namely Angola, Botswana, Democratic Republic of the Congo, Ghana, Kenya, Mauritius, Mozambique, Namibia, Nigeria, Senegal, South Africa, Tanzania, Togo, Uganda, and Zimbabwe.

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## TABLE OF CONTENTS

ANGOLA	...	...	...	...	...	...	4
BOTSWANA	...	...	...	...	...	...	8
DEMOCRATIC REPUBLIC OF CONGO	...	...	...	...	...	...	13
GHANA	...	...	...	...	...	...	18
KENYA	...	...	...	...	...	...	24
MAURITIUS	...	...	...	...	...	...	32
MOZAMBIQUE	...	...	...	...	...	...	35
NAMIBIA	...	...	...	...	...	...	42
NIGERIA	...	...	...	...	...	...	46
SENEGAL	...	...	...	...	...	...	51
SOUTH AFRICA	...	...	...	...	...	...	54
TANZANIA	...	...	...	...	...	...	58
TOGO	...	...	...	...	...	...	61
UGANDA	...	...	...	...	...	...	65
ZIMBABWE	...	...	...	...	...	...	69

# ANGOLA

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What laws regulate mining

The mining activities are regulated by the Mining Code approved by Law no. 31/11 of 23 September.

Which Government Bodies administer mining law?

The Government bodies which administer the mining industry are the Ministry of Geology and Mines, ENDIAMA (National Concessionaire for diamonds); SODIAM (a public company authorized to commercialize Angolan diamonds and the Regulatory Gold Market Agency.

## TYPES OF AND MANNER OF ACQUISITION OF RIGHTS

What rights are granted to conduct reconnaissance, exploration and mining operations

Mining rights can be awarded pursuant to a public tender or upon request. Articles no. 90, 91, 92 and 93 of the Mining Code describe the rights and obligations of the Mining right holders which have the following legal guarantees:

- applications for access to mining rights are recorded and decided according to order of entry, within the legally established time limits;
- applications for the granting of mining rights shall be properly published;
- unrestricted extraction of mineral resources during prospecting, except as expressly provided under the standards of the Mining Code or additional legislation;
- titles for mineral resource extraction are allocated on an exclusive basis, and may be transferred pursuant to the provisions of the Mining Code;
- the necessary support from the Government for the execution of mining activities and respect for the rights inherent thereto;
- the right to freely dispose of and market mining output, subject to the rules and procedures provided under the Mining Code and additional legislation on the matter.

The mining holders are also entitled with the following:

- obtain geological/mineral information from competent supervisory authorities that is available for the area subject to concession, or to consult such authorities in regard to such information;
- obtain the cooperation of administrative authorities for the execution of field work and the establishment of rights-of-way, pursuant to law;
- use existing surface and groundwater in proximity to the concession area that is not used or covered by any other specific extraction title, without prejudice to third-party rights and always subject to mining legislation;
- build and deploy infrastructure and facilities necessary to the execution of geological/mining activities;
- pursuant to pertinent legal and regulatory conditions, use land demarcated for the implementation of mining facilities, buildings and equipment;
- pursuant to approved work plans and schedules and to the extent necessary for execution of mining operations, modify the natural configuration of areas subject to concession;
- conduct geological/mining activities necessary to the execution of approved work plans, without other restrictions other than those arising from legal standards, the concession contract or by order of the regulatory body;
- extract, transport and benefit from the mineral resources subject to contract, in accordance with the law;
- dispose of extracted mineral resources and market them, in accordance with the law;
- through extraction proceeds, recoup expenses from investments made during the exploration, prospecting, surveying and evaluation phase;
- receive compensation for losses that may be incurred from any action limiting the exercise of mining rights, in accordance with the law or the concession contract.

## OIL AND GAS

What rights are granted to conduct oil and gas exploration and production

Petroleum deposits existing in the available area of the Angolan national territory, inland waters, territorial waters, exclusive economic Zone and continental shelf are an integral part of public property of the Angolan State.

Mining rights shall be granted by the National Concessionaire, the public company, Sociedade Nacional de Combustíveis de Angola, Empresa pública (Sonangol, E. P), under the terms of the law no. 10/04 of 12 November



(Petroleum Activities Law).

The rights granted to conduct oil and gas exploration and production are for: (i) Prospecting, (ii) exploration and (iii) Production.

Petroleum and gas operations may only be carried out under a prospecting license or petroleum concession.

Prospecting licenses shall be issued by the Ministry of Petroleum, while the Government shall be responsible for granting concessions for the exercise of mining rights.

A prospecting license has a maximum duration of three years. As regards the concession the duration is determined in the concession decree. Although, whether it is a license or concession its duration may exceptionally be extended, upon the request of the licensee or the National Concessionaire. Such extension is subject to the approval of the Ministry of Petroleum, upon verification of the reasons invoked and certification checked that the licensee or the National Concessionaire have performed their obligations.

Any company that wishes to carry out petroleum operations in Angolan territory apart from the scope of its prospecting licenses may only do so together with the National Concessionaire under the following terms:

Subject to the prior consent of the Government, the National Concessionaire may associate with Angolan or foreign entities of recognized capacity, technical knowledge and financial capability.

ii) Such association may take the forms of (a) Corporation; (b) Consortium; or (c) Production Sharing Agreement.

Finally, in regards to the applicable framework to the natural oil and gas sector, such resources are mainly regulated by Petroleum Activities Law and may be conducted under the assignment of a prospecting license or petroleum concession.

On the other hand, other mining activities are mainly regulated pursuant to the Mining Code which rights can only be assigned through a concession regime.

## INDIGENISATION REQUIREMENTS

Are there any requirements in relation to the holding of equity in exploration and mining projects by indigenous peoples



The Angolan Government is deeply committed in promoting Angolan companies. Moreover, Angolan companies must comply with several local policies designed to promote the

development of industrial infrastructures and the furthering of the education levels of the people in Angola. The Angola local content policies aim to protect the domestic market over the products and services for the mining industry. The local content rules broadly aim to promote the Angolan employment, the Angolan ownership of business and the Angolan industry, production and services.

The Local content policies are reflected in different levels including:

- the preferential treatment of Angolan companies in public tender processes;
- the obligation of companies to maintain a work force ratio of 30% of foreign employees to 70% of Angolan employees;
- the Mining and Oil companies are expected to source certain products and services exclusively from Angolan companies; meaning companies with majority Angolan ownership;
- the restrictions to the incorporation or acquisition of a company in Angola by foreign investors.

Are there any special rules or restrictions applicable to foreign applicants

There are no restrictions under the Mining Code, which provides a special regime that allows foreigners to invest and carry out mining activities.

The main types of investment in the mining sector are: the general investment regime, the investment in strategic minerals regime and the artisanal investment regime. In general, holders of mining rights must enter into an investment agreement with the Angolan State. Such mining investment agreement shall be approved by the competent Minister or, if the amount of the investment is equal or higher than USD 25.000.000 (twenty five millions United States Dollars), by the Angolan Chief of Executive.

Identify any rights that the State may have. Does the State have any rights to equity in mining projects

The Mining Code provides that, in consideration for granting mining rights, the Angolan State shall be entitled to compensation. Such compensation shall be in the form of a participation of not less than 10% in the company that conducts activities and/or in kind allocations of the minerals to be extracted.

## PROCESSING AND BENEFICIATION

Are there any requirements to beneficiate minerals mined

Holders of mining rights are entitled to dispose of the mineral mined and have the power to sell the products of mining activities, subject to the limitations set out in the Mining Code.

The Chief of the Angolan Executive is bound to approve the rules related to trade in strategic minerals sector, in view of the specificities regarding each particular strategic mineral.

The Mining Code determines that, when reasons of public policy or national sovereignty are at stake, the Angolan Government may create a particular institution to act as the sole trade public body (has it happens already with diamonds). It is also ensured that the holders of mining rights participate in the negotiation and in the draft of the trade agreements related to strategic minerals that are produced in their mines. The Mining Code also foresees that the Angolan State may create one or more trading companies, aimed at acquiring the strategic minerals directed to producers, in a free market regime, whenever this is required by law or by an objective need of State intervention.

Are there any restrictions on the export of minerals

Export of mineral is subject to a previous licence issued by the Ministry of Trade and an authorization issued by the Customs authority.

All minerals exported from Angola are subject to a certificate of origin granted by the competent authorities.

Also internal rules adopted by the framework of the Kimberley Process Certification Scheme (KPCS) apply to other strategic minerals.

Additionally, a local certification process was implemented, in accordance with the KPCS.

#### DISPOSALS OF RIGHTS AND CONTROLLING INTERESTS

Are there any statutory consents required to dispose of rights to explore and mine

The Mining rights can be transferred, granted as collateral and can be subjected to judicial execution measures, subject to the limitations set out in the Mining Code, which include previous authorisation from the competent authority. In case of insolvency of the mining rights holder, the mining rights will not terminate, but can be allocated to the creditor of the holder that offers the best price (subject to a right of first refusal of the Angolan State).

The transfer of mining rights is subject to the payment of taxes.

Are there any restrictions on disposals of controlling interests in entities holding exploration or mining rights?

There are no particular rules regarding restrictions or disposals of controlling interests in entities holding exploration or mining rights.

#### USE OF SURFACE OF LAND INVOLVED IN PROSPECTING AND MINING ACTIVITIES

What are the rights of the holder of an exploration right or mining right to use the surface necessary or incidental to an exploration or mining operation

The holders of mining rights have the right to use the surface necessary or incidental to the exploration or mining operation.

#### ENVIRONMENTAL

What legislation governs environmental protection of exploration and mining sites

Pursuant to the Mining Code, holders of mining rights must ensure the conservation and protection of nature and the environment, complying with the respective legal standards.

Without prejudice to the provisions of specific environmental standards for mining activity, the exploitation of minerals must be carried out in accordance with basic laws on the environment, biological and aquatic resources and water as well as with Environmental Impact Assessment standards.

Holders of mining rights are specifically required to observe the following precepts:

- fulfil the obligations arising from the Environmental Impact Assessment and environmental management plan, pursuant to the terms established therein;
- take measures necessary to reduce the formation and propagation of dust, debris and radiation in areas of extraction and surrounding areas;
- prevent or eliminate water and soil pollution, using appropriate means for such purposes;
- neither reduce nor in any other way impair the normal supply of water to the populations;
- execute mining operations in order to minimise soil damage;
- when using explosives in proximity to human settlements, reduce impact from noise and vibration to acceptable levels, as determined by competent authorities;
- refrain from discarding waste harmful to human health, flora and fauna into the sea, water currents and lakes;
- notify authorities of any occurrence that causes or may be capable of causing environmental damage.

In generally, the mining operators must adopt internal rules of conduct on environmental matters that are compliant with legislation in force creating conditions to ensure that workers at all levels recognise their responsibility in regard to environmental management, as well as that resources, personnel and training adequate to

implementing environmental plans are provided.

In collaboration with competent State bodies, they are responsible for strengthening infrastructure, training and qualifications of workers in regard to environmental management in mining operations.

Moreover, the environmental obligations are set forth jointly with the payment of an environmental guarantee.

#### NATIVE TITLE AND LAND RIGHTS

Is there any native title which has any implication for the exploration and mining industry

No, but holders or owners of land have the right to an income for the duration of activities corresponding to prospecting and surveying, and such parties shall be compensated for the losses incurred, but they must properly consider the relative interest of mining production for the national economy, refraining from creating unjustified barriers to geological/mining research.

#### HEALTH AND SAFETY

What legislation governs health and safety in mining

There is specific legislation governing health and safety in general.

Pursuant to the Mining Code, the holders of mining rights must adopt measures to ensure hygiene, health and safety at work, as well as to prevent professional risks and accidents at work, pursuant to regulations issued by competent bodies and necessary training programs in the realm of hygiene, health and safety in the workplace must be promoted, as well as the observance of proper use of machinery, materials and working equipment.

#### CONSTITUTIONAL AND ADMINISTRATIVE LAW

Is there a constitution which has an impact upon rights to prospect and mine

No.

Are there administrative appeals in the mining law

The conflicts arising between state bodies and mining holders are subject to the general administrative law.

#### ROYALTIES AND TAXES

Are there special rules applicable to taxation of exploration and mining companies

All local and foreign entities that are engaged in mining activities in Angola as well as abroad (to the extent that Angola has the power to tax) are subject to the special tax regime described in the Mining Code. They may be subject to the

following taxes: income tax (actually at the rate of 25%), royalties; surface tax; artisanal mining tax; and taxes applicable to other activities conducted by the relevant entities.

The provisions related to custom duties provide for certain exemptions, in particular with equipment used in connection with the mining activities, and the conditions that apply to such exemptions. Mining products can be exported directly or indirectly by the mining right-holder without any additional custom duties.

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

Yes, the mining operators must pay for the tax over the value of the mineral resources.



# BOTSWANA

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## RELEVANT AUTHORITIES AND LEGISLATION

### What laws regulate mining

The relevant legislation that governs the system of mining law in Botswana is the Mines and Minerals Act Cap 66:01 and the Mines, Quarries, Works and Machinery Act Cap 44:02.

### Which Government Bodies administer mining law

The Department of Mines administered under the Ministry of Minerals, Energy and Water Resources.

## TYPES OF AND MANNER OF ACQUISITION OF RIGHTS

### What rights are granted to conduct reconnaissance, exploration and mining operations

All Minerals in Botswana vest in the state. No person may prospect or mine minerals save in terms of a licence issued by the Minister for Minerals, Energy and Water Resources under the Mines and Minerals Act Cap 66:01 ("MMA").

### Prospecting licence

Prospecting licences are issued for 3 years with 2 options to renew, each period not exceeding two years and the licences cover such area as provided for by a licence which area shall not exceed 1,000km<sup>2</sup> under the terms of the MMA.

The Minister may renew a prospecting licence for additional periods where a discovery has been made and evaluation work has not, despite proper efforts, been completed. This means that a licence is renewable beyond the 3 + 2 + 2 year periods. For example, if at the end of the 7 year period the holder informs the Minister that a discovery has been made but evaluation work has not been completed, an additional extension may be granted.

Alternatively, the holder could apply for a retention licence and/or mining license. Generally, retention licences entitle the holder to keep the area to which the licence relates for future mining operations and to carry on prospecting

within the retention area. They are granted for two periods not exceeding 3 years each.

In terms of the MMA the holder of a prospecting licence is entitled to enter onto any land to which its prospecting licence relates and may prospect thereon for the mineral to which the prospecting licence relates, drill bore holes, make excavations, erect camps and put up temporary buildings for machinery necessary for prospecting purposes.

The rights of a holder of a prospecting licence are more restrictive and narrow compared to the rights under a mining licence. The MMA obliges the holder of a prospecting licence to:

- commence prospecting operations within three months or such further period as the Minister may allow, of the date of issue of his licence;
- carry on prospecting operations in accordance with the programme of prospecting operations as set out in the prospecting licence; and
- notify the Minister of the discovery of the mineral to which his prospecting licence relates within a period of 30 days of such discovery or discovery of any mineral deposit of economic value.

The holder of a prospecting licence shall not without the written permission of the Minister, remove any mineral from a prospecting area except for the purpose of having such mineral analysed, valued or tested in Botswana.

The Minister is empowered to monitor compliance with the programme of prospecting operations as specified in a prospecting licence however, in practice we note that compliance is reviewed at the time of licence renewal or transfer. A licence may not be cancelled, even in the event of non-compliance unless the notice has been given to a holder to rectify the default.

The holder of a prospecting licence can notify the Minister of proposed amendments to the programme of prospecting operations. Unless the Minister objects within 60 days of such notification, which in practice the Minister does not do if the proposed amendments are reasonable, the amendments take effect automatically.

The holder of a prospecting licence may at any time not later than three (3) months before the expiry of the licence apply to the Minister for renewal thereof, submitting a report on prospecting operations carried out so far and the costs incurred and a proposed programme of prospecting operations to be carried out and the estimated cost thereof. The holder shall be entitled to a renewal provided that:

- it is not in default under the terms of the MMA or the licence; and
- the proposed programme of prospecting operations is adequate.



At the end of the period of the prospecting licence the rights granted to the holder thereof under the terms of the MMA and the licence cease, and the holder is required to vacate the area to which the licence relates, taking such measures as are necessary to restore the land substantially to the condition it was in prior to the commencement of prospecting operations, the holder being obliged to make adequate on-going financial provision for compliance with such obligations.

#### Retention Licence

The holder of a prospecting licence may apply to the Minister for a retention licence in respect of the area and mineral covered by the prospecting licence.

A retention licence - for which an application must be made no less than three months before the expiry of the prospecting licence - is designed to bridge the gap between (i) the expiry of a prospecting licence and completion of the prospecting programme and (ii) the time when, subject to the feasibility study, mining can proceed on a profitable basis.

Retention licences are granted for two periods, not exceeding 3 years each and entitles the holder to:

- to retain the retention area to which the retention licence relates, for future mining operations;
- to carry on prospecting operations in the retention area in order to determine from time to time the prospects of mining any mineral to which the retention licence relates on a profitable basis;
- to remove any mineral or sample of a mineral for any purpose other than sale or disposal, from any place where it was found or incidentally won in the course of prospecting operations to any other place within Botswana or, with the permission of the Director of Mines, outside Botswana; and
- to carry on, in order to determine, from time to time, the prospect of mining any mineral to which the licence relates, on a profitable basis, such other investigations and operations, including erection of necessary equipment, plant and buildings, in the retention area as may be reasonably necessary for, or in connection with, any future mining operations or any prospecting operations.

The holder of a retention licence is obliged to

- demarcate and keep demarcated the retention area in the prescribed manner;
- obtain consent of the Director of Mines to any amendment of his intended work programme;
- unless the Director of Mines otherwise stipulates:
  - back fill or otherwise make safe excavations made during the course of his prospecting operations to the satisfaction of the Director of Mines;
  - permanently preserve or

otherwise make safe any borehole in the manner directed by the Director of Geological Survey and Director of Mines; and

- remove within 2 months of the expiry of his licence, any camp, equipment, plant or building erected by him in the retention area, and repair or otherwise make good any damage to the surface area of the grant occasioned by such removal, to the satisfaction of the Director of Mines.
- furnish the Director of Geological Survey and to the Director of Mines a quarterly report;
- furnish to the Minister by submitting to the Director of Mines, as soon as they become available:
  - the results of all studies, surveys and tests including but not limited to analytical, metallurgical, mineralogical, and geo-physical work incidental to those prospecting operations;
  - the interpretation and assessment of such studies, surveys and tests; and
  - submit annually to the Director of Mines an updated feasibility study and an audited statement of direct expenditure if any, incurred in the retention area during the year.

#### Mining Licences

A person wishing to obtain a mining licence is entitled to apply to the Minister and the Minister shall grant a mining licence if he is satisfied that the applicant is the holder of a prospecting licence, retention licence or a waiver issued (if the area over which a mining licence is required has been sufficiently prospected and that no other person has exclusive rights over that area).

Under the terms of the MMA the holder of a mining licence, may enter upon any land to which his mining licence relates and take all reasonable measures on or under the surface to mine the mineral to which his mining licence relates, erect the necessary equipment, plant and buildings for the purposes of mining, transporting, dressing, treating, smelting or refining minerals recovered, dispose of any mineral product recovered, prospect within his mining area for the mineral for which he holds a mining licence and for any other mineral and stack or dump any mineral waste product in a manner approved by the Director of Mines.

The mining licence once granted is valid for a period as is reasonably required to carry out the mining programme but not exceeding 25 years.

The Minister shall grant a mining licence if satisfied that:

- the proposed programme of mining operations will ensure the most efficient and beneficial use of the mineral resources in the proposed mining area;
- the proposed mining area is not the same as nor does it overlap an existing mining area or retention area unless the holder of that area consents to the grant of a mining licence, or in the case of a retention licence,

- has failed to make an application;
- the proposed mining area extends to cover only that area reasonably required for surface mining and treatment facilities and also to cover the proved, indicated and inferred reserves;
- the applicant has or has secured access to adequate financial resources, technical competence and experience to carry on effective mining operations;
- the proposed financing plan submitted as part of the feasibility study is in accordance with good financial practice, and provides for a debt to equity ratio of no more than 3:1 unless the Minister otherwise agrees;
- the parent company guarantees the performance of the obligations of the relevant company; and
- the applicant is not in default under the terms of the MMA.

The holder of a mining licence has the following obligations:

- to commence production on or before the date referred to in the proposed programme of mining operations in the mining licence application as the date by which he intends to work for profit;
- develop and mine mineral covered by his mining licence in accordance with the programme of mining operations as adjusted from time to time in accordance with good mining and environmental practice;
- demarcate and keep demarcated the mining area in such manner as may be prescribed and within three months submit to the Minister a diagram of the mining area;
- keep and maintain an address in Botswana, full particulars of which shall be registered with the Minister to which all communications and notices may be addressed; and
- notify the Minister as soon as he begins to work his mining area for profit.

## OIL AND GAS

What rights are granted to conduct oil and gas exploration and production

There are two pieces of legislations that are relevant to the production of Gas, one is the Industrial Development Act, Chapter 43:01 and the Petroleum (Exploration and Development) Act, Chapter 67:01.

The Industrial Development Act relates to the manufacture (means to subject physical matter to any process which materially changes it or its packaging in substance, character or appearance and includes the assembly of parts), for sale, any product. Product is defined as any article, thing or substance produced by any manufacturing enterprise to which the Industrial Development Act applies, but excludes any immovable structure at any place in Botswana.

The Industrial Development Act provides that no person shall manufacture any product at any place in Botswana unless he is in possession of a licence to manufacture such product, issued by a licensing committee. The application for a licence to carry on a manufacturing enterprise shall be made in the prescribed form to a licensing committee.

The Industrial Development Act does not list the types of products that will require a licence under the Act therefore an enquiry has to be made to the licensing committee as to whether the product falls under the Industrial Development Act

The second legislation is the Petroleum (Exploration and Development) Act which relates to the exploration and the production of petroleum. Petroleum under the Act is defined as any naturally occurring, hydrocarbon; mixture of hydrocarbons; or mixture of one or more hydrocarbons and any other substance, whether in gaseous, liquid or solid form, and includes petroleum which has been returned to a natural reservoir, but does not include coal or a substance which may be extracted from coal.

Under the Petroleum (Exploration and Development) Act, two licences can be issued, the first one being the exploration licence, which from reading the Petroleum (Exploration and Development) Act has to be issued prior a development licence is issued (the licence to produce petroleum from the discoveries made by the exploration licence.

A development licence may be issued to a person who is not the registered holder of an exploration licence if he is satisfied that the area in which he intends to retrieve the petroleum does contain a petroleum reservoir or part of a petroleum reservoir and that area is not subject to any exploration or development license.

## INDIGENISATION REQUIREMENTS

Are there any requirements in relation to the holding of equity in exploration and mining projects by indigenous peoples

No.

Are there any special rules or restrictions applicable to foreign applicants

No.

Identify any rights that the State may have. Does the State have any rights to equity in mining projects

Upon the issue of a mining licence, the Government shall have the option of acquiring up to 15% working interest participation and shall inform the applicant as to whether or not it is exercising its option.

If the Government does decide to exercise its option, it shall be issued a single P1.00 special share at par, which shall carry the right to appoint up to two directors, with alternates, and to receive all dividends or other distributions in respect of its working interest percentage and shall be obliged in the same manner as other shareholders to contribute its working interest percentage.

## PROCESSING AND BENEFICIATION

Are there any requirements to beneficiate minerals mined  
No.

Are there any restrictions on the export of minerals  
There are no restrictions in the export of minerals nor are we aware of any export permits or levies. We are aware in practice that the Department of Mines is required to issue a supporting letter to the exporter confirming that they have no objection to the export of the minerals mined

## DISPOSALS OF RIGHTS AND CONTROLLING INTERESTS

Are there any statutory consents required to dispose of rights to explore and mine  
A prospecting licence or an interest therein or any controlling interest in the holder thereof may be transferred from one person to another, with the prior approval of the Minister. For the avoidance of doubt, a change in shareholding of a company that holds a licence which does not result in a change in controlling interest in that company does not require approval of the Minister. Approval is subject only to the Minister being provided with such details of the proposed transferee as would be required in the case of an application for a prospecting licence and the transferee not being disqualified under any provision of the MMA from holding a prospecting licence.

No retention licence or any interest therein shall be transferred, assigned, encumbered or dealt with in any other way without the approval of the Minister.

In any application to the Minister for his approval the applicant give such particulars concerning the proposed transferee, assignee or other party concerned as would be required in an application for a mining licence.

The Minister shall grant his approval to the transfer, assignment or other dealing with any retention licence or interest therein provided the transferee is not disqualified under any provision of the MMA from holding a retention licence and the Minister is satisfied that the application is not in breach.



No mining licence or any interest therein shall be transferred, assigned, encumbered or dealt with in any other

way without the approval of the Minister.

Are there any restrictions on disposals of controlling interests in entities holding exploration or mining rights  
The restrictions on disposals of controlling interests in entities holding exploration or mining rights are capable of two possible interpretations, namely a wide and a narrow interpretation.

The narrow interpretation holds that no approval from the Minister is required for a change of control in the parent or ultimate parent of a license holders. The basis for this interpretation is the definition of "interest" in section 50 (4) of the MMA. More particularly the fact that "interest" is defined as meaning "in the case of a holder who is private company, a controlling interest in such holder".

It has been interpreted as being limited to circumstances where there is a transfer in the shares of the license holder and such transfer has the effect of changing the control in such entity.

The wide interpretation holds that the transfer of any interest, whether direct or indirect in a mining license. To date no Court in Botswana has determined which of the aforementioned interpretation applies and consequently this is unsettled under Botswana Law.

Our approach in dealing with this issue has been to address a letter to the Minister notifying him of the change in control at the parents (or ultimate parent level) but informing him that there is no requirement for such notification under the Act or for his consent or approval to the transaction.

To date we have not had any objection from the Minister to such approach. We should however caution that recently the Department of Mines and Minerals has indicated that in its view the wider interpretation of Section 50 has application and that it will advise the Minister accordingly. We cannot thus warrant or guarantee that the Minister will not adopt the wide interpretation and insist on his consent for a change of control at the parent company level.

## USE OF SURFACE OF LAND INVOLVED IN PROSPECTING AND MINING ACTIVITIES

What are the rights of the holder of an exploration right or mining right to use the surface necessary or incidental to an exploration or mining operation  
In Botswana, the grant of a prospecting licence, a retention licence or a mining licence issued in terms of the MMA does not give surface rights in the area to be subject of the concession.

Section 62 of the MMA provides that where the holder of a Mineral Concession requires exclusive use of the whole or any part of the prospecting area, retention area, mining

area or mineral permit area he shall, if requested by the owner or lawful occupier of the area, obtain a lease or other rights to use the area. A rental to be paid, the duration of the lease and the extent or area to be covered may be agreed upon by the parties and failing such agreement, the MMA makes provision for the rental to be determined by arbitration. During prospecting operations it is not usual for leases to be entered into with holders, although the MMA makes it mandatory if the owner so requires that a lease agreement be entered into.

In addition, the MMA contains restrictions on the use of surface rights in certain places without obtaining appropriate consent, including sensitive land (e.g. places of burial, monuments or government land), within proximity of buildings, agricultural land or land used for water purposes, national parks, railways, roads, land the subject of mining and any other restricted land specified by the Minister.

## ENVIRONMENTAL

What legislation governs environmental protection of exploration and mining sites

There is the Environmental Assessment Act Cap 65:07 which is used to assess the potential effects of planned developmental activities; to determine and to provide mitigation measures for effects of such activities as may have significant adverse impact on the environment; and to put in place a monitoring process and evaluation of the environmental impacts of implemented activities.

The Environmental Assessment Act requires authorisation prior to any holder of an exploration right or mining right to conduct activities or an activity where there is an unanticipated irreversible adverse environmental impact.

## NATIVE TITLE AND LAND RIGHTS

Is there any native title which has any implication for the exploration and mining industry

The Mineral Rights in Tribal Territories Cap 66:02 is an Act that provides for the vesting of mineral rights in tribal territories in the Republic of Botswana including all mineral rights heretofore vested in the designated Tribes and Chiefs thereof and all moneys accruing to the Tribes or Chiefs.

## HEALTH AND SAFETY

What legislation governs health and safety in mining  
The Mines, Quarries, Works and Machinery Act Cap 44:02 regulates and governs health and safety and welfare of persons engaged in prospecting, mining and quarrying operations including any works which are part of and ancillary to mining and quarrying operations and to make provision with respect to the inspection and regulation of mines, quarries, works, and of machinery used in

connection therewith.

## CONSTITUTIONAL AND ADMINISTRATIVE LAW

Is there a constitution which has an impact upon rights to prospect and mine

No.

Are there administrative appeals in the mining law

No.

## ROYALTIES AND TAXES

Are there special rules applicable to taxation of exploration and mining companies

Yes, the Income Tax Act Cap 52:01 has a designated Schedule, Schedule Twelve that deals with the taxation of companies involved in mining operations.

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

The holder of a mineral concession shall be liable to pay royalties to the Government on any mineral obtained by him in the course of the exercise of his rights thereunder at the rates and in the manner prescribed

The royalties payable shall be the following percentages of gross market value:

Mineral Type	Percentage
Precious stones	10%
Precious metals	5%
Other minerals or mineral products	3%

Royalty shall be paid on a mineral or mineral product on receipt of each payment or other consideration for such mineral or mineral product, and each royalty payment shall be accompanied by full particulars of the mineral or mineral product sold or disposed of and the terms of payment therefor: Provided that any disposal for other than monetary consideration or consideration deferred for a period beyond industry practice shall be referred to the Minister for determination of royalty.

Where it appears to the Minister that minerals have been disposed of otherwise than in an arm's length transaction, the Minister shall determine the royalty payable on the basis of prices ruling in the industry, and the royalty so determined shall be payable on demand: Provided that the royalty so determined and paid may be varied by court review or arbitration and the sum of any such variation shall thereupon become payable or repayable as the case may be.

# DEMOCRATIC REPUBLIC OF THE CONGO (DRC)

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What laws regulate mining

In the DRC, mining law is regulated by law no. 007/2002 of 11 July 2002 on the Mining Code (the Mining Code) and Decree no. 038/2003 of 26 March 2003 on Mining Regulations (Mining Regulations).

Which Government Bodies administer mining law

The Mining industry is governed by the Ministry of Mines, there are other administrative entities intervening such as the Mines Directorates, Geology Directorate and Mining Environment Protection Directorate.

## TYPES OF AND MANNER OF ACQUISITION OF RIGHTS

What rights are granted to conduct reconnaissance, exploration and mining operations

Mineral prospecting is free over the entire national territory, except in:

- protected areas and natural reserves of flora and fauna, as well as in the protected areas governed by special laws;
- areas declared to be prohibited areas according to article 6 of the present Code;
- restricted and restricted access areas according to articles 279 and 282 of the present Code; and
- perimeters of existing mining, and/or quarry rights.

Any person who wishes to undertake mineral prospecting in the national territory must make a preliminary declaration with the Mining Registry.

The Mining Regulations set forth the conditions of the declarations required to be made prior to carrying out Prospecting activities.



In order to conduct exploration, articles 56 and 58 of the Mining Code requires a minimum financial capacity equal to ten times the total amount of the annual surface rights fees payable for the last

year of the first period of validity of the exploration Permit applied for.

For example: if an applicant has an exploration Permit made up of 100 Squares, he must prove his minimum financial capacity as follows: 100 Squares x 10x USD 34,74= USD 34,730.

The applicant is required to prove that he has his own funds, borrowed funds or a bank guarantee which could cover the perimeters of both his former and new Exploration Licences applied for, in order to carry out his mineral exploration work programme.

Any person who is eligible for an Exploration Permit may request certification of his minimum financial capacity from the Mining Registry at any time without applying for an Exploration Licence.

The forms and documents to be attached to the request for certification of the minimum financial capacity are set forth in the Mining Regulations.

The Mining Registry processes the request for certification of minimum financial capacity and certifies the additional number of squares kilometres allowed for which the applicant has demonstrated his financial capacity, within a period not exceeding thirty days as of the date the request has been submitted.

## OIL AND GAS

What rights are granted to conduct oil and gas exploration and production

The procedures are different. With mines, there are some granting conditions according to the Mining Code and Mining Regulations. Oil and gas permits are granted through an agreement negotiated with the DRC Government (Production Sharing Agreement) and they are governed by Ordinance-Law no. 81-013 of 2 April 1981 relating to the general legislation on mines and hydrocarbons.

## INDIGENISATION REQUIREMENTS

Are there any requirements in relation to the holding of equity in exploration and mining projects by indigenous peoples

The constitution of the DRC enacts a principle that the State exercises its permanent sovereignty over the soil, subsoil, water, forests, air spaces, rivers, lakes and sea and continental shelves. This principle of State ownership is also recognised in article 3, section 1 of the Mining Code which states that the deposits, underground water and geothermal deposits on surface or in the national territory are the exclusive, inalienable and imprescriptible property of the State.

In respect to the Congolese national, a company cannot

apply for a small mining exploitation only if she transfers 25% of its capital to Nationals.

Are there any special rules or restrictions applicable to foreign applicants

There are no special rules for foreign applicants. Foreign companies can become holders of exploration permits but for the exploitation permits, they must incorporate a Congolese company. A foreign applicant must also elect a domicile to a certified mining agent.

Identify any rights that the State may have. Does the State have any rights to equity in mining projects

The State can acquire shareholding only on the exploitation phase and the current State participation in the share capital of a mining operating company is 5 per cent. These shares are free of all charges and cannot be diluted. However, with the proposed revision, the State participation may be increased and this participation can be done in financial compensation.

## PROCESSING AND BENEFICIATION

Are there any requirements to beneficiate minerals mined

There is no special regulatory provision relating to processing and further beneficiation of mined minerals. According to the Mining Code, the Ministry of Mines has competence for the issuance of authorisation for the processing or transformation of artisanal exploitation products. Article 81 stipulates that the processing or transformation of mineral substances may be done either by the holder of an Exploitation Permit or by a Processing or Transformation entity. Article 82 stipulates that any person who wishes solely to transform mineral substances must apply for and obtain a Processing or Transformation Permit which is governed by specific legislation. On 5 April 2013 the Minister of Mines and the Minister of Finances by Inter-Ministerial Decree no. 122/CAB.MINE/MINES/01/2013 and no.782/CAB.MIN/FINANCES/2013 has banned the export of copper and cobalt concentrate and given the mining companies 90 days to clear their stockpiles. However, on the same, the Minister of Mines and Minister of Finances have by an Inter-Ministerial Decree no.0327/CAB.MON/MINES/01/2013 and no.855/CAB.MIN/FINANCES/2013 of 4 July 2013 delayed this ban until the end of the year.

Are there any restrictions on the export of minerals

According to article 85 of the Mining Code, the sale of mining products which originates from the exploitation perimeters is free. The holder of an Exploitation Permit may sell his products to the customers of his choice at prices freely negotiated.

However, the Minister's authorisation is required for exporting unprocessed ores for treatment outside the national territory. This authorisation will only be granted if

the holder who is applying for it demonstrates at the same time:

the fact that it is impossible to treat the substances in the National Territory at a cost which is economically viable for the mining project; and

the advantages for the Democratic Republic of the Congo if the export authorisation is granted.

## DISPOSALS OF RIGHTS AND CONTROLLING INTERESTS

Are there any statutory consents required to dispose of rights to explore and mine

During the exploration the assignor and the assignee must fulfil the same requirements. Article 182 stipulates that the mining rights and exploitation authorisation of quarries may be conveyed in whole or in part, this conveyance is final and irrevocable. In the absence of any processions to the contrary the substance law on conveyance applies.

Any partial conveyance must comply with the provisions of articles 28 and 29 of the Mining Code. In addition, any partial transfer of mining exploitation rights or an exploitation authorisation, authorisation of quarries only becomes effected as of the date a new mining or quarry exploitation right is granted. The transferee must be a person who is eligible to apply and to hold the mining rights or the exploitation authorisation of quarries

Are there any restrictions on disposals of controlling interests in entities holding exploration or mining rights

The only restriction on disposals of controlling interests is that any transfer must be registered at the Mining Registry (CAMI) in order to be binding to third party.

## USE OF SURFACE OF LAND INVOLVED IN PROSPECTING AND MINING ACTIVITIES

What are the rights of the holder of an exploration right or mining right to use the surface necessary or incidental to an exploration or mining operation

Mineral prospecting is free over the entire National Territory.

Regarding the exploration, article 50 of Mining Code provides that a Mineral Exploration Permit entitles its holder the exclusive right, within the perimeter on which it is granted and for the term of its validity, to carry out mineral exploration work for mineral substances classified as mines, substances for which the permit has been granted, and associated substances if the holder applies for the permit to be extended to include these substances. However, the holder of the Mineral Exploration Permit cannot commence work on the property without having obtained approval in advance of its MRP, in accordance with the provisions of the present Code.

The holder of the Mineral Exploration Permit is authorised to take samples of the mineral substances within the Perimeter indicated on his Mineral Exploration Permit in order to carry out analyses or industrial assays in the laboratory or plant of his choice.

Regarding the exploitation, article 64 of Mining Code provides that the Exploitation Permit entitles its holder to the exclusive right to carry out, within the perimeter over which it has been granted, and during its term of validity, exploration, development, construction and exploitation works in connection with the mineral substances for which the permit has been granted, and associated substances if he has applied for an extension. In addition, it entitles, without restriction, to:

- enter the exploitation perimeter to conduct mining operations;
- build the installations and infrastructures required for mining exploitation;
- use the water and wood within the mining perimeter for the requirements of the mining exploitation, complying with the requirements set forth in the EIS and the EMPP;
- use, transport and freely sell his products originating from within the exploitation perimeter;
- proceed with concentration, metallurgical or technical treatment operations, as well as the transformation of the mineral substances extracted from the deposit within the exploitation Perimeter; and
- proceed to carry out works to extend the mine.

## ENVIRONMENTAL

What legislation governs environmental protection of exploration and mining sites

For the reconnaissance, there is no environmental authorisation but any person who carries out mineral prospecting or prospecting for quarry products must comply with the code of conduct for said activity set forth in the Mining Regulations.

With respect to exploration, article 203 of the Mining Code provides that before commencing mineral exploration, work or quarry products exploration work, the holder of an Exploration Permit or an Exploration Permit of Quarry Products must prepare and obtain the approval of the MRP for the proposed activity.

The conditions of the MRP and its approval are determined by way of regulation.

The approval of the MRP is under the jurisdiction of the department responsible for the protection of the environment within the Ministry of Mines in collaboration with the Minister of the Environment.



In respect to exploitation, article 204 of

the Mining Code provides that any applicant for an Exploitation Permit, an Exploitation Permit for Tailings, a Small-scale Mining Exploitation Permit, or an Authorisation for Quarry Exploitation must submit an environmental impact study together with an environmental management plan for the project, and obtain the approval of his EIS and EMPP, as well as implement the EMPP.

The environmental impact study will include a description of the ecosystem before commencing mining operations, including the flora and fauna, soil and topography, air quality, underground and surface water. It specifies the aspects which may be affected qualitatively and quantitatively by the mining or quarry exploitation activity.

It will include as well, the measures planned for the protection of the environment, the elimination or the reduction of pollution, the rehabilitation of the sites, as well as the verification of the effectiveness of said measures.

The holder of mining or quarry rights must provide security in order to guarantee the compliance with the environmental obligations relating thereto during exploration, and/or exploitation. In addition, the holder of a mining right is authorised to set up a provision for the site rehabilitation in accordance with the provisions of article 258 of the Mining Code.

The conditions of application of this provision, including the financial guarantee, are specified in the Mining Regulations.

Any opening or closing of an exploration centre or mineral exploitation or permanent quarry exploitation centre must be notified without delay to the Mines Administration, according to the modalities set forth in the Mining Regulations. Annex 10 of the Mining Regulations provides the measures that should be taken into account. There is a financial security to put in place so that if the holder does not comply with the environmental obligations during the closure, that deposit can be used by another company to repair the damages.

According to article 294 of the Mining Code, if, on completion of the exploration and/or exploitation works, the holder of a mining or quarry right does not voluntarily execute the obligations agreed to in the EMPP or MRP, at the request of the Mines Authority and to its benefit, the competent court shall order the confiscation of the corresponding provision for rehabilitation set up by the holder.

If the value of the guarantee or provision thus confiscated is not sufficient to cover the costs necessary to return the site concerned to its original state, the Mines Authority may entrust execution of the pending work to a third party.



The costs incurred for carrying out such additional works shall be borne by the defaulting mine operator.

At the request of the Mines Authority, the defaulting operator may be the subject of a ban on leaving the National Territory, ordered by the competent court, until completion of the works for rehabilitation of the site.

Article 279 of the Mining Code provides some restrictions on the occupation of the land.

Except with the consent of the competent authorities, no person may occupy land:

- reserved for cemeteries;
- containing archaeological remains or a national monument;
- situated on, or less than 90 metres from a dam or a building belonging to the State;
- close to National Defence installations;
- within an airport;
- reserved for railway projects;
- reserved for the planting of young trees or forest plantations;
- situated less than 90 metres from the boundary of a village, a town, a municipality or a city;
- on a street, a road, a motorway; and
- within a national park.

Unless there is consent from the owner or legal occupant, no person may occupy land situated less than:

- 180 metres from occupied, unoccupied or temporarily unoccupied houses or buildings;
- 45 metres from land hoed and ploughed for farm cultivation; and
- 90 metres from a farm breeding cattle, having a reservoir, a dam or a private water reserve.

## NATIVE TITLE AND LAND RIGHTS

Is there any native title which has any implication for the exploration and mining industry

No, there is no impact. The constitution of the DRC, in its article 9, enacts a principle that the State exercises its permanent sovereignty over the soil, subsoil, water, forests, air spaces, rivers, lakes and sea and continental shelves. However, with regard to the access to the exploration, no artisanal exploitation of mineral substances on the national territory is authorised to any person who applies and fulfils eligibility, priority, and capacity as provided by the Mining Code health and safety

What legislation governs health and safety in mining  
Health and safety in mining are governed by the labour code, mining regulations, Mining Code and other ministerial decrees of the Ministry of Mines and Ministry of Labour.

## CONSTITUTIONAL AND ADMINISTRATIVE LAW

Is there a constitution which has an impact upon rights to prospect and mine

The constitution has an impact upon right to conduct prospection, exploration and mining.

Article 9 of the constitution of the DRC enacts a principle that the State exercises its permanent sovereignty over the soil, subsoil, water, forests, air spaces, rivers, lakes and sea and continental shelves. This principle of State ownership is also recognised in article 3, section 1 of the Mining Code which states that the deposits, underground water and geothermal deposits on the surface or in the national territory are the exclusive, inalienable and imprescriptible property of the State.

According to article 93 of the constitution, the Minister is responsible for his ministry, he applies the governmental programme in his ministry under the coordination of his First Minister. He regulates by decree.

Its article 202 point 36 littera f points out that the economic legislation concerning the mines and minerals are within the competence the central administration. Equally, article 203 point 16, provides that mining and land rights are of the joint competence of the central administration and provinces.

Are there administrative appeals in the mining law

There is a system of appeals against administrative decisions via administrative authorities, the judicial system and arbitration according to articles 313 et seq. of the Mining Code.

Appeals made against administrative decisions by the administrative authorities pursuant to, or in breach of, the provisions of the Mining Code or the provisions of the Mining Regulations are governed by the relevant provisions of substantive law, in particular, by the provisions of Articles 146 to 149 and 158 of Ordinance-Law no. 82-020 of 31 March 1982 relating to the code organising and setting the jurisdiction of the courts as modified and by Ordinance-Law no. 82-017 of 31 March 1982 relating to the procedure before the Supreme Court, as modified and supplemented up to this date.

Appeals can be done also via the judicial system, without prejudice to the provisions of Article 46 of the Mining Code, the following are subject to court appeals, in particular:

- the withdrawal and the refusal to renew artisanal miner's and trader's cards;
- the refusal to transfer titles in cases of transfer or lease, by the person in charge at the Mining Registry or his local representative;
- overlaps between holders of mining



rights;

- disputes between the holders or with the occupants of the land;
- confiscation of the guarantee or the provision for site rehabilitation in favour of the Mines Authority;
- disputes concerning compensation for expropriation;
- appeals against fines decided by the Mines Authority in case of irregular keeping of documents;
- the ban on leaving the National Territory;
- the imposition of a fine in case of failure to submit reports; and
- the increase of penalties for late payment of the mining royalties and disputes due to cases of force majeure, as well as civil actions relating to the infringements provided for by this Code.

Subject to the provisions relating to administrative and judicial appeals, and subject to the breaches, penalties and sanctions set forth by the present Code, disputes which might arise from the interpretation or application of the provisions of the present Code may be settled by arbitration as specified in articles 318 to 320 of Mining Code.

Disputes arising from the interpretation or application of the provisions of the present Code shall be subject to arbitration according to the procedure set forth in the provisions of articles 159 to 174 of the Congolese Code of Civil Procedure.

## ROYALTIES AND TAXES

Are there special rules applicable to taxation of exploration and mining companies

The Mining Code creates a specific preferential and exhaustive tax and customs regime applying to mining activities in the DRC. The tax regime is specific because it creates certain taxes that are specific to mining activities, such as mining royalties or annual surface area tax. It is preferential because it provides for reduced tax rates and exemptions with comparison to the standard tax regime. It is also exhaustive because it lists all taxes, royalties, duties or duties or other fees applicable to mining activities to the exclusion of any other form of taxation, except more favourable tax or customs provisions entering into force after the Mining Code.

The tax and custom regime of the Mining Code is applicable to holders of a mining title, their affiliate companies and subcontractors that carry out mining activities in accordance with a contract concluded with the holder of the mining title. Furthermore, the Mining Code provides for specific tax incentives to strengthen the competitiveness of the mining sector in the DRC.



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

The exploitation right holder is subject to mining royalties on all commercial products as of the effective date of commencement of the activity. Mining royalties serve two goals:

- to provide the DRC State with income at the outset of the exploitation, even in the case that the exploitation makes no profits; and
- to contribute to the development of local communities, as part of the royalties are redistributed to communities surrounding the mining the mining site.

Mining royalties are redistributed to communities surrounding the mining site. Mining royalties are: 0.5 per cent for iron or ferrous metal; 2 per cent for non-ferrous metal; 2.5 per cent for precious metals; 4 per cent for precious stones; 1 per cent for industrial minerals; and 0 per cent for standard construction materials. Solid hydrocarbons and other substances are not specifically mentioned.

Mining royalties are due upon the sale of the products and are calculated on the value of sales made, minus the costs of transport, quality control analysis of the commercial products, insurance and any cost related transaction.

Mining royalties are considered as deductible expenses for the determination of corporate taxable income. Furthermore, according to article 243 of the Mining Code, holders of mining titles that sell their products to local processors benefit from a tax credit equal to one-third of the mining royalties paid on the products sold to a transformation entity located in the DRC.

# GHANA

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## RELEVANT AUTHORITIES AND LEGISLATION

### What Laws Regulate Mining

The laws which regulate mining in Ghana are constitutional and statutory.

The 1992 Constitution, the highest legal authority, mandates parliamentary ratification of all transactions, contracts or undertakings involving the grant of rights or concessions for the exploitation of any mineral, water or other natural resource of Ghana. Key legislation relating to the sector includes:

- Minerals and Mining Act, 2006 (Act 703), which is the parent legislation that consolidates the law relating to minerals and mining.
- Minerals Commission Act, 1993 (Act 450), which establishes the Minerals Commission, which is the regulatory body for the mining sector, provides for its composition and prescribes its functions relating to the regulation and management of the utilisation of minerals.
- Environmental Protection Agency Act, 1994 (Act 490), which consolidates the law relating to environmental protection.
- Minerals (Royalties) Regulations 2009, which provides for the payment of royalties by license holders.
- Minerals and Mining (General) Regulations, 2012 (LI 2173), which prescribes guidelines for the mining industry on matters such as staffing, disposal of minerals, mineral rights and reconnaissance, prospecting and mining operations.
- Minerals and Mining (Explosives) Regulations, 2012 (LI 2177), which regulates the use of explosives in the sector.
- Minerals and Mining (Licensing) Regulations, 2012 (LI 2176), which prescribes the procedures for obtaining, maintaining licenses and transferring licenses.
- Minerals and Mining (Health, Safety and Technical) Regulations, 2012 (LI 2182), which regulates safety,

health and technical operation parameters in the industry.

- Minerals and Mining (Support Services) Regulations, 2012 (LI 2174), which regulates entities that provide auxiliary services to the mining sector.
- Environmental Assessment Regulations, 1999 (LI 1652), which prescribes the procedure for acquiring and maintaining an environmental permit.

### Which Government Bodies Administer Mining Law

The Minerals Commission is the main regulatory body that administers mining law in Ghana. Mandated by the Constitution and set up by the Minerals Commission Act, 1993 (Act 450), it is responsible for the regulation, management of the utilisation of mineral resources and the co-ordination of the policies in relation to mineral resources. An application for a mineral right and mineral licence should be submitted to the Minerals Commission for processing.

Another major regulatory body is the Environmental Protection Agency ("EPA"), which is the regulator for all activities that have an impact on the environment. The EPA is mandated to issue environmental permits and every undertaking in the mining industry is required to register with the EPA and receive an environmental permit before it can commence operations. An Environmental Impact Assessment ("EIA") is a pre-condition for the issue of licences, permits, approvals or consents in relation to matters affecting the environment, by other regulatory agencies.

## TYPES OF AND MANNER OF ACQUISITION OF RIGHTS

### What Rights are Granted to Conduct Reconnaissance, Exploration and Mining Operations

*Reconnaissance License* - a reconnaissance license confers on the holder or its authorised person, the exclusive right to carry on reconnaissance in the reconnaissance area for the minerals to which the licence relates and to conduct other ancillary or incidental activity. For that purpose, the licensee or its authorised person may erect camps or temporary buildings in the reconnaissance area. The licensee can however not engage in drilling or excavation.

*Prospecting License* - a prospecting license gives a licensee the right to enter the land to which the licence relates and:

- prospect for the mineral in respect of which the licence is granted;
  - make boreholes and excavations that may be necessary for the prospecting purposes;
  - erect camps and put up temporary buildings necessary for the prospecting operations, and
  - conduct other activities ancillary or incidental to the prospecting
- *Mining Lease* - a mining lease

authorises the holder, its agents, employees and properly authorised persons to enter the land and:

- conduct mineral operations including mining for the specified minerals of the mining lease;
- erect equipment, plant and buildings for the purposes of mining, transporting, dressing, treating, smelting or refining the specified minerals recovered during the mining operations;
- take from the land, the specified minerals and dispose of them in accordance with the holder's approved marketing plan;
- stack or dump a mineral or waste product as approved in the holder's Environmental Impact Statement; and
- conduct other incidental or ancillary activity.

## OIL AND GAS

### What Rights are Granted to Conduct Oil and Gas Exploration and Production

Petroleum, like minerals, existing in their natural state within the jurisdiction of Ghana is the property of the state and is vested in the President on behalf of the people. Apart from the Ghana National Petroleum Corporation (GNPC), no person may engage in the exploration, development or production of petroleum except in accordance with the terms of a petroleum agreement entered into between that person, the Republic and the GNPC.

A contractor conducting oil and gas exploration and production has a right to carry out petroleum operations and execute the works that are expedient in the authorised area. The contractor has the right to enter land to carry out petroleum operations. The exercise of the contractor's rights is however subject to restrictions in specified areas to be prescribed in Regulations. However, no relevant regulations have been promulgated yet. The contractor also has the right to export the petroleum to which it is entitled under the terms of a petroleum agreement, although in the event of an emergency affecting energy supplies, the Minister may require the contractor to sell all or part of the petroleum at the prevailing market prices to the state or an agency of the state.

The Petroleum Agreement (PA) entered into by a contractor, the government and the Ghana National Petroleum Company, to conduct oil and gas exploration also grants the contractor following rights within the terms of applicable law:

- to establish offices in Ghana and assign the necessary representatives to the office;
- to use public lands for installation and operation of shore bases, terminals, harbours and related facilities, pipelines from fields to terminals and delivery facilities, camps and other

housing;

- to receive licenses and permission to install and operate the necessary communications and transportation facilities required for its operations;
- to bring to Ghana the number of foreign national employees necessary for its operations, including employees assigned on permanent or resident status, with or without families, as well as those assigned on temporary basis, such as rotational employees;
- to provide or arrange for reasonable housing, schooling and other amenities for its employees and to import personal and household effects, furniture and vehicles, for the use of its personnel in Ghana;
- to be solely responsible for provision of health, accident, pension and life insurance benefit plans for its foreign national employees and their families; and those employees are not required to participate in any insurance, compensation or other employee or social benefit programs established in Ghana;
- to have, together with its personnel, at all times, the right to enter or exit its offices in Ghana, the contract area, and the facilities associated with its petroleum operations, including the offshore waters, using its owned or chartered means of land, sea and air transportation;
- to engage subcontractors, including consultants, expatriate and national, and to bring them and their personnel to Ghana in order to carry out the petroleum operations in a skillful, economic, safe and expeditious manner; and the subcontractors will have the same rights as the contractor, as specified above.

## INDIGENISATION REQUIREMENTS

### Are there any Requirements in Relation to the Holding of Equity in Exploration and Mining Projects by Indigenous Peoples

There are no general requirements for Ghanaians to hold equity in exploration and mining projects. However, Restricted Licenses, which are licenses for the reconnaissance, prospecting and mining of industrial minerals, are mainly granted to Ghanaian citizens. Nevertheless, a non-citizen may apply for a mineral right in respect of industrial mineral provided the proposed investment in the mineral operations is US\$ 10 million or above. If the holder of the mineral right fails, within a specified period of time specified in the holder's programme of mineral operations given with the application, or further time permitted by the Minister responsible for mines ("Minister"), to expend an amount equal to or greater than US\$ 10 thousand (sic), the Minister may suspend or cancel the mineral right.

### Are there any Special Rules or Restrictions Applicable to Foreign Applicants

There are no special rules for the holding of equity in mining projects by foreign nationals. However, the Ghana Investment Promotion Centre Act, 2013 (Act 865)



mandates all enterprises in which foreign participation is permitted (including mining), to register with the GIPC. Under the GIPC Act, special rules relate to capital requirements for the operations. Where a foreign national enters a joint enterprise with a Ghanaian citizen, the foreign partner should invest not less than US\$200,000 in cash or capital goods relevant to the investment or a combination of both, by way of equity participation and the Ghanaian partner does not have less than 10% equity participation in the joint enterprise. Where the enterprise is wholly owned by the foreigner, the foreigner should invest a foreign capital of not less than US\$500,000 in cash or capital goods relevant to the investment or a combination of both by way of equity capital in the enterprise.

As stated earlier, for the grant of licenses for the reconnaissance, prospecting and mining of industrial minerals, a foreigner may only apply if its proposed investment in the mineral operations is US\$10,000,000 or above.

#### The States Rights to Equity in Mining Projects

Where a mineral right is for mining or exploitation, the Government is entitled to a 10% free carried interest in the rights and obligations of the mineral operations. This does not preclude the Government from any other participation in mineral operations that may be agreed with the holder.

The Minister may also give written notification to a mining company to issue to the Republic with a special share in the company for no consideration. The special share constitutes a separate class of shares and has the rights that the Minister and the company will agree on. In the absence of the agreement, the special share has the following rights:

- the share is a preference share and carries no right to vote but the holder is entitled to attend and speak at a general meeting of the members of the company or a separate meeting of the holders of a class of shares in the company;
- the share may only be issued to, held by or transferred to the President, the Minister or another person that the President or Minister may authorise in writing;
- the share does not confer a right to participate in the dividends, profits or assets of the company or a return of assets in a winding-up or liquidation of the company;
- the holder of the share may require the company to redeem the share at any time for no consideration or for a consideration determined by the company and payable to the holder on behalf of the Republic;
- A mining company, which for a period of 2 months, fails to comply with a notice to issue a special share commits an offence and is liable on summary conviction to a fine not more than the cedi equivalent of US\$10,000.

The Government also has the right of pre-emption of all minerals raised, won or obtained in Ghana and from any area covered by territorial waters, the exclusive economic zone or the continental shelf and products derived from the refining or treatment of these minerals.

## PROCESSING AND BENEFICIATION

### Requirements to Beneficiate Minerals Mined

There are no requirements to beneficiate minerals mined.

### Restrictions on the Export of Minerals

Minerals cannot be exported, sold or otherwise disposed of without a licence granted by the Minister for that purpose. A license issued is not transferable. Shipment of rough diamonds to and from Ghana is subject to prescribed rules and regulations and should be in accordance with the Kimberley Process Certification Scheme.

## DISPOSALS OF RIGHTS AND CONTROLLING INTERESTS

### Statutory Consents Required to Dispose of Rights to Explore and Mine

A mineral right cannot, in whole or in part, be transferred, assigned, mortgaged or otherwise dealt in, without the prior written approval of the Minister. The approval should not be unreasonably withheld or given subject to unreasonable conditions.

### Restrictions on Disposals of Controlling Interests in Entities Holding Exploration or Mining Rights

There are restrictions on the disposal of controlling interests in entities which hold mining rights. A person may not become a controller of a mining company unless:

- the person gives the Minister written notice of his intention to become a controller of the mining company, and
- the Minister has, within 2 months after being served with the notice, given the person written notice that there is no objection to the person becoming a controller of the mining company; or the 2 month period has elapsed without the Minister having served the person with a written notice of objection.

The notice served to the Minister loses effect if the person fails to acquire the controlling interest within 1 year from the date of service of the notice. If the Minister considers on reasonable grounds that the public interest would be prejudiced by the person becoming a controller of the mining company, the Minister will serve a written notice of objection on the person. If a person becomes a controller without giving the notice, the Minister will serve the person with a written notice of objection within 6 months after becoming aware of that fact. Contravening these requirements is

an offence punishable on summary conviction to a fine of not more than the cedi equivalent of US\$ 20,000 or imprisonment for a term not more than 3 years or to both.

When a person becomes or remains a controller after being served with a notice of objection, the Minister, acting on the recommendation of the Minerals Commission may, by Executive Instrument, order that specified shares must, until further order is made, be subject to one or more of the following restrictions:

- a transfer of, or agreement to transfer those shares or, in the case of un-issued shares, a transfer of or agreement to transfer the right to be issued with them shall be void;
- no voting rights to be exercisable in respect of the shares;
- no further shares to be issued in right of them or in pursuance of an offer made to their holder;
- except in a liquidation, no payment to be made for sums due from the mining company on the shares,
- whether in respect of capital or otherwise.

The Minister may also apply to the High Court for the sale of specified shares.

The specified shares subject to these measures are:

- shares or rights to be issued with shares in the mining company of which the person in question is a controller which are held by the person or an associate of the person and which were not held immediately before the person became a controller, and
- where the person in question became a controller of a mining company as a result of the acquisition by the person or an associate of the person of shares in another company, to all the shares or rights to be issued with shares in that company which are held by the person or an associate of the person which were not held before the person became the controller.

A person who ceases to be a controller of a mining company must notify the Minister in writing prior to or within 14 days of ceasing to be a controller.

A mining company must also give written notice to the Minister of the fact that a person has become or ceased to be a controller of the company. The notice should be given within 14 days of the mining company becoming aware of the relevant facts. Failure to give the required notice makes the company liable to an administrative penalty of the cedi equivalent of US\$ 1000 payable to the Minerals Commission. The Minister may also, whenever considered desirable in the public interest, appoint one or more competent persons to investigate and report on the ownership or control of a mining company.



## USE OF SURFACE OF LAND INVOLVED IN PROSPECTING AND MINING ACTIVITIES

### Rights of the Holder of an Exploration Right or Mining Right to Use the Surface Necessary or Incidental to an Exploration or Mining Operation

There are no provisions that directly authorise the holder of a license or lease to use the land surface necessary or incidental to its operations. However, the holder of a mining lease has the right to, within 30 days after the grant of the mining lease, designate an area within the lease area as a mining area. This should be done with the approval of the Minerals Commission and upon notification and payment of the appropriate compensation to the affected persons.

A lawful occupier of land within an area subject to a mineral right retains the right to graze livestock on or cultivate the surface of the land if the grazing or cultivation does not interfere with the mineral operations of a holder of a mineral right in the area. However, where compensation has been paid by the holder to the affected persons or claimants outside the mining area but within the lease area, a person or lawful occupier of land within that area shall not retain the right to graze livestock, cultivate the land or erect a building or structure without the consent of the holder of the mining lease.

The holder of a mining lease may also vary from time to time, the boundaries of the areas designated as a mining area, subject to the approval of the Minerals Commission and to the notification of and the payment of the appropriate compensation to affected persons. Once compensation has been paid, no one can exercise surface rights in such a designated area. However, the holder of a mining lease cannot restrain or restrict any lawful occupier of land outside the mining area from exercising surface rights over that area.

Further, the owner or lawful occupier of the land within the mining area needs the consent of the holder of the mining lease (or if the consent is unreasonably withheld, the consent of the Minister) before erecting a building or a structure. An owner or lawful occupier of land also needs the written consent of the holder of the mining lease (or if the consent is unreasonably withheld, the consent of the Minister) before upgrading to a higher value crop.

## ENVIRONMENTAL

### Legislation that Governs Environmental Protection of Exploration and Mining Sites

Environmental protection of exploration and mining sites is generally governed by the Environmental Protection Agency Act, 1994 (Act 490) and the Environmental Assessment Regulations, 1999 (LI 1652). Before undertaking an activity or operation under a mineral right, the holder of the mineral right must obtain the necessary

approvals and permits required from the Forestry Commission and the Environmental Protection Agency for the protection of natural resources, public health and the environment.

The Environmental Assessment Regulations, 1999 (LI 1652) protect the environment by ensuring that a mining company conducts an Environmental Impact Assessment of its activities before it can be granted an Environmental Permit with which to conduct its business. Once an Environmental Permit is granted, the mining company should submit an annual environmental report in respect of its undertaking to the Environmental Protection Agency (EPA).

## NATIVE TITLE AND LAND RIGHTS

Native Title which has Implications for the Exploration and Mining Industry

There are no native land titles with implications for the exploration and mining industry.

## HEALTH AND SAFETY

Legislation that Governs Health and Safety in Mining

A number of legislation control different aspects of health and safety in mining.

The Minerals and Mining (Explosives) Regulations, 2012 (LI 2177) regulate the conveyance, storage, possession, manufacture and use of explosives for mining and substances used for the manufacture of explosives.

The Minerals and Mining (Health, Safety and Technical) Regulations, 2012 (LI 2182) is a comprehensive legislation with extensive provisions on health and safety, including ventilation and dust prevention, the management of cyanide, discharge of dust, gas and fumes into the atmosphere, conveyance, fire protection, first aid, provision of health facilities, mine rescue brigades and medical examination of workers.

The Environmental Assessment Regulations, 1999 (LI 1652) protect the environment by ensuring that a mining entity conducts an Environmental Impact Assessment of its activities before it can be granted an Environmental Permit with which to conduct its business. Once an Environmental Permit is granted, the mining entity must submit an annual environmental report in respect of its undertaking to the Environmental Protection Agency (EPA).

The Fire Precaution (Premises) Regulations, 2003 (LI 1724) governs fire safety by requiring that a fire certificate be acquired for mining premises before work can be commenced. The certificate is revocable if the fire precaution measures on the premises cease to conform to the requirements of the Regulations.

## CONSTITUTIONAL AND ADMINISTRATIVE LAW

Constitution which Impacts Upon Rights to Prospect and Mine

The 1992 Constitution requires parliamentary ratification of all transactions, contracts or undertakings involving the grant of rights or concessions by or on behalf of any person including the Government of Ghana, to any other person or body of persons for the exploitation of any mineral or other natural resource of Ghana.

Administrative Appeals in the Mining Law

There are no specific laid down procedures for administrative appeals. However, mutual discussions to resolve disputes are encouraged by the Minerals and Mining Act. Where a dispute arises between a holder of a mineral right and the Republic in respect of a matter expressly stated by the Act to be referable for resolution, all efforts should be made through mutual discussion and if agreed between the parties, by reference to alternative dispute resolution procedures to reach an amicable settlement. Thus, mutual discussions are offered as a first option for dispute resolution.

## ROYALTIES AND TAXES

Special Rules Applicable to Taxation of Exploration and Mining Companies

Generally, mining companies are subject to the general taxes of: Income/Corporate tax, Capital gains tax and Withholding tax. In addition, mining companies may also be granted the following:

- exemption from payment of customs import duty in respect of plant, machinery, equipment and accessories imported specifically and exclusively for the mineral operations;
- exemption of staff from the payment of income tax on furnished accommodation at the mine site;
- immigration quota in respect of the approved number of expatriate personnel; and
- personal remittance quota for expatriate personnel free from tax imposed by an enactment regulating the transfer of money out of the country.

The Minister may also, as a part of a mining lease, enter into a stability agreement with the holder of the lease to ensure that the holder will not, for a period not exceeding 15 years from the date of the agreement, be adversely affected by subsequent changes to:

- the level of and payment of customs or other duties relating to the entry materials, goods, equipment and any other inputs necessary to the mining operations or project,
- the level of and payment of royalties, taxes, fees and other fiscal imports, and
- laws relating to exchange control, transfer of capital and dividend remittance.

The stability agreement is subject to parliamentary ratification.

#### Royalties Payable to the State Over and Above any Taxes

A holder of a mining lease, restricted mining lease or small scale mining license must pay royalty in respect of minerals obtained from its mining operations to the state at the rate of 5% of the total revenue earned from the minerals obtained by the holder. Annual ground rents, as may be prescribed must also be paid to the owner of the land or successors and assigns of the owner except in the case of annual ground rent in respect of mineral rights over stool lands, which should be paid to the Office of the Administrator of Stool Lands.

An annual mineral right fee, payable to the Minerals Commission, may also be prescribed. A fee, royalty or other payment which falls due in respect of a mineral right is a debt owed to the Republic and recoverable in Court.



# KENYA

KAPLAN & STRATTON, ADVOCATES

## GENERAL INFORMATION

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## RELEVANT AUTHORITIES AND LEGISLATION

### What Laws Regulate Mining

Key laws relating to regulation of mining in Kenya includes the Constitution of Kenya (the Constitution), Mining Act (Cap. 306 of the Laws of Kenya) (the Mining Act), the Trading in Unwrought Precious Metals Act (Cap. 309 of the Laws of Kenya) and the Diamond Industry Protection Act (Cap. 310 of the Laws of Kenya).

The Constitution vests all minerals and mineral oils in the national government in trust for the people of Kenya. Under the Constitution, the State is responsible for ensuring the sustainable exploitation, utilisation, management and conservation of natural resources (including minerals) and to ensure the equitable sharing of the accruing benefits.

The Mining Act is currently the principal substantive legislation regulating the mining sector in Kenya. The Act has been in force for the last 75 years and is considered to be outdated and inadequate for the growing sector. Parliament has recently passed the Mining Bill 2014 ("Mining Bill") which is intended to revamp and consolidate the existing legislative framework for mining in Kenya and accordingly, the Mining Bill proposes to repeal the Mining Act as well as related legislation, specifically, the Trading in Unwrought Precious Metals Act (Cap. 309 of the Laws of Kenya) and the Diamond Industry Protection Act (Cap. 310 of the Laws of Kenya). In view of this, it would be important to include in this guide a review of the provisions of the proposed new law.

The Mining Bill is currently awaiting the assent of the President before enactment. However, the Bill may be subjected to further review by the Senate before presidential assent is granted. Therefore, comments in this guide relating to provisions of the Mining Bill do not necessarily reflect the final provisions of the Bill which may be subject to further amendments.

Which Government Bodies Administer Mining Law  
The Cabinet Secretary (formerly the Minister) responsible for mining has generally had the responsibility to administer mining laws in Kenya together with the Commissioner of Mines and Geology (Commissioner) appointed by the Cabinet Secretary and other officers that should be appointed according to the Mining Act including a mining engineer, inspectors and assistant inspectors of mines, wardens and registrars and other officers as may be deemed necessary to carry into effect the provisions of the Act.

However, under the Constitution, the administration of minerals and mineral oils is vested in the National Land Commission established under the Constitution. The effect of this on the powers of the Cabinet Secretary under the Mining Act is still not clear but it is expected that the powers of the Cabinet Secretary would fall away in any instance where the exercise of such powers would overlap with the functions of the National Land Commission.

Similarly, under the Mining Bill, the Cabinet Secretary shall be responsible for the general administration of the legislation and shall in that regard have the general power to make regulations to prescribe procedures for consideration of applications made under the law and the negotiation, grant, revocation, suspension or renewal of mineral rights. It is not clear under the Bill how an overlap between the powers of the Cabinet Secretary and the constitutional mandate of the National Land Commission would be resolved.

The office of the Commissioner is removed under the Mining Bill and instead the Bill proposes the creation of the following directorates under the Ministry of Mining with the following broad mandates:

- The Directorate of Mines headed by the Director of Mines which shall be responsible for:
  - ensuring compliance with the requirements of the Mining Bill
  - exercising regulatory administration and supervision over all prospecting, mining, processing, refining and treatment operations, transport and any dealings in minerals, including import and export of minerals
  - promoting the effective and efficient management and the development of mineral resources, and the mining sector
  - Providing advice and support to holders of mineral rights on proper and safe mining methods
  - Providing advice during the negotiation of mineral agreements
  - Advising on the development of policy to ensure compliance with international conventions and national policies relating to the sustainable development of the

mineral resources and ensure that mining operations take into account local and community values.

- The Directorate of Geological Survey headed by the Director of Geological Survey which shall be responsible for:
  - providing geoscience expertise and data to the Government on all matters related to geology and the development of minerals including conducting geological studies, surveys, monitoring and analyses
  - developing a national repository of geo-science information through the compilation, publication and dissemination of information and data concerning the geology and mineral resources of Kenya and to facilitate access to this information by the general public
  - Promotion of private sector interest and investment in mineral exploration by providing geological information and services to prospective investors
  - monitoring of seismic activities and mapping of areas of potential geohazards and conducting geo-environmental studies
  - providing geosciences expertise in evaluations of prospecting and mining applications
  - undertaking audits of mineral rights holders' geological sampling and assaying processes

The Cabinet Secretary may establish other directorates as may be necessary.

The Mining Bill also provides for the establishment of the following institutions relating to the mining sector:

- The National Mining Corporation which shall be the investment arm of the national government in respect of minerals. The Corporation shall engage in mineral prospecting, mining and any related activities on behalf of the Government and shall also invest on behalf of the Government. It is expected that mandatory Government participation in mineral rights shall be done through the Corporation (please refer to section 4 below relating to Government equity participation in mining operations under the Mining Bill).
- The Minerals and Metals Commodity Exchange ("Exchange") which shall be established for purposes of facilitating efficiency and security in mineral trade transactions in Kenya. The Cabinet Secretary for mining shall facilitate the establishment of the Exchange and may prescribe the criteria for the establishment and the functions of the Exchange.
- The Mineral Rights Board which shall advise and give recommendations to the Cabinet Secretary on various issues that relate to mining operations in Kenya including include the grant,

rejection, retention, renewal, suspension, revocation, variation, assignment, trading, tendering or the transfer of mineral rights agreements. The Mineral Rights Board would also advise the Cabinet Secretary on the fees, charges and royalties payable for mineral rights or minerals in Kenya. According to the Bill, the Mineral Rights Board would comprise of:

- a chairperson appointed by the President;
- the Principal Secretary responsible for matters relating to mining, who shall be the secretary to the Mineral Rights Board;
- the Principal Secretary responsible for the National Treasury;
- the Principal Secretary responsible for matters relating to devolution;
- the Chairperson of the Kenyan National Land Commission;
- the Director of Mines;
- the Director of Geological Surveys; and
- two members with professional qualifications and experience in the mining industry, appointed by the Cabinet Secretary.

## TYPES OF AND MANNER OF ACQUISITION OF RIGHTS

### What Rights are Granted to Conduct Reconnaissance, Exploration and Mining Operations

The following rights may be granted under the Mining Act: *Prospecting Rights* - these may only be granted to individuals and are not transferrable. Prospecting rights are granted for a period of one year which is renewable for further one year periods. Minerals obtained in the course of prospecting shall be the property of the Government of Kenya.

*Exclusive Prospecting Licence* - this licence may be granted to a person who holds a prospecting right or to any company or body of persons whose agent is the holder of a prospecting right. An exclusive prospecting licence grants the holder the sole right of prospecting for minerals within a specified area in Kenya. In addition, the licence grants the holder the sole right to peg locations of any class of minerals that may be specified in the licence and, with the consent of the Commissioner, the sole right of alluvial mining, the right to remove and dispose of any minerals so mined and the sole right to peg locations of any class of minerals other than those specified in the licence. However, this licence may not be granted for the prospecting of diamonds unless it is specifically endorsed on the licence allowing this. A licence may be granted for a period of one year and may be renewed for a further period of one year up to a maximum of five years from the date of the original grant of the licence. Transfer of a licence is subject to the prior written consent of the Commissioner. Except where specific consent has been obtained from the Cabinet Secretary, any minerals obtained under an exclusive prospecting licence shall be

the property of the Government of Kenya.

*Registered Locations* - a holder of a prospecting right or exclusive prospecting licence may apply for registration of a location once it has been pegged. This registration of the location must be done within thirty (30) days after the location has been pegged and the rights are valid for a period of one year from the date of pegging but may be renewed. The holder of a registered location would have the sole right to prospect and mine and remove and dispose any minerals in respect of which the location is registered and would have the same rights as a holder of a mining lease to enter the subject land and exclusively mine and carry out mining operations. The written consent of the Commissioner is required before the holder of a location can divide his interest in the location and allot the shares or transfer the location.

*Mining Lease* - the Commissioner may grant a mining lease to a holder of a location or to any person who holds a prospecting right in that location. A lease would grant the holder the right to enter into the land which is the subject of the lease and the exclusive right to mine on such land and to do all such things as are reasonably necessary for the conduct of mining operations, subject to the terms and conditions of the lease. A mining lease may only be granted in respect of any land vested in or on behalf of the Government of Kenya. A lease may be granted for a period of between five and twenty one years as the Commissioner may deem fit and may not be transferred or assigned without the written consent of the Commissioner.

*Special mining leases* - a special mining lease may be granted where the Commissioner is satisfied that by reason of the difficulties and cost attending the mining in, or under such land, or for any other cause, it is desirable that such a lease be granted. A special lease may be granted, and may be renewed, for such term and upon and subject to such terms and conditions as the Commissioner may think fit.

The Mining Bill proposes a different structure for grant of mineral rights. Rights granted shall depend on whether a prospecting or mining operation will be classified either as a large scale operation or small scale operation.

According to the Mining Bill, a prospecting or mining operation shall be classified as a small scale operation where:

- in the case of prospecting operations, the proposed prospecting area does not exceed twenty five contiguous blocks; or
- in the case of mining operations, the proposed mining area does not exceed two contiguous blocks;
- in the case of mining operations, the actual or estimated annual extraction of minerals or material bearing minerals does not exceed 25,000 cubic

metres; or

- the prospecting or mining operations do not employ specialised prospecting, mechanised mining technologies, chemicals including mercury and cyanide or explosives; or
- the proposed prospecting or mining operations, do not involve an investment or expenditure which exceed such amount as may be prescribed by the Cabinet Secretary.

All other prospecting or mining operations that do not have the above characteristics of a small scale operation shall be classified as large scale operations.

According to the Mining Bill, the following rights may be granted with regard to large scale operations:

*Reconnaissance Licence* - this licence grants the holder the right to carry out reconnaissance activities on the area specified in the licence. The licence is valid for a period of two years and shall cover an area not exceeding five thousand contiguous blocks. Any mineral obtained under this licence shall be deemed to the property of the National Government.

*Prospecting Licence* - this licence shall grant the holder the exclusive rights carry out prospecting operations (defined as operations carried out offshore and on land to search for and define the extent of a mineral deposit and to determine its economic value). The licence would cover an area not exceeding one thousand five hundred contiguous blocks and may be granted for a period of up to three years. Any mineral obtained under the licence shall be the property of the National Government and shall not be disposed or removed from Kenya without the written consent of the Cabinet Secretary. The licence may be renewed for a further period of three years and may only be renewed twice.

*Retention Licence* - this licence should be obtained where the holder of a prospecting licence has identified a mineral deposit that is of potential commercial significance within the prospecting area but the deposit cannot be developed immediately due to temporary factors that are beyond reasonable control of the holder of the licence. The holder would have the exclusive right to conduct prospecting operations in the retention area and apply for a mining licence in respect of all or a part of the retention area. The licence is issued for a period not exceeding for two years and may be renewed for a further period not exceeding two years. The Cabinet Secretary may issue a written notice to a holder of a retention licence to apply for a mining licence before the expiry of the period stipulated in the licence.

*Mining Licence* - this licence may be granted to a holder of a prospecting licence who has given notice to the



Cabinet Secretary of the discovery of minerals within the area covered under a prospecting licence and who has also satisfied the application requirements prescribed under the Mining Bill. A mining licence would grant the holder the exclusive right to carry out mining operations in respect of the mineral or mineral deposit specified in the licence and within the area specified in the licence. A mining licence may be issued for a period not exceeding twenty five years or the forecast life of the mine whichever is shorter. The holder of the licence may apply for renewal of the licence at least one year before the expiry of the licence and the licence would be renewed for a period not exceeding fifteen years or the remaining life of the mine. The holder of this licence would be required to notify the Cabinet Secretary if any new minerals are discovered and which minerals do not relate to the current licence.

*Artisanal Miners Permit* - this licence would be granted to persons engaged in traditional and customary mining operations using traditional and customary ways and means and may not be granted in respect of land where any other mineral right has already been granted. The permit may only be granted to a person who is a Kenyan citizen, has attained age of majority and who may be a member of an artisanal mining cooperative or group. The term of the permit is limited to three years but may be renewed for an additional period of three years.

The following rights would be available with regard to small scale operations:

*Reconnaissance Permit* - this would permit the holder non-exclusive rights to conduct reconnaissance of the minerals in the area covered under the permit.

*Prospecting permit* - this may be issued for a period of up to five years and may be renewed for further period of up to five years. The area covered by this permit should not exceed twenty five contiguous blocks.

*Mining permit* - this may be granted to a holder of a prospecting permit to carry out mining operations on a small scale in an area that does not exceed two contiguous blocks. The permit may be granted for a period of five years and may be renewed for a further period of five years.

## OIL AND GAS

What Rights are Granted to Conduct Oil and Gas Exploration and Production  
The Mining Act and the Mining Bill do not apply to matters relating to oil and gas exploration and production.



The exploration and production of oil and gas is regulated by the Petroleum (Exploration and Production) Act (Cap. 308, Laws of Kenya) ("Petroleum Act"). Under the Petroleum Act, the Cabinet

Secretary responsible for Energy has the power to divide Kenya and its continental shelf into blocs. No person may engage in any petroleum operations without the permission of the Cabinet Secretary. The Petroleum Act permits the government to conduct petroleum operations either through an oil company established by the government for that purpose or through private contractors that are licensed by the government (acting through the Cabinet Secretary) under petroleum agreements.

A model form petroleum agreement is scheduled to regulations made under the Petroleum Act and is a form of production sharing contract (the Model Form PSC). The Petroleum Act sets out certain obligations to the contractor that are implied into any production sharing contract which are also dealt with in more detail in the Model Form PSC.

The Ministry of Energy administers the application process relating to the entry into a production sharing contract. This can be by way of competitive bidding process or through bilateral negotiations. The Model Form PSC forms the basis for negotiations.

Under the Petroleum Act and Regulations made thereunder, the Cabinet Secretary may also grant non-exclusive exploration permits to carry out geological and geophysical surveys in respect of any open block. The Cabinet Secretary may grant more than one exploration permit for any block.

No entity other than a Kenyan incorporated or registered company may enter into a petroleum agreement with the Government.

Neither the Petroleum Act nor the Model Form PSC prescribe the length of any exploration period, which is therefore a negotiable term, although typically the period would be two or three years. The initial exploration period can be extended by two further periods, the first for two years and the second extension for a period that is negotiable. Following approval of a development plan for any commercial discovery, the Model Form PSC continues for 25 years from the date of such approval.

## INDIGENISATION REQUIREMENTS

Are there any Requirements in Relation to the Holding of Equity in Exploration and Mining Projects by Indigenous Peoples

In October 2012, the Mining (Local Equity Participation) Regulations 2012 were passed under the Mining Act by the then Minister for Environment and Mineral Resources. The regulations require that a minimum of thirty five (35) percent of the interest in the mining companies must be held by Kenyans. These regulations have since been

suspended by the current Cabinet Secretary for Mining and are currently not being enforced.

However, the Mining Bill proposes the following local equity participation requirements:

- Prospecting or mining permits in respect of small scale operations may only be acquired by Kenyan citizens or a body corporate with more than sixty (60) percent shareholding held by Kenyan citizen
- the holder of a mining right would be obligated to list at least twenty five (25) percent of its equity on the local stock exchange within four years of commencement of production in the event that such person exceeds specific capital limits to be prescribed by the Cabinet Secretary.

Are there any Special Rules or Restrictions Applicable to Foreign Applicants

There are no special rules or restrictions applicable to foreign applicants of licences under the Mining Act.

However foreign applicants should be aware of the following provisions under the Mining Bill:

- a mining right may only be held by a company which is registered and established in Kenya;
- a holder of a mineral right must register with the Principal Secretary in the Ministry of Mining an address in Kenya to which all communications and notices made under the proposed law to the right holder or its agent may be sent
- an artisanal mining permit would only be available to Kenyan citizens.

Identify any Rights that the State may have

The State does not have any rights to equity in mining projects under the current legal framework.

However, under the Mining Bill, it is intended that the State shall have a mandatory 10 percent free carried interest in the share capital of holder of a mineral right under a large scale operation or engaged in mining operations relating to strategic minerals. It is expected that such interest shall be held on behalf of the State by the National Mining Corporation to be established under the Mining Bill.

## PROCESSING AND BENEFICIATION

Are there any Requirements to Beneficiate Minerals Mined

No.

Are there any Restrictions on the Export of Minerals

Minerals may only be exported out of Kenya if all royalties have been paid. An export permit should be obtained in respect of each shipment and the Commissioner must be satisfied that all royalties in respect of the shipment have been paid before issuing an export permit.

Under the Mining Bill, an export permit shall be obtained

from the Cabinet Secretary.

## DISPOSALS OF RIGHTS AND CONTROLLING INTERESTS

Are there any Statutory Consents Required to Dispose of Rights to Explore and Mine

Under the Mining Act, the written consent of the Commissioner is required for:

- the transfer of an exclusive prospecting licence;
- the division or transfer a location; or
- the transfer or assignment of a mining lease

The Mining Bill has similar provisions and generally requires that the consent of the Cabinet Secretary be obtained before one can transfer, mortgage, or trade of a mineral right.

According to the Mining Bill, the Cabinet Secretary must be notified if there is a change in the ownership or control of the mining company with any single interest exceeding twenty five (25) percent interests in the licence.

There is an additional requirement under the Mining Bill that the transferor should notify the Kenya Revenue Authority in case of a transfer (within thirty (30) days of the date of the consent to transfer, mortgage or trade in the mineral right by the Cabinet Secretary). In this case, the transfer will only be registered after the transferor has provided evidence indicating that Kenya Revenue Authority has been notified.

Are there any Restrictions on Disposals of Controlling Interests in Entities Holding Exploration or Mining Rights

The Mining Act requires that the consent of the Commissioner must be obtained in a transaction that would lead to a transfer of the prospecting licence, transfer of location or the transfer of a lease.

Similarly, the Mining Bill provides for the same. However, the threshold is lower such that it does not strictly relate to the change in control of the mining company. The notification to the Cabinet Secretary relates to a change in the ownership or control with any single interest exceeding twenty five (25) percent.

It is essential to note that it is a requirement under the Competition Act (Act No. 12 of 2010) to notify the Competition Authority in case of a change in control of a company. In relation to this requirement, there are certain thresholds that are provided under this legislation to determine whether or not the Competition Authority needs to be notified and its approval sought.

## USE OF SURFACE OF LAND INVOLVED IN PROSPECTING AND MINING ACTIVITIES

What are the Rights of the Holder of an Exploration Right or Mining Right to use



the Surface Necessary or Incidental to an Exploration or Mining Operation

Holders of mining rights are generally conferred the rights to use and erect equipment, plant and buildings as necessary within the land over which a mining right is granted in order to carry on mining operations. More particularly, the Mining Act confers the following rights to holders of mining rights relating to the use of the relevant land covered under a specific mining right:

- The holder of a prospecting right under the Mining Act may by himself, his agents and his servants:
  - whilst engaged in bona fide prospecting, erect on any unoccupied land his camp and such buildings or machinery as may be necessary for the purpose of prospecting;
  - make excavations, sink shafts or wells, drive adits or levels or dig trenches;
  - on any land not excluded from prospecting take for the purposes of bona fide prospecting or for his domestic use water from any lake, river or stream, and, with the consent of the owner or occupier of private land or on tendering to the owner or occupier a reasonable sum in payment thereof, any fuel other than standing timber provided that he shall not divert water from any river, stream or watercourse without the consent of the authority having control thereof;
  - graze upon lands not excluded from prospecting such horses or other animals as may be necessary for his subsistence or for the carrying on of prospecting or mining, on payment of a reasonable sum; and
  - build installations and other devices for protecting and, where the prospecting is done within the exclusive economic zone, create safety areas around such installations or devices;
- The holder of an exclusive prospecting licence may by himself, his agents or servant on and over unoccupied land comprised in his licence, erect and maintain such machinery and plant and construct such ways as may be necessary for or in connexion with his prospecting operations and any alluvial mining.
- The holder of a location may, subject to obtaining any necessary consents, on the lands included within the area of his location, cut, take and use any tree when necessary in the course of mining operations or when required for mining or domestic purposes, but he shall be liable for any fees or royalties which may be payable under any law relating to forests and shall, before cutting, taking and using any such tree, pay to the owner or occupier of the land on which such tree is standing a reasonable sum.
  - A lessee under a mining lease or a special mining lease would, in connection with the mining operations be entitled to:
    - make all necessary excavations;
    - erect, construct and maintain

houses and buildings for his use and for the use of his agents and servants;

- erect, construct and maintain such engines, machinery, buildings and workshops and other erections as may be necessary;
- stack or dump any of the products of mining;
- construct and maintain such tramways, roads, communications and conveniences as may be necessary;
- graze upon lands not excluded from prospecting or mining such horses or other animals as may be necessary for his subsistence or for the carrying on of mining, on payment of a reasonable sum;
- in the exclusive economic zone to construct such artificial islands and installations
- take timber as stated above

## ENVIRONMENTAL

### What Legislation Governs Environmental Protection of Exploration and Mining Sites

The primary legislation with relation to environmental conservation and management in Kenya is the Environmental Management and Co-ordination Act (the "EMCA"). It requires that a licence holder to obtain an Environmental Impact Assessment Licence from the National Environment Management Authority ("NEMA") with respect to its mining activities since the activities have a substantial impact on the environment. Further to this, environmental self audit reports would be required to be filed with NEMA annually in compliance with the EMCA.

The licensee may also be required to obtain an emissions licence with regard to emissions of any substance or energy which causes or is likely to cause air pollution.

## NATIVE TITLE AND LAND RIGHTS

Is there any Native Title which has any Implication for the Exploration and Mining Industry

No. However, the Mining Bill provides that no prospecting or mining rights may be granted over community land without the consent of the authority responsible for the administration and management of community land or the National Land Commission, in respect of land that is un-alienated. Community land is defined under the Constitution as consisting of:

- land lawfully registered in the name of group representatives under the provisions of any law;
- land lawfully transferred to a specific community by any process of law;
- any other land declared to be community land by an Act of Parliament; and
- land that is (i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; or (ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities; or (iii) lawfully held as trust land by the county governments, but not including any public land

held in trust by a county government.

## HEALTH AND SAFETY

What legislation governs health and safety in mining

Health and safety in mining is primarily governed by The Mining (Safety) Regulations made under the Mining Act ("Safety Regulations") which provide for the safety standards, precautions and measures that should be maintained at all mines in Kenya.

The Safety Regulations broadly prescribe safety requirements and standards for surface protection, opencast and underground workings, use of explosives, machinery and poisonous substances, preparation of mine plans and accident procedures.

The Safety Regulations also provide for the appointment of mine officials for each mine and require that each mine must have a properly appointed manager for a period longer than 1 month. The qualifications and procedure of appointment of the manager is also provided for in the Safety Regulations. The Safety Regulations provide that every mine should have in place a mine captain and a surveyor.

In addition to the above mentioned Safety Regulations, the Occupational Safety and Health Act (the "OSHA") is relevant. The OSHA generally regulates the safety, health and welfare of workers and all persons lawfully present at workplaces. The OSHA requires that every occupier of a workplace must cause a thorough safety and health audit of all such workplaces at least once in every period of 12 months. The audit is to be carried out by a safety and health advisor who should issue a report and send a copy of the report to the Director of Occupational Safety and Health Services. Also, each premises used as a workplace must be registered as workplaces in accordance with the OSHA.

## CONSTITUTIONAL AND ADMINISTRATIVE LAW

Is there a constitution which has an impact upon rights to prospect and mine

Please refer to comments under paragraph 1 above.

Are there administrative appeals in the mining law

The Commissioner is empowered to inquire into and decide all disputes concerning boundaries of an area held under a prospecting or mining right, any wrongful act committed or omitted in the course of prospecting and mining operations by any person against another, claims by any person to be entitled to erect, cut, construct or use any pump, line of pipes, flume, race, drain, dam or reservoir for mining purposes, claims to have any priority of water taken, diverted, used or delivered for mining purposes, as against any other person claiming the same or disputes relating to the assessment and payment of compensation where provided for under the Mining Act,

unless another authority is authorised to do so.

The Commissioner is also empowered to make any order which may be necessary to give effect to his decision and to order that any party to the dispute to pay compensation to another party as may be reasonable. A person aggrieved by the decision of the Commissioner may appeal to the High Court within thirty days after the date of the decision. Disputes may also be taken directly to court for determination without having to refer the dispute to the Commissioner.

The Mining Bill has similar provisions except that it is the Cabinet Secretary that would have the power to determine disputes in the matters mentioned above. The Mining Bill also makes it explicit that disputes may be resolved through a mediation or arbitration process as may be agreed upon by the disputing parties.

## ROYALTIES AND TAXES

Are there special rules applicable to taxation of exploration and mining companies

There are special rules that relate to the taxation of mining companies in Kenya. These are contained in Part III of Schedule 2 of the Income Tax Act (Cap. 470 of the Laws of Kenya). These rules relate to the deductions in respect of mining operations in Kenya.

Mining companies enjoy capital deduction on the purchase of equipment at the rate of forty (40) percent for the first year and ten (10) percent from the second to the seventh year of operations.

Value added tax ("VAT") is levied on most taxable goods and services supplied in Kenya at the rate of 16%. Certain specified goods and services are exempt from VAT or subject to zero-rating. The VAT Act, 2013 amended the law to provide that certain taxable supplies for mining or exploration companies may be exempted from payment of VAT upon the recommendation of the Cabinet Secretary in charge of mining.

Further to this, sales of property or shares in respect of mining and mineral prospecting companies are subject to withholding tax at the rates of ten (10) percent for residents and twenty (20) percent for non-residents. This withholding tax is final on the proceeds.

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

Royalties are payable to the Government in respect of minerals sold. Royalties are calculated as a percentage of the gross sales value of a mineral and the rates are prescribed under regulations made under the Mining Act. These regulations will continue in force after the Mining Bill is

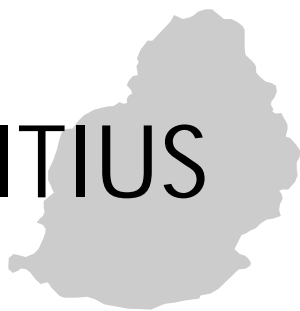
enacted unless expressly repealed.

The current royalty rates are as follows:

Mineral		Rate (as a percentage of the gross sales value)
1.	Diamond	12%
2.	Rare earth elements and radioactive minerals	10%
3.	Niobium	10%
4.	Titanium ores and Zircon	10%
5.	Coal	8%
6.	Gold, silver, platinum and other platinoid group metals	5%
7.	Gemstones	5%
8.	Metallic ores , iron ores, manganese ore, chromium ore, nickel ore, bauxite and other ores	8%
9.	Fluorspar, diatomite, natural carbon dioxide gas and all other minerals	5%
10.	Industrial minerals including gypsum, limestone and silica sand	1%
11.	Construction materials	2%



# MAURITIUS



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## What laws regulate mining

In Mauritius, mining of ores is not a common activity in view of its volcanic origin. A few decades ago, lagoon sand mining was carried out by sand miners and boat owners in the shallowest parts of the largest lagoons on the north and east coast of the island. The extracted coral sand was used mainly as a raw material in the construction industry. Coral sand extraction from the lagoon has been banned since October 2001.

In any event, in spite of the practically non-existent mining activity, the principal legislation governing mining in Mauritius is the Mineral Acts 1966 (the "Act").

## Which Government Bodies administer mining law

According to the Act, the main governing body administering mining and responsible for authorising prospecting operations is the Minister of Industry and Commerce.

## TYPES OF AND MANNER OF ACQUISITION OF RIGHTS

### What rights are granted to conduct reconnaissance, exploration and mining operations

The Act grants the right to prospect minerals, i.e. search for minerals, which also includes such working as is reasonably necessary to enable the prospector to test the mineral-bearing qualities of the land.

The Government shall have the exclusive right to prospect for minerals in or under any land. Subject to the Act, and until such time as the President may by regulations prescribe, no person shall prospect for, mine or work minerals in or under any land in Mauritius whether he is the owner of the land or not. The Minister may authorise in writing any person to carry on prospecting operations in or under any land on behalf of the Government.

It should be noted that under the Act, minerals include:

- metaliferous minerals containing aluminium, antimony, arsenic, barium, bismuth, cadmium, cerium, chromium, cobalt, colombium, copper, iron,

lead, lithium, magnesium, manganese, mercury, molybdenum, nickel, potassium, sodium, tantalum, tin, titanium, tungsten, uranium, vanadium, zinc, zirconium, and all other substances of a similar nature to any of them, and all ores containing them and combinations of any of them with each other or with any other substance, other than those occurring in the form of precious minerals;

- combustible carbonaceous minerals including:
  - coal;
  - lignite, which includes brown coal and any coal which the President may prescribe to be lignite;
- other minerals, including those used for their abrasive or refractory qualities and asbestos, barytes, bauxite, china clay, crystals, fuller's earth, graphite, laterite, marble, mica, nitrates, pipeclay, potash, pumice, quartz, slate, soda, sulphur, talc, and all other substances of a similar nature to any of them; and
- precious minerals, including:
  - precious stones (diamonds, emeralds, opals, rubies, sapphires, turquoises, and such other stones as may be prescribed to be precious stones for the purposes of the Act) and semi-precious stones including amber, amethyst, beryl, cat's eye, chrysolite, garnet, and all other semi-precious stones, whether of the same kind as those enumerated or not;
  - precious metals;
- minerals shall not include:
  - pottery, clay or rock salt;
  - any materials, such as clay, sand, limestone, sandstone, or other stones, commonly used for the purpose of road making, building or for the manufacture of any article used in the construction of buildings where such material does not contain any valuable metal or precious stone;
  - petroleum and associated substances as defined in the Petroleum Act 1970.

## OIL AND GAS

### What rights are granted to conduct oil and gas exploration and production

Oil and gas explorations and production are governed by the Petroleum Act 1970 (the "Petroleum Act"). Under the Petroleum Act, petroleum is meant to include any mineral oil or hydrocarbon, whether gaseous, liquid or solid, existing in its natural condition in strata, including crude oil, casing head spirits, ozokerite, asphalt and natural gas.

The governing body shall be the Minister to whom the responsibility for the administration of the Petroleum Act is assigned.

The Minister may:

- on application made in the prescribed manner;



- by auction or tender; and
- on being satisfied that the applicant, the bidder or the tenderer, as the case may be, has sufficient technical knowledge, experience and financial resources to ensure the proper prospecting and mining for petroleum, grant to the applicant, bidder or tenderer a prospecting licence or a mining lease.

A prospecting licence shall confer on the licensee exclusive rights to conduct prospecting operations over the area comprised in the licence.

A mining lease shall be granted only in respect of an area which has been comprised in a prospecting licence and in which petroleum has been found and shall confer on the lessee exclusive rights to prospect and mine for petroleum and associated substances over the area comprised in the lease.

A prospecting licence or a mining lease may be granted for such consideration, over such area, for such period and such other terms and conditions as the Minister may determine.

A prospecting licence or a mining lease may, on application being made in the prescribed manner, be renewed for such consideration, over such area, for such period and on such other terms and conditions as the Minister may determine.

Notwithstanding the above, the terms and conditions of any prospecting licence or mining lease may provide for:

- the royalty or other payment to be made in respect of petroleum obtained in the exercise of the rights conferred by the licence or the lease, the method of calculating the royalty or other payment, and its manner of payment;
- the rent to be paid in respect of an area comprised in the licence or lease;
- the working obligations attached to the licence or lease;
- the method of measuring petroleum obtained from an area comprised in the licence or lease;
- directions relating to the drilling, location and plugging of wells, the avoidance of harmful methods of working, the avoidance of interference with other activities in or about the area comprised in the licence or lease;
- directions relating to:
  - the nationality of persons employed by the licensee or lessee for the purposes of his operations under the licence or lease;
  - the safety, health and welfare of such persons;
  - the supply of information by way of returns, reports, notices, plans and

records of operations carried out under the licence or lease;

- the terms and conditions under which the licence or lease may be terminated.

## INDIGENISATION REQUIREMENTS

Are there any requirements in relation to the holding of equity in exploration and mining projects by indigenous peoples

Mauritius do not have any indigenous people. As regards petroleum, the property in petroleum existing in Mauritius shall be deemed to be, and always to have been, vested in the State.

Are there any special rules or restrictions applicable to foreign applicants

As mentioned above, whether with respect to minerals and/or petroleum, the government has all exclusive rights thereto. Therefore, foreign applicants shall only be authorised to carry out prospecting operations with the authorisation of the government.

Identify any rights that the State may have. Does the State have any rights to equity in mining projects

As mentioned above, the property of petroleum shall be deemed to have always been vested in the State, and as regards minerals, the State shall have the exclusive right to prospect for minerals under any land.

## PROCESSING AND BENEFICIATION

Are there any requirements to beneficiate minerals mined

No, there are no requirements in local laws as to the beneficiation of minerals.

Are there any restrictions on the export of minerals

As the export of minerals from Mauritius is quite rare, there are practically no prescribed regulations as regards the exportation of such goods. However, sand, limestone and rough diamonds fall under the category of controlled goods for which export permits are required.

## DISPOSALS OF RIGHTS AND CONTROLLING INTERESTS

Are there any statutory consents required to dispose of rights to explore and mine

The law does not provide for any disposal of exploration and mining rights.

Are there any restrictions on disposals of controlling interests in entities holding exploration or mining rights

There are no such statutory restrictions.

## USE OF SURFACE OF LAND INVOLVED IN PROSPECTING AND MINING ACTIVITIES

What are the rights of the holder of an exploration right or mining right to use the surface necessary or incidental to an exploration or mining operation

The holder of an exploration right or mining right shall have all rights over the area for which mining leases or prospecting licences have been granted.

## ENVIRONMENTAL

What legislation governs environmental protection of exploration and mining sites

As per the First Schedule of the Environment Protection (Amendment) Act 2008, both offshore sand mining and rock quarrying are undertakings that warrant an Environment Impact Assessment licence (EIA).

To date only two EIA licences have been granted for rock quarrying and one quarry site is presently operational. EIA licences are usually granted subject to terms and conditions. The conditions attached to the EIA licence granted for rock quarrying also require the proponent to, amongst others:

- Provide for earth bunds to inhibit dust emissions and noise propagation
- Provide for a buffer zone from public access road
- Provide for the reinstatement of the quarry zone concurrently with the progression of the quarry
- Exploit the quarry in conformity with the methodology proposed in the EIA report.
- Submit an environmental monitoring plan prior to starts of works with subsequent monitoring reports.

Use of explosive for blasting purposes is normally not allowed except under the control and supervision of a special branch of the Police Force. Information pertaining to the decommissioning of the project at the end of its life cycle and associated impacts and the reinstatement plan of the quarry zone should also be submitted to the Department of Environment for approval.

## NATIVE TITLE AND LAND RIGHTS

Is there any native title which has any implication for the exploration and mining industry

The Government shall pay compensation to the owner or occupier of the land in or under which prospecting operations are carried out for any:

- disturbance of the rights of the owner or occupier;
- damage done to the surface of the land; or
- damage caused to any crops, trees, buildings or works on the land.

## HEALTH AND SAFETY

What legislation governs health and safety in mining

There are no specific legislation as regards health and safety in mining. However, the Occupational Safety and Health Act 2005 governs health and safety in employment.

## CONSTITUTIONAL AND ADMINISTRATIVE LAW

Is there a constitution which has an impact upon rights to prospect and mine

No.

Are there administrative appeals in the mining law

No.

## ROYALTIES AND TAXES

Are there special rules applicable to taxation of exploration and mining companies

There are no special rules applicable to same. It should be noted however that a domestic company is taxable at the rate of 15% on its income. Entities are usually set up in Mauritius with respect to mining activities outside Mauritius and these are set up as Global Business Category 1 Companies. The latter are taxable at a maximum rate of 3%.

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

Please refer to royalty payment provisions described under Section 3 above regarding petroleum products. The Mineral Act is however silent regarding royalties on minerals.

# MOZAMBIQUE

COUTO, GRAÇA & ASSOCIADOS, LDA

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What laws regulate mining

The Mozambican Parliament approved Mining Law (Law 20/2014) on 18 August 2014, which was published in Mozambique's Official Gazette (Boletim da República) (1st Series – No. 66) and entered into force in the same day (new Mining Law), repealing the previous Mining Law.

The Mozambique mining legal framework comprises the main statutes below:

- Law nr. 20/2014, of 18th August - The Mining Law;
- Decree nr. 61/2006, of 26th December - Regulation on Health and Safety for Mineral Activities;
- Decree nr. 26/2004, of 20th August - Environmental Regulation for Mineral Activities;
- Ministerial Diploma nr. 189/2006, of 14th December - The Basic Rules on Environmental Management for Mineral Activities;
- Decree nr. 20/2011, of 1st June - Regulation for the Commercialization of Mineral Products;
- Ministerial Diploma nr. 92/2007, of 11th July - Rules and Procedures on Activities report;
- Law nr. 28/2014, of 23rd September (to entry in force by 1st January 2015) - Mining Tax and Incentives Regime; and
- Decree nr. 63/2011, of 7th December - Regulation on the Hiring of Foreigners for the Mining and Petroleum activities.

Which Government Bodies administer mining law

Several key bodies are currently responsible for regulating mining activities, namely the Council of Ministers, the Ministry of Mineral Resources (Ministério dos Recursos Minerais) (MIREM) and the National Directorate of Mines (Direcção Nacional de Minas) (NDM).



The Council of Ministers, the highest Governmental body in Mozambique includes the president, prime minister and other Government ministers and is responsible for creating primary legislation for the mining sector. The

Council of Ministers is also technically responsible for the granting of concessions and mining licences, the process of which is run by NDM.

On a day-to-day basis, the sector is primarily governed by MIREM, which is responsible for overseeing NDM. MIREM develops and implements policies relating to the exploration and production of mineral resources, including minerals and metals.

NDM was established to manage and oversee Mozambique's mining sector and is responsible for, among other things:

- developing public policy in respect of 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 and environmental impacts 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.

Pursuant to the new Mining Law, the Mineral Resources General Inspection is responsible for overseeing compliance of the Mining Law and any other legislation, regulations and national standards governing mining activities.

In addition, the new Mining Law provides that a new authority, the High Authority for the Extractive Industry (Alta Autoridade da Indústria Extractiva), will be created to oversee the extractive industry. That said, the new Mining Law is silent as to the powers and role of this High Authority.

In particular, it is uncertain as to whether the new authority will be regulatory in nature or will take the role of ombudsman and/or whether its role will conflict or overlap with NDM and/or the Mineral Resources General Inspection.

The new Mining Law has created the National Institute of Mines (INM), as the regulatory authority for the mining activities, supervised by MIREM, and responsible for the guidelines for the participation of the public and private sector on the research, exploitation, treatment, exportation and importation of mineral products and its derivatives.

The INM competencies are:

- propose policies for the development of the mining sector and accompany its execution;
- analyse and approve projects and technical and economical studies for the opening of new mines, as

well as for the rehabilitation and/or mine closure;

- receive, prepare, organize and analyse processes regarding the attribution of research licenses, mining concessions and concessions for mineral water, practicing the acts that are attributed in the ambit of the Mining Law Regulation;
- promote, support and control, in coordination with other institutes, the prospection, research and extraction, use and benefit of mineral resources, excluding oil and gas; and
- promote, support and control the small scale mining, having into consideration the minimization of the negative impacts of social and environmental nature resulting from the exercise of such activity.

The INM organization, functioning and other competencies are defined by the Government.

#### TYPES OF AND MANNER OF ACQUISITION OF RIGHTS

Under the new Mining Law, a prospective investor may obtain the following types of concession contracts

Exploration Licenses (licença de prospecção e pesquisa) Exploration Licences govern any exploration and prospecting activities. Exploration Licences will be valid for:

- 2 years for mineral resources being supplied for the construction industry, renewable once for same period; or
- 5 years for other mineral resources, including mineral water, and may be renewed once for an additional 3 year period.

Mining Concessions (concessão mineira) - Mining Concessions provides the concessionaire (incorporated and registered under the Mozambique Laws) the right to extract, develop and process mineral resources which discovered under an Exploration Licence. Mining Concessions will be valid for a period of 25 years and may be extended by another 25 years.

Mining Certificates (certificado mineiro) - Mining Certificates govern small-scale mining operations. Mining Certificates are only granted to Mozambican nationals, in addition to legal entities and will be valid for a period of 10 years and may be extended by another 10 years.

Mining Treatment Licenses (tratamento mineiro) - In circumstances when the investor does not hold a valid Mining Concession, Mining Certificate or Mining Pass which authorises such activities, Mining Treatment Licences govern mining processes through which usable ore and derivatives are recovered in valuable mining products by physical treatments. The treatment of radioactive minerals (e.g. uranium) will require further authorisations in accordance with legislation regarding atomic energy and radioactive materials.

Mining Processing Licenses (processamento mineiro) - In circumstances when the investor does not hold a valid Mining Concession, Mining Certificate or Mining Pass which authorises such activities, Mining Processing Licences govern those processes required to achieve ore concentrate by means of (among others) physical, chemical and metallurgical treatments. The processing of radioactive minerals (e.g. uranium) will require further authorisations in accordance with legislation regarding atomic energy and radioactive materials.

Mining Products Commercialization Licenses (licença de comercialização de produtos minerais) - Mining Products Commercialization Licences govern the activity of the sale and purchase of mineral products sourced from outside of Mozambique. We note that Mining Products Commercialization Licences may be awarded to Mozambican nationals in addition to legal entities.

Mining Passes (senhamineira) - Mining Passes govern "artisanal" mining operations generally being undertaken by individuals, and allow for the sale of mineral products arising from such small scale mining activities. We note that Mining Passes may be awarded to Mozambican nationals, in addition to legal entities.

Save for Mining Passes and Mining Products Commercialization Licences, only entities incorporated and registered in accordance with Mozambican law that are able to evidence their technical and financial capacity are eligible for any licence under the new Mining Law. As noted above, Mining Passes and Mining Products Commercialization Licences may also be awarded to Mozambican nationals (i.e. natural persons).

The new Mining Law itself does not provide further detail as to the length of validity for Mining Treatment Licences, Mining Processing Licences and Mining Products Commercialization licences. As such, it is expected that further details regarding these licences will be provided by way of future regulations or secondary legislation.

#### Mining Contracts

Pursuant to the new Mining Law, the Government of Mozambique may launch a public tender in respect of entering into public-private undertakings in relation to mining activities with the holder of an Exploration License or a Mining Concession (a Mining Contract).

The Mining Contract must contain clauses regarding:

- the level of participation of the Government of Mozambique in the undertaking;
- minimum local content;
- local employment and training requirements;
- incentives in relation to increasing the value of the minerals to be extracted;
- corporate social responsibility



requirements;

- memorandum of understanding between the licence holder, the State and the community;
- disputes resolution mechanics, including provisions relating to the settlement of disputes by way of arbitration; and
- the way that the communities in the area will be involved and benefit on the undertaking.

The new Mining Law provides that Mining Contracts must be published in the Mozambique's Official Gazette and are subject to the Administrative Court's prior approval.

It is uncertain as to whether such Mining Contracts will be standardised or whether each Mining Contract can be individually negotiated. As such, potential investors considering entering into a Mining Contract should fully consider the allocation of risk under the proposed Mining Contract.

Further, Mining Contracts awarded by way of public tenders require the payment of an award fee to the Government of Mozambique. As the new Mining Law does not provide any further details regarding such award fees, it is recommended that investors considering bidding for a Mining Contract under a public tender process should first ascertain the amount of such award fee, in order to be able to properly value the price of their bid.

## OIL AND GAS

What rights are granted to conduct oil and gas exploration and production

The Mozambican Parliament approved the new Petroleum Law on 14 August 2014 and it entered into force on the date of its publication in the Government's Official Gazette (18 August 2014), having expressly repealed the old Petroleum Law.

The Mozambican Parliament also approved, on 20 August 2014, the Enabling Law regarding the LNG Projects of Areas 1 and 4 of the Rovuma Basin. This Enabling Law authorizes the Government to approve a Special Legal Regime for the LNG Project in the Rovuma Basin and is valid until 31st December 2014. Subsequently, it is expected that a Decree-Law establishing a special legal regime for the concessionaires operating within the Blocks 1 and 4 of the Rovuma Basin will be passed by the Mozambican Government, before the term of the validity of the Enabling Law.

Key institutions involved in regulating the upstream oil and gas sector in Mozambique include the Council of Ministers, the Ministry of Mineral Resources (MIREM) and National Institute of Petroleum (INP). MIREM and INP are relatively new bodies, having been established by



Decree in 2005 and 2004, respectively.

Ultimate law making power and the power to approve the granting of concessions rests with the Council of Ministers. This is the highest government body and is composed of the president, prime minister and other government ministers. However, the sector is, on a day-to-day basis, primarily governed by MIREM which has responsibility for petroleum operations and oversees INP. It directs and executes policies relating to the exploration for and production of mineral resources, including raw petroleum, coal and natural gas, in accordance with, in relation to petroleum and natural gas, the National Strategy for Petroleum Operations Concessions. Separately, the Ministry of Energy is responsible for the regulation of downstream production and distribution.

INP was established to manage the petroleum resources of Mozambique and administer related operations.

### Licensing Regime

The four types of concession contracts prescribed in the new Petroleum Law are the following:

- Reconnaissance concession contract - Unlike in the old Petroleum Law, reconnaissance concession contracts entered into under the new Petroleum Law:
- Can only be entered into on a non-exclusivity basis;
- Shall be for a non-renewable two year term; and
- May not give rise to a right of first refusal in the granting of prospection and production concession.

Prospection and production concession contract - While under the old Petroleum Law prospection and production concession contract were stated only to grant exclusive rights to explore and produce petroleum and a non-exclusive right to build and operate pipelines, under the new Petroleum Law such concession contracts grant an exclusive right to conduct petroleum operations and a non-exclusive right to build and operate the infrastructures used in the production and transportation of petroleum. Also, unlike in the old Petroleum Law:

- The approval of the Government shall be required for joint-bidding or joint-operation agreements;
- The right to carry prospection activities cannot arguably be extended beyond eight years even if necessary to complete the works;
- There is no specified term for the extension of prospection activities in case a discovery is made; and
- There is no specified term for the extension of the contract for the purpose of production.

Oil or gas pipeline system concession contract - previously covered in similar terms under the old Petroleum Law. An oil pipeline or a gas pipeline system concession contract grants the right to construct and operate oil pipeline or gas pipeline systems for the purpose of transporting crude oil or natural gas, in those cases that such operations are not covered by an exploration and production concession

contract. An oil pipeline or a gas pipeline system concession contract shall be accompanied by the relevant development plan, which is an integral part of the concession contract.

Infrastructure concession contract - this is a new type of concession contract for the construction and operation of infrastructures. Such concessions shall grant the right to build and operate infrastructures for petroleum production, including liquefaction. Such concessions shall only be required if the relevant infrastructures are not covered by an approved plan of development for prospection and production.

In addition to the four types of concession contracts above mentioned, the new Petroleum Law also contains a new provision in respect to gas liquefaction, providing that the Government may authorize concessionaires which have discovered deposits of oil and non-associated gas to develop projects for the design, construction, installation, ownership, financing, operation, maintenance, use of wells, installations and ancillary equipment, either onshore or offshore, for the production processing, liquefaction, delivery and sale of gas in the domestic or foreign markets. It is therefore now clear that liquefaction activities, either onshore or offshore, can be undertaken under EPCC's, subject to Government approval but without the need of a separate agreement.

All prospection and production concessions must be granted by way of public tender and, unlike in the old Petroleum Law and as mentioned above, the types of concession contracts foreseen in the new Petroleum Law now include a concession for the construction and operation of infrastructures.

The State reserves the right to participate in petroleum operations in which any legal entity is involved in. The State may also decide to participate in any given project at any stage under the terms to be established by contract between the State and the holder of the rights.

In addition to what was already provided under the old Petroleum Law, the new Petroleum Law provides that the State shall promote a progressive increase of its participation in all oil and gas ventures.

The new Petroleum Law also provides that:

- The National Oil Company (ENH, E.P.) represents the State in petroleum operations;
- The National Oil Company is the State-owned entity responsible for the reconnaissance, prospection, production and commercialisation of petroleum products;
- The National Oil Company shall participate in all petroleum operations and in all various stages, including prospection, production, refining, transportation, storage and commercialisation of oil

and gas and their by-products, including, LNG and GTL, within or outside the territory of Mozambique;

- The National Oil Company shall manage the oil and gas share to be channelled to the domestic market for consumption;
- Any investor interested in exploiting the petroleum resources of Mozambique must enter into a partnership with the National Oil Company as exclusive representative of the State.

## INDIGENISATION REQUIREMENTS

Are there any requirements in relation to the holding of equity in exploration and mining projects by indigenous peoples

The Mining Law establishes that the Mining Contract must be signed with companies that have the State as shareholder and a minimum local content.

The Mozambique Government must create mechanisms of involvement of Mozambican companies or individuals on the mining ventures and shall promote, gradually, the increase of the level of its participation on mining ventures.

Under the new Mining Law, preference should be given to goods and services purchased or obtained from Mozambican individuals or entities. Further, the new Mining Law requires that goods or services, the value of which exceeds a particular amount (to be determined in subsequent regulations), must be purchased by way of a public tender. Such public tenders must be published in widely read newspapers in Mozambique and on the website of the relevant interest holder.

In addition, foreign entities that provide services to mining operations in Mozambique are required under the new Mining Law to "associate with" Mozambican entities. Details of how this obligation is fulfilled remain unclear and we expect this to be detailed in future regulations and/or secondary legislation.

Are there any special rules or restrictions applicable to foreign applicants

The Mining Law establishes that the Mining Contract must be signed with companies that have the State as shareholder and a minimum local content, meaning foreign applicants must have a minimum local content, which terms and conditions will be soon regulated.

Identify any rights that the State may have. Does the State have any rights to equity in mining projects

The Mining Law establishes that the Mining Contract must be signed with companies that have the State as shareholder and a minimum local content.



The Government must create mechanisms for the involvement of the national businessmen's on the mining undertakings and promote the listing of mining companies in the Mozambique Stock Exchange.

Pursuant to the new Mining Law, the State is required to progressively increase its participation in mining projects.

Nevertheless, the new Mining Law is unclear as to whether this means that the State shall be a larger participant in mining projects in the future, or whether the State is expected to obtain greater interests in particular projects over time.

#### PROCESSING AND BENEFICIATION

Are there any requirements to beneficiate minerals mined

The new Mining Law establish that whenever the availability of resources and the economic feasibility so justifies the processing and beneficiation of minerals mined in Mozambique must be undertaken within Mozambique territory.

The terms and conditions for such processing and beneficiation will be regulated soon.

Are there any restrictions on the export of minerals  
Mineral products are subject to a special export customs regime, pursuant to the Mining law, holders of exploration licenses are only allowed to export mineral samples for analysis and testing.

Holders of mining concession are allowed to export mineral products they produced in the area covered by the title.

#### DISPOSALS OF RIGHTS AND CONTROLLING INTERESTS

Are there any statutory consents required to dispose of rights to explore and mine

The transfer of title, rights and obligations under a mining licence, whether to an affiliate or a third party, may only take place two years after the commencement of the relevant mining activities authorised by the mining licence. Such transfers must be in accordance with Mozambican law and will be subject to the approval of the Government of Mozambique.

The new Mining Law expressly provides that indirect transfers of participating interests, titles and/or mining rights, notably by way of change of control of any licence holder, shall be considered as a transfer of rights and obligations under a mining licence and shall, therefore, require prior governmental approval.

Non-compliance to any transfer

requirements results in any such transfers being void and invalid.

Such transfers of rights may also be subject to the payment of capital gains tax. As of 1 January 2014, capital gains derived from the sale of shares of a resident company by a non-tax resident are taxable.

#### USE OF SURFACE OF LAND INVOLVED IN PROSPECTING AND MINING ACTIVITIES

What are the rights of the holder of an exploration right or mining right to use the surface necessary or incidental to an exploration or mining operation

The Mining Law states that the use and occupation of land for purposes of mining activities are regulated by Law and that the pre-existing land rights are considered extinct after payment of just compensation to land title holders and revocation of such titles, under the terms of applicable laws.

The right of use and benefit of land obtained by the mining title holder has a specific validity period and dimension established on the mining title.

When the development, use and benefit of certain mineral resources is considered of public interest for the national economy or for future development of the region were occurring, the Government may declare that such land on which the mineral resources are located to be reserved for preservation purposes, specifying the type of incompatible activities and not permitted on such mining reserved area.

No rights of land use and benefit can be acquired in total and partial protection zones, and the exercise of mining activities on such areas is subject to specific legislation.

The total and partial protection zones are part of the public domain, which are areas considered to be destined for the satisfaction of the public interest.

Areas that are intended for nature conservation or preservation activities and area for State security and defence are considered total protection zones.

The following areas are considered partial protection zones:

- the bed of interior waters, the territorial sea and the exclusive economic zone;
- the continental platform;
- the strip of maritime coastline, including that around islands, bays and estuaries, which is measured from the high tide line mark 100 meters inland;
- the land strip of up to 100 meters surrounding water sources;
- the land strip of up to 250 meters along the edge of dams and reservoirs;



- the land occupied by public interest railway lines and their respective stations with a bordering strip of 50 meters on each side of the line;
- the land occupied by motorways and four lane highways, aerial, surface, underground and water installations and conduits for electricity, telecommunications, petroleum, gas and water, including a bordering strip up to 50 on each side, as well as the land occupied by roads including a bordering strip of 30 meters for primary roads and 15 meters for secondary and tertiary roads;
- the two kilometre strip of land along the terrestrial border;
- the land occupied by airports and aerodromes with surrounding strip of land of 100 meters; and
- the 100 meters strip of land surrounding military or other defence and security installations of the State.

Special licenses may be issued for specific activities, which will authorise the carrying out of any economic activity within total or partial zones.

The Mozambique State has primacy over other land rights and the land rights may be extinct in favour of the State upon just indemnification paid by the applicants of the mining exploitation.

When the area subject to concession, in part or whole, is occupied by families or communities that imply the resettlement, the company/applicant is obliged to indemnify such populations on terms to be regulated.

The mining right is distinct of the right of use and benefit of land or of any other pre-existing rights.

The attribution of the mining rights does not necessarily imply the attribution of the right of use and benefit of land or of other pre-existing rights, which are kept under the Mozambique State custody up to the closing of the mining activities.

After the closing of the mining activities the Mozambique State may attribute the right of use and benefit of land to other applicants.

## ENVIRONMENTAL

What legislation governs environmental protection of exploration and mining sites

The main legislation are: Decree nr. 61/2006, of 26th December - Regulation on Health and Safety for Mineral Activities and Decree nr. 26/2004, of 20th August – Environmental Regulation for Mineral Activities and Ministerial Diploma nr. 189/2006, of 14th December - The Basic Rules on Environmental Management for Mineral Activities.

Pursuant to above legislation prior to commencement of

mineral operations, holders of mining licenses are required to prepare and lodge security, health and safety plans to the Ministry of Mineral Resources and to the Ministry of Labour, including risk assessment, potential sources of fire explosion, use and maintenance of equipment, working conditions and measures to mitigate and prevent risks, accidents and occupational diseases.

Under the new Mining Law, mining activities are classified as Category A, Category B and Category C.

The new Mining Law indicates that differing levels of environmental impact assessments are required for each classification of mining activities. That said, no further details are provided as to the substantive requirements for each type of environmental impact assessment and how these obligations may be fulfilled.

## NATIVE TITLE AND LAND RIGHTS

Is there any native title which has any implication for the exploration and mining industry

The Mining Law states that the pre-existing land rights are considered extinct after payment of just compensation to land title holders and revocation of such titles, under the terms of applicable laws.

The Mozambique State has primacy over other land rights and the land rights may be extinct in favour of the State upon just indemnification paid by the applicants of the mining exploitation.

When the area subject to concession, in part or whole, is occupied by families or communities that imply the resettlement, the company/applicant is obliged to indemnify such populations on terms to be regulated.

The just indemnification must be executed by means of memorandum of understanding between the Government, the company and the communities, and the memorandum is pre-requisite for the granting of the mining exploitation rights.

## HEALTH AND SAFETY

What legislation governs health and safety in mining

The Labour Law and its regulations contemplate provisions and rules, of general application, dealing with health and safety.

The Mining Law states in its Article 41 (1) that Persons who extract mineral products under a permit as defined in this article, shall comply with all the regulatory provisions applicable to mining management, health and safety.

Under that context, by the Decree nr. 61/2006, of 26 of December, the



Government approves the Regulations on technical safety and health for geological and mining activities. The article 297 of these Regulations provides guidelines for risk assessment to assure the safety of workers and equipment. Companies, miners associations and the workers shall be involved in the discussion of the risk analysis.

According to the Article 313 of the referred Regulations, the breach of the provisions of the Regulations, shall be penalized with a fine of five to hundred minimum national salaries, without prejudice of the criminal procedure, in terms of Criminal Law, the companies that:

- do not comply with the provisions of this Regulations regarding to health, safety, transport, equipment in underground or outdoor work;
- incorrect use of the mercury while processing the gold; and
- non-compliance with the minimum limits of the oxygen concentration on the air, presence of pollutant gases, as well as other chemicals elements in concentrations above the maximum limits which could influence the environment on site, endangering workers health.

## CONSTITUTIONAL AND ADMINISTRATIVE LAW

Is there a constitution which has an impact upon rights to prospect and mine

The Constitution of the Republic of Mozambique states that natural resources on the soil and subsoil and in the areas off shore areas within the jurisdiction of Mozambique are owned by the State of Mozambique, and the access to such resources is subject to statutory provisions.

Are there administrative appeals in the mining law

Administrative appeals are governed by specific administrative legislation.

## ROYALTIES AND TAXES

Are there special rules applicable to taxation of exploration and mining companies

Under the new Mining Law, concessionaires shall pay, along with any relevant specific taxes on petroleum operations:

- Income Tax;
- Value Added Tax;
- Production Tax;
- Surface Tax;
- Municipal Tax, when applicable; and
- any other relevant taxes required by law.



The Mozambique Parliament approved the enabling law in respect of Specific Regime of Taxation and Fiscal Benefits

for Mining Operations (Law nr. 28/2014, of 23rd September), which will provide further specifics in respect of specific taxes in respect of the mining sector and will repeal the current regime (Laws 11/2007 and 13/2007 of 27 June 2007). The Specific Regime of Taxation and Fiscal Benefits for Mining Operations is due to enter into force on 1 January 2015.

However such Law provides that the Production Tax applies to the extracted mineral product after treatment. If no treatment is required then the Tax is applied over the extracted mineral product.

The Production Tax is applied as follows:

- 8% for diamonds;
- 6% for precious metals, precious and semi-precious stones and heavy sands;
- 3% for basic metals, coal, ornamental rocks and remaining mineral products not included above points; and
- 1.5% for sand and stone.

All mineral products utilized for the development of the local industry benefits of reduction of 50% of the Production Tax.

Indirect transfers of participating interests, titles and/or mining rights, notably by way of change of control of any licence holder, shall be considered as a transfer of rights and obligations under a mining licence, irrespective if within or outside of Mozambique territory, are subject to capital gains rated at 32%.

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

The Law nr. 28/2014, of 23rd September provides that a new tax will be created under the name of Tax over the Mineral Resource Revenue which applies to all Mining Concessions and Mining Certificates holders over the net cash flow resulting from the mining activity during the fiscal year end and is rated at 20%.



# NAMIBIA

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### What laws regulate mining

In terms of article 100 of the Constitution of the Republic of Namibia, 1990, all natural resources (including minerals) below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia belong to the state, unless they are otherwise lawfully owned.

Mining in Namibia is regulated by the Minerals (Prospecting and Mining) Act 33 of 1992 ("Minerals Act"). Section 2 of this Act vests all rights in respect of minerals in the state. This Act furthermore provides for the administration of the minerals industry and access to mineral resources through various types of authorisations.

Health and safety aspects relating to the minerals industry were passed in terms of the previous Mines, Works and Minerals Ordinance 20 of 1968. These regulations are still in force in terms of the Minerals Act and will remain in force until they are repealed. New regulations have been drafted some time ago but are not yet in force. The general health and safety regulations passed in terms of the Labour Act 6 of 1992 (which are still applicable under the Labour Act 11 of 2007) apply also to all employment relationships in Namibia.

The exploitation of minerals is also affected largely by the Environmental Management Act 7 of 2007 ("EMA") and the Environmental Impact Assessment Regulations passed in terms of this Act. In terms of this Act, no person may undertake a listed activity without an environmental clearance certificate. Listed activities include mining and quarrying activities. The minister of mines and energy may not issue a mineral licence before the applicant has obtained an environmental clearance certificate.

Various other laws might be applicable to the mining industry. These include the Soil Conservation Act 76 of 1969, the Hazardous Substance Ordinance 14 of 1974, the Atmospheric Pollution Prevention Ordinance 11 of 1976, the Prevention and Combating of Pollution of the Sea by

Oil Act 6 of 1981, the Forest Act 12 of 2001, and the Atomic Energy and Radiation Protection Act 5 of 2005.

### Which Government Bodies administer mining law

The minerals industry falls under the auspices of the Ministry of Mines and Energy and its line minister, the Minister of Mines and Energy. The Minister is assisted by the Mining Commissioner. The Minerals Act also provides for a Minerals Board of Namibia. The Minerals Act prescribed the function of the Mining Commissioner and the Minerals Board.

Environmental issues are regulated by the Minister of Environment and Tourism. He is assisted by the Environmental Commissioner, whose functions are prescribed by the EMA.

### TYPES OF AND MANNER OF ACQUISITION OF RIGHTS

#### What rights are granted to conduct reconnaissance, exploration and mining operations

In order to search for minerals, a person may apply for a number of authorisations. These are a non-exclusive prospecting licence, exclusive prospecting licence or reconnaissance licence.

Reconnaissance licences authorise the holder thereof to conduct reconnaissance operations, which are operations carried on 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 out from the air. It is valid for a maximum period of six months and may not be renewed. It may, however, be extended once for a period of six months.

Prospecting operations are conducted in terms of non-exclusive and exclusive prospecting licences. "Prospecting" means intentionally searching, whether by way of excavations or otherwise, for any mineral or group of minerals with a view to delineating or evaluating deposits or concentrations of any such mineral or group of mineral. A non-exclusive prospecting licence is valid for a period of one year and is not renewable. It is not granted over a specific area. An exclusive prospecting licence, on the other hand, is valid for a period of three years and may be renewed twice for a period of two years per renewal. Further renewals are possible only if the Minister deems it desirable in the interests of the development of the mineral resources of Namibia. It is granted over a specific area.

Mining operations may be conducted in terms of a mining claim or a mining licence. The holder of a non-exclusive prospecting licence may peg a claim, which may not be bigger than three hundred metres by six hundred metres. This claim is then registered with the Ministry, which



entitles the holder to conduct mining operations on the mining claim. A claim is valid for three years and may be renewed for two years at a time. On the other hand, the holder of an exclusive prospecting licence may apply for a mining licence over the prospecting area. A mining licence is valid for a period of twenty-five years and may be renewed for further periods of fifteen years per renewal.

## OIL AND GAS

What rights are granted to conduct oil and gas exploration and production

The upstream petroleum industry in Namibia is primarily regulated by the Petroleum (Exploration and Production) Act 1991 (Act 2 of 1991) ("Petroleum Act"). The Petroleum Act provides for the reconnaissance, exploration, production and disposal of petroleum as well as the control over petroleum. It provides that all rights in respect of petroleum vest in the State notwithstanding any right with regard to the ownership of the land where the petroleum is found. No person may carry on any operations in respect of petroleum without the necessary licence issued by the Ministry of Mines and Energy. The Act also provides for the payment of petroleum royalties. The Petroleum Act is administered by the Minister of Mines and Energy. The Minister must appoint a Commissioner of Petroleum Affairs and a Chief Inspector of Petroleum Affairs. These two officers exercise or perform the powers, duties and functions conferred or imposed upon them by, or under, the provisions of the Petroleum Act and such other functions as may be imposed upon them by the Minister. The Commissioner and Chief Inspector are assisted by such other officers as may be designated by the Permanent Secretary: Mines and Energy for such purpose. The Petroleum Ancillary Rights Commission is also established under the Act. This Commission principally deals with disputes between licence-holders and landowners.

## INDIGENISATION REQUIREMENTS

Are there any requirements in relation to the holding of equity in exploration and mining projects by indigenous peoples

The Minerals Act does not provide for rights of indigenous people.

Are there any special rules or restrictions applicable to foreign applicants

In general, there are no specific rules or restrictions for foreign applicants. However, in terms of the Foreign Investment Act 27 of 1990, it may be a condition for the granting of a licence or authorisation or an agreement for the granting of rights over natural resources that the applicant shall have to accommodate previously disadvantaged Namibians. Furthermore, in terms of the Minerals

Act, the Minister may grant a licence, or the renewal of a licence, subject to such terms and conditions as he may deem necessary. In the light hereof, licences are often granted subject to the condition that there must be some local ownership (which can include joint holding with Epangelo Mining Company (Pty) Ltd, the state-owned mining company).

There are certain restrictions on foreigners pegging a mining claim. In terms of the Minerals Act, a mining claim may only be pegged by a Namibian citizen or Namibian owned company. We are of the view, however, that the Minerals Act does not exclude foreign-owned close corporations from pegging a claim.

Identify any rights that the State may have. Does the State have any rights to equity in mining projects?

In general, the state does not have any rights to equity in mining projects, save possibly for the right of Epangelo to be a joint holder in a mining project.

## PROCESSING AND BENEFICIATION

Are there any requirements to beneficiate minerals mined

There are at this stage no requirements to beneficiate minerals locally. However, new royalties have been introduced and one of them appears to be a type of penalty royalty where the holder fails to beneficiate locally. These new royalties are not yet applied in Namibia yet.

Are there any restrictions on the export of minerals  
Certain limitations exist on the export of source material. No person may, except with the written permission of the Minister, export any source material from Namibia. The exportation of diamonds are also strictly regulated in terms of the Diamonds Act 13 of 1999 and the Regulations passed in terms of this Act.

## DISPOSALS OF RIGHTS AND CONTROLLING INTERESTS

Are there any statutory consents required to dispose of rights to explore and mine

Reconnaissance licences and non-exclusive prospecting licences are not transferable and not disposable. On the other hand, mining claims, exclusive prospecting licences and mining licences (collectively referred to as "mineral licences") may not be transferred without the consent of the Minister. Furthermore, no interest in a mineral licence may be granted, ceded or assigned and no person may be joined as a joint holder of a mineral licence without the consent of the Minister.

Are there any restrictions on disposals of controlling interests in entities holding exploration or mining rights  
In terms of the Minerals Act, there is no restriction on the disposal of a controlling interest in entities holding



exploration or mining rights. However, in practice the Minister has interpreted “interest in a mineral licence” to include a controlling interest in the holder of a mineral licence as well.

## USE OF SURFACE OF LAND INVOLVED IN PROSPECTING AND MINING ACTIVITIES

What are the rights of the holder of an exploration right or mining right to use the surface necessary or incidental to an exploration or mining operation

In terms of the common law, the holder of a licence may exercise any rights granted to him reasonably (*civilliter modo*) 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. This was confirmed by the High Court of Namibia in *Hoffman v Maier* 1994 NR 61 (HC).

Furthermore, before entering any private land and exercising any rights on private land, the holder must enter into an agreement with the owner of the land which must provide for compensation to be paid by the holder to the owner for the use of the land. This is generally referred to as a surface agreement or access agreement.

## ENVIRONMENTAL

What legislation governs environmental protection of exploration and mining sites

In terms of the EMA, the Minister of Mines and Energy may not issue a mineral licence until the applicant has been furnished with an environmental clearance certificate. A person wishing to apply for an environmental clearance certificate must lodge an application with the Minister of Mines and Energy, who is designated as the competent authority in terms of the EMA. The applicant must then hold public consultation, draft a scoping report, and give interested and affected parties an opportunity to comment. The results of the public consultation, scoping report, a management plan and all comments and replies thereto must then be lodged with the minister of mines and energy, who must then forward this to the environmental commissioner. The environmental commissioner can then either issue the environmental clearance certificate, or request the applicant to conduct an environmental impact assessment before the clearance certificate is issued.

In terms of the Minerals Act, an environmental impact assessment study must be furnished to the Ministry of Environment before a mining project can proceed. In terms of the regulations to the Environmental Management Act, where an assessment is required in terms of any other law, and that other law or policy requires that information must be submitted or processes must be carried out that are substantially similar to information or processes required in terms of these

regulations of the EMA, the Minister of Environment and Tourism must take steps to enter into a written agreement with the authority responsible for administering the law or policy (such as the Minister of Mines and Energy) in respect of the coordination of the requirements of the law, policy and regulations passed in terms of the Environmental Management Act to avoid duplication in the submission of such information or the carrying out of such processes. As far as we know, no such agreement has been entered into.

## NATIVE TITLE AND LAND RIGHTS

Is there any native title which has any implication for the exploration and mining industry

The Minerals Act does not recognise native title.

## HEALTH AND SAFETY

What legislation governs health and safety in mining

The health and safety regulations passed in terms of the Labour Act 6 of 1992 (which are still applicable under the Labour Act 11 of 2007) apply in general. Furthermore, mine health and safety regulations were passed in terms of the previous Mines, Works and Minerals Ordinance 20 of 1968. These regulations are still in force in terms of the Minerals Act and will remain in force until they are repealed. New regulations have been drafted but are not yet in force. The new regulations have been in circulation for a number of years and its future is uncertain.

## CONSTITUTIONAL AND ADMINISTRATIVE LAW

Is there a constitution which has an impact upon rights to prospect and mine

In terms of article 100 of the Constitution of the Republic of Namibia, 1990, all natural resources (including minerals) below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia belong to the state, unless they are otherwise lawfully owned. Other provisions of the Constitution which may be applicable include the right to property (which extends to mining title as well), the right to be treated fairly, the right to just administrative action and the right to have disputes determined by a court or independent and impartial tribunal.

Are there administrative appeals in the mining law

Any person who feels aggrieved with any action or decision taken or made by the Commissioner in terms of any provision of the Minerals Act, may, within 30 days 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 may confirm, set aside, or amend any such action or decision.

The right to fair and reasonable administrative justice is guaranteed in terms of Article 18 of the Constitution of the Republic of Namibia, 1990. The Commissioner and the Minister are administrative bodies and any decision taken by them may be taken on review to the High Court of Namibia. Any aggrieved person may therefore take a decision by them on review to the High Court of Namibia. Where the decision was taken by the Commissioner, however, the High Court may suspend any application until the internal appeal has been exhausted.

## ROYALTIES AND TAXES

Are there special rules applicable to taxation of exploration and mining companies

Mining companies (other than diamond mining companies) must pay income tax at a rate of 37.5 per cent on its taxable income, which is somewhat higher than the normal 33 per cent for companies. The rate for diamond mining companies is 50 per cent. Other companies must pay income tax at a rate of 33 per cent. A recent amendment to the Income Tax Act 24 of 1981 (the Income Tax Third Amendment Act 15 of 2011) introduces a tax on income from the alienation of a right or licence to explore, mine, or retrieve natural resources in Namibia, irrespectively of where the transaction is concluded or where the payment is made. This includes income on the sale of shares in companies that hold such a right.

Aside from the above, mining companies are treated the same as other companies. All other taxes applicable in Namibia therefore apply to mining companies as well.

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

The State is granted wide discretion with regard to the rate at which royalties are to be imposed. The Minerals (Prospecting and Mining) Amendment Act 8 of 2008 ("Amendment Act") amends the existing legislation by deleting the maximum percentage of royalties that the Minister can charge on all minerals excluding precious stones and dimension stone and introduces the possibility of a windfall royalty. The Amendment Act, therefore, confers discretion on the Minister to levy a windfall royalty on the holder of a mining claim, a non-exclusive prospecting licence or a mineral licence, if there is an increase in the market price or, alternatively, mining operations are made more profitable by new technology or any other circumstances. These amendments concerning windfall taxes are applicable to all minerals. The Amendment Act also introduces a new type of royalty in respect of all minerals other than precious stones and dimension stone. It is not certain what the nature of this royalty is, but it could possibly be a penalty royalty.



According to section 114 of the Minerals Act (as amended by the Amendment Act), a holder of a mining claim, a non-exclusive prospecting licence or a mineral licence is required to pay

royalties to the Commissioner for the benefit of the State Revenue Fund. A holder in respect of any rough or uncut mineral of the precious stones group shall pay a royalty at a rate of 10 per cent of the market value. A holder in respect of any rough or unprocessed mineral of the dimension stone group shall pay a royalty at a rate of 5 per cent of the market value. A holder in respect of any other mineral shall pay a royalty at such rate as may be determined by the Minister from time to time by notice in the *Government Gazette*.

The Amendment Act introduces a windfall royalty, payable at the discretion of the Minister. The Minister may levy such a royalty upon the holder of a mining claim, a non-exclusive prospecting licence or a mineral licence in respect of any mineral if, in the opinion of the Minister:

- the market prices that can be obtained for such mineral have increased to such an extent that the operations have become considerably more profitable than similar operations under normal circumstances; or
- the deployment of new technology or any other circumstances have made the operations in question considerably more profitable than they are under normal circumstances. This section does, however, contain certain safeguards to curtail the discretion of the Minister.

The Minister may only impose the royalty if:

- he has informed the holder in writing of his intention to impose a windfall royalty; and
- he has afforded the holder the opportunity within such reasonable period as may be specified in such notice to make representations and proposals in relation to any matter relating to such intention to impose windfall royalties; and
- he has taken into account such representations and proposals. If the Minister has levied a windfall royalty upon a holder, such holder may at any time make representations to the Minister as regards such royalty if the circumstances have changed or new information has come to the knowledge of such person.

A royalty, in addition to the compulsory royalty, is created by the Amendment Act. Despite the sloppy drafting, it seems as if this section only applies to any mineral excluding precious stones and dimension stone. What the exact nature of this new type of royalty is, is unclear. It might be a type of penalty royalty where a holder fails to beneficiate locally. The rate at which this type of royalty will be imposed lies within the discretion of the Minister. The Minister may determine different rates in respect of different classes of minerals, but also in respect of different holders of the same class of minerals.

Royalties are calculated based on the market value. The determination of market value is prescribed by the Minerals Act.

# NIGERIA

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What laws regulate mining

The principal law that regulates mining in Nigeria is the Nigerian Minerals and Mining Act, 2007("the Act"). The Act repealed the Minerals and Mining Act, No 34 of 1999. The Act contains specific provisions that seek to enhance private sector leadership in the development of the mining industry in the country.

Mining is also governed by the Nigerian Minerals and Mining Regulations 2011 and Guidelines as may be issued from time to time by the Minister of Mines and Steel Development and the Director-General of the Nigeria Mining Cadastre Office (MCO) respectively.

Apart from the statutory and regulatory provisions, English Common Law, Equity and Statutes of General Application are important sources of the Nigerian law.

Which government bodies administer mining law

The administration of the mining industry is vested in the Ministry of Mines and Steel Development (MMSD), operating through the following four departments:

- Mines Inspectorate Department;
- Mines Environment and Compliance ;
- Mining Cadastre Office ; and
- Artisanal and small-scale Mining Department.

Mining Cadastre Office (MCO)

The functions of the MCO include, but not limited to, the following:

- Consider applications for mining titles and permits;
- Issue, suspend and may revoke mining titles, subject to government's rules and regulations;
- Receive and dispose applications for transfer, renewal, modification and relinquishment of mineral titles;
- Maintain a chronological record of all applications for mineral titles in a priority order; and
- Maintain a register, and a general registry book.

## TYPES OF AND MANNER OF ACQUISITION OF RIGHTS

What rights are granted to conduct reconnaissance, exploration and mining operations

The followings are the types of mineral titles and rights granted by the MCO:

- Reconnaissance Permit - This enables the holder to carry out reconnaissance on non-exclusive basis in an environmentally and socially responsible manner and compensate for any damage to crops or property in the course of prospecting. This does not permit the holder to engage in drilling, excavation or other sub-surface techniques;
- Exploration Licence- - An exploration licence is issued/granted within 30 days upon receipt of a valid application by the MCO. This licence will not be granted over any land that is subject of an existing Exploration Licence, Mining Lease, Small Scale Mining Lease, Quarry Lease or closed to prospecting/mining activity (e.g forest reserves, military areas, government development areas, national heritage area etc);
- Mining Lease - A mining lease confers on the holder (among other rights) the right to obtain access and enter the mining lease area, the exclusive use, occupation and the carrying out of mineral exploitation within the mining lease area. Mining Lease will not be granted in respect of any area within an Exploration Licence area or a Small Scale Mining area except to the holder of an Exploration Licence or Small Scale Mining Lease covering such area. The lease area is determined in relation to the ore body as defined in the feasibility study submitted in respect of the Mining Lease together with an area reasonably required for the workings of the mineral resources;
- Quarry Lease - A quarry lease confers on its holder the right to carry out quarrying operations on the land within the area of the lease and to remove and dispose of any quarriable mineral specified in the lease. A quarry lease is granted in respect of a land area not exceeding 5 square kilometres and covers a 5 year period unless renewed; and
- Water Use Permit - The area of land in respect of which any water use permit is granted shall not exceed the area reasonably required for the purpose of the permit.

## OIL AND GAS

What rights are granted to conduct oil and gas exploration and production

Concessions

The Minister of Petroleum is empowered to grant:

- oil exploration licence, to explore for petroleum;



- oil prospecting licence, to prospect for petroleum; and
- oil mining lease, to search for, win, work, carry away and dispose of petroleum.

#### Production Sharing Contracts (PCS)

The essence of PSC is that Nigerian National Petroleum Corporation (NNPC) engages a competent contractor to carry out petroleum operations on NNPC's wholly held acreage. The contractor undertakes the initial exploration risks and recovers his costs if and when oil is discovered and extracted.

This policy is designed to transfer exploration risks and funding of exploration and development efforts on new acreage to the interested oil companies.

Under the PSC, the contractor has a right to only that fraction of the crude oil allocated to him under the cost oil (oil to recoup production cost) and equity oil (oil to guarantee return on investment). He can also dispose of the tax oil (oil to defray tax and royalty obligations) subject to NNPC's approval.

#### Service Contracts

The Service Contract could be Risk- Service, Pure-Service or Technical Assistance Agreement. In the Risk-Service arrangement, the host country owns the concession covered by the arrangement as well as the petroleum discovered while all risks are borne by the oil company who is employed as a contractor in a certain area and for a specific period. The contractor provides the upfront money and furnishes the technical expertise for the operations and only gets fully reimbursed from the sale of the concessions of oil production. This type of contractual arrangement is successful where there is commercial discovery or upon other contractual terms.

The Pure Service contract or Technical Assistance Agreement is a simple contract of work. All risks are borne by the government and the contractor performs its stipulated services and is paid fees for his services.

#### Joint venture agreements

Also known as Joint Operating Agreements (JOA) is the basic, standard agreement between the NNPC and the operators. Under JOA, One of the partners is designated the operator. The NNPC reserves the right to become an operator. All parties are to share in the cost of operations. Each partner can lift and separately dispose its interest share of production subject to the payment of Petroleum Profit Tax (PPT) and Royalty. The operator is the one to prepare proposals for programme of work and budget of expenditure joint on an annual basis, which shall be shared on share holding basis.

Each party can opt for and carry on sole risk operations. Technical matters are

discussed and policy decisions are taken at operating committees where partners are represented on the basis of equity holding.

Please see the manner of acquisition of rights described above. Applicants for any of the Licences/lease in oil and gas industry are required to submit their relevant application(s) to the Department of Petroleum Resources (DPR) before they are granted right to explore oil and gas Licences/Lease. The primary law in this area is the Petroleum Act Cap P 10, Laws of the Federation of Nigeria, 2004.

In addition, an applicant for mineral rights is required to apply to MCO for such right. Please note that the principal law that regulates mining in Nigeria is the Nigerian Minerals and Mining Act, 2007.

#### INDIGENISATION REQUIREMENTS

Are there any requirements in relation to the holding of equity in exploration and mining projects by indigenous peoples

No. The general principle of local content policy mandates foreign investors who engage in certain industries to engage the services of Nigerians/Nigerian Companies in carrying out their business operations.

Are there any Special Rules or Restrictions Applicable to Foreign Applicants

Yes there are. The Mineral and Mining Act stipulates that a qualified applicant for a Reconnaissance Permit, an exploration Lease, a Small Scale Mining Lease and a Quarry Lease must be:

- A citizen of Nigeria with legal capacity and who has not been convicted of a criminal offence;
- A body corporate duly incorporated under the Companies and Allied Matters Act; or
- A mining Cooperative.

For a mining Lease, a qualified applicant must be a body corporate duly incorporated under the companies and Allied Matters Act or any other legal entity that has demonstrated, under conditions stated in the Regulations that a commercial quantity of mineral resources exists in the area.

No special rules. It is however a prudent business decision to have at least a Nigerian as shareholder.

Identify any rights that the State may have. Does the State have any rights to equity in mining projects.

The state does not have any free- carry or contributory rights in mining projects.





## PROCESSING AND BENEFICIATION

Are there any requirements to beneficiate minerals mined

No. Please note that persons eligible for the fiscal regime under the Nigerian Minerals and Mining Act, 2007 include companies or enterprises engaged in mining operations in Nigeria.

The Act provides for the following fiscal and tax incentives

A licence holder is entitled to deduct from its assessable profits a Capital Allowance of 95% of Qualifying Capital Expenditure incurred in the year in which the investment was made on all certified exploration, development and processing expenditure including feasibility study and sample assaying cost.

Infrastructure costs incurred regardless of ownership or replacement

The amount of any loss incurred by a licence holder shall be deducted as far as is possible from the assessable profits of the first year of assessment after that in which the loss was incurred and in so far as it cannot be so made then from such amounts of such assessable profits of the next year of assessment and so on up to a limit of four years after which period any unregistered loss shall become lapse.

All operators shall be granted the following benefits:

- Exemption from payment of customs and import duties in respect of plant, machinery, equipment and accessories imported specifically and exclusively for mining operations;
- Expatriate quota and resident permit in respect of the approved expatriate personnel; and
- Personal remittance quota for expatriate personnel, free from any tax imposed by any enactment for the transfer of external currency out of Nigeria.

The machinery, equipment and accessories to be imported shall be approved by the Mines Inspectorate Division. The plant, machinery, equipment and accessories imported pursuant to this section may be disposed of by the holder of Mineral Title upon full payment of customs and import duties in respect thereof.

The Central Bank of Nigeria (CBN) may permit a holder of a Mineral Title who earns foreign exchange from sale of his minerals to retain in a foreign exchange domiciliary account a portion of his earnings for use in acquiring spare parts and other inputs required for the mining operations which would otherwise not be readily available without the use of such earnings.

The Act also guarantees free transferability of funds through the CBN in convertible currency of payments in respect of loan servicing where a certified foreign loan has

been obtained by the holder for his mining operations. The remittance of foreign capital in the event of sale or liquidation of the mining operations or any interest therein attributable to foreign investment.

The Act provides a tax relief period of 3 years for any company granted a Mineral Title under the Act. The tax relief period may be extended for a further period of 2 years by the Minister on the fulfilment of certain conditions. The tax relief period commences on the date that the licence holder commences operations.

Section 30 of the Act provide for deductibility of environmental cost. It specifically states that:

- A tax deductible reserve for environmental protection, mine rehabilitation, reclamation and mine closure costs shall be established by companies engaged in the exploitation of mineral resources, provided however, that the appropriateness of the reserve is certified by an independent qualified person taking into account the determination made under the provisions of this Act;
- the reserve is recorded in the audited financial statements of the companies;
- tax deductibility will be restricted to actual amount incurred for the purpose of the reclamation; and
- a sum equivalent to the reserve amount is set aside every year and invested in dedicated account or trust fund managed by independent trustees appointed pursuant to the provisions of the Act.

Section 32 provides for Annual Capital Cost Indexation. It states that the unclaimed balance of capital cost shall be increased yearly by 5 percent for mines that start production within 5 years from the date of enactment of the Mining Act.

The Act provides that any mineral obtained in the course of exploration or mining operations shall be liable to pay royalty as prescribed in any regulations made under the Act. However, the Minister may also defer the payment of royalty on any minerals for a specific period, on the approval of the Federal Executive Council.

Are there any restrictions on the export of minerals  
Yes. The applicant will apply to the MCO for a permit to export minerals. The application is accompanied a list of minerals to be exported and the destination. The fees for exporting minerals for commercial purpose is N10,000 whilst N1,000.00 is paid for a permit to export minerals and samples for analysis purposes.

## DISPOSALS OF RIGHTS AND CONTROLLING INTERESTS

Are there any statutory consents required to dispose of rights to explore and mine

Yes. The holder of such right is required to seek and obtain the consent of the Minister before disposal of such right and same will be registered with the Mining Cadastre Office.

Are there any restrictions on disposals of controlling interests in entities holding exploration or mining rights

The holder of Mineral Licence/lease is required to seek and obtain the consent of the Minister before disposal of such right and same will be registered with the Mining Cadastre Office. In practice, disposal of controlling interest in entities holding exploration or mining rights is another way of transferring the exploration or mining right and as such will require the consent of the Minister.

Please note that section 147(10) of the Nigerian Minerals and Mining Act No. 20, 2007 provides that no title mineral or rights therein shall be assigned to a person to whom that mineral title could not have been granted under the Act.

In view of our response in 6.2 above, please note that the mineral title holder shall make an application for approval of the transfer of a mineral title to the MCO in the prescribed form.

In the application for a transfer of a mining title, the holder shall provide to the MCO such details of the assignment or transfer as may be required together with any other information that the MCO may require.

The MCO shall approve a transfer of a mineral title under this section if the transferee is a qualified applicant, provided that the application for transfer shall be deemed automatically approved if not acted upon by the MCO within 30 days from the official receipt thereof.

Please note that no title mineral or rights therein shall be assigned to a person to whom that mineral title could not have been granted under the Act.

## USE OF SURFACE OF LAND INVOLVED IN PROSPECTING AND MINING ACTIVITIES

What are the rights of the holder of an exploration right or mining right to use the surface necessary or incidental to an exploration or mining operation

Please see our response above.



Exploration right enables the holder (among other rights) to obtain access and enter the mining lease area, for the exclusive use, occupation and carrying out of mineral exploitation within the mining area.

## ENVIRONMENTAL

What legislation governs environmental protection of exploration and mining sites

- Environmental Impact Assessment Act E12, Laws of the Federation of Nigeria 2004;
- The Nigerian Minerals and Mining Act No. 20, 2007; and
- Nigerian Minerals and Mining Regulations 2011.

The environmental impact assessment Act provides that any person planning a project/activity which may likely or to a significant extent affect the environment or have an environmental effect on those activities is statutorily required to prepare an Environmental Impact Assessment Report, and the Report must set out the potential impact of the activity on the environment and plans for preventing/mitigating the same. In addition, the public or private sector of the economy shall not undertake or embark on or authorise projects or activities without prior consideration of the effect on the environment.

## NATIVE TITLE AND LAND RIGHTS

Is there any native title which has any implication for the exploration and mining industry

Yes. Under the provision of Land Use Act, (LUA) Cap L5, Laws of the Federation, 2004, a Governor of a State is empowered to revoke a statutory or customary right of occupancy granted over a parcel of land for mining purposes. In addition, section 22 of the Nigerian Minerals and Mining Act, 2007 provides that the use of land for mining operations shall have a priority over other uses of land.

Section 1(2) of the Nigerian Minerals and Mining Act No. 20, 2007 provides that all lands in which minerals have been found in commercial quantities shall, from the commencement of this Act be acquired by the government of the federation in accordance with the provisions of LUA.

The Act also recognises the fact that mining operations will one way or the other affect the wellbeing of the aborigines of the land upon which mineral title is granted. The Act mandates the holder of a mining lease, small scale mining lease or quarry lease to, prior to the commencement of any development activity within the lease area, conclude with the host community where the operations are to be conducted an agreement referred to as a Community Development Agreement or other such agreement that will ensure the transfer of social and economic benefits to the community.

Section 29 of LUA provides for compensation to be paid to the titleholder of a land where such title is revoked by a State Governor for mining purposes. Section 107 of the Nigerian Minerals and Mining Act No. 20, 2007 also makes provision for the payment of compensation to the Mineral

Title holder to the title holder of the land acquired for mining purposes this is in addition to any other amounts payable

## HEALTH AND SAFETY

What legislation governs health and safety in mining  
The Nigerian Minerals and Mining Act No. 20, 2007 and Regulations made pursuant to the Act.

## CONSTITUTIONAL AND ADMINISTRATIVE LAW

Is there a constitution which has an impact upon rights to prospect and mine

Yes. Section 44(3) of the Constitution of the Federal Republic of Nigeria (as amended) 1999 provides that "Notwithstanding the foregoing provisions of this section, the entire property in and control of all minerals, mineral oils and natural gas in under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly."

Are there administrative appeals in the mining law

Yes. Section 17 of the Nigerian Minerals and Mining Regulations 2011 provides that any person aggrieved by any decision of the Ministry or any of its agencies on any application or matter under these Regulations, may within seven days after being notified of the decision, appeal to the Minister for a review.

The Minister may set up a committee to consider the appeal and forward to him a report which shall include its findings and recommendation.

On receiving the report, the Minister may uphold, set aside or vary the decision complained of.

A notice of the Minister's decision on the appeal may be sent to the parties within seven days of the receipt however, any delay to issue the notice will not nullify the decision of the Minister.

The mineral title holder if not satisfied with the outcome of the appeal to the Minister, may seek redress from the Federal High Court.

## ROYALTIES AND TAXES

Are there special rules applicable to taxation of exploration and mining companies

Yes. There are rules applicable to taxation of exploration and mining companies. Under the Nigerian Minerals and Mining Act 2007, a licence holder enjoys a three year tax relief period from the date of the commencement of mining operations. At the end of the tax relief period, the Minister may also extend the period for one further period

of two years for any Mineral title holder.

In addition, there are certain statutory incentives given to licence holders which include the following:

- deduction from their assessable profits capital allowance of 95% of qualifying capital expenditure incurred in the year in which the investment is incurred;
- all certified exploration, development and processing expenditure, including feasibility study and sample assaying costs; and
- all infrastructure costs incurred regardless of ownership and replacement
- exemption from payment of customs and import duties in respect of plant, machinery, equipment and accessories imported specifically and exclusively for mining operations
- Personal remittance quota for expatriate personnel, free from any tax imposed by any enactment of the transfer of external currency out of Nigeria;
- a holder of a mineral title is guaranteed free transferability through the Central Bank in convertible currency payment of a certified foreign loan obtained in respect of its mining operations in Nigeria and the remittance of foreign capital in the event of sale of liquidation of the mining operations or any interest therein attributable to foreign investment.

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

Yes. Any mineral obtained in the course of exploration or mining operations is liable to pay royalty as prescribed by the regulation made under the Act.

# SENEGAL

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## What Laws Regulate Mining

In Senegal, mining activities are currently regulated by the following laws:

- Reglement 18/2003/CM/WAEMU dated December 23, 2003 being the Community Mining Code of the Country members of the West African Economic and Monetary Union (WAEMU);
- Mining Law n° 2003-36 dated November 24, 2003 (local law);
- Executive Decree of above-mentioned Law 2003-36 n°2004-647 dated May 17, 2004.

The above-mentioned legislation is in the process of being amended and a new one will be further enacted.

## Which Government Bodies Administer Mining Law

The Direction of Mining (Direction en charge des Mines) of the Ministry of Mining is the relevant Government Department involved in processing applications]

## Types of and Manner of Acquisition of Rights

What rights are granted to conduct reconnaissance, exploration and mining operations

Under the Mining regulation, the rights that can be granted in order to conduct mining activities are as follow:

### Reconnaissance (or Prospection)

This right to conduct investigation on the structure of the surface or sub-surface can be granted to natural or corporate body either national or foreigner.

This permit that can be given to conduct reconnaissance in the whole territory for 6 months renewable once.

The holder of a reconnaissance permit shall have a non-exclusive right to L'autorisation de prospection confère à son titulaire un droit non exclusif right to investigate on the target minerals.



However that right does not include the right to any other mining title or the right to dispose minerals that can be discovered.

The permit cannot be assigned, transferred or given as a security.

## Exploration

This mining title relates to investigation that aims at discovering deposits of minerals substances, defining their limits, assessing their structure, importance and conditions of exploitation.

Exploration title can be granted to natural or corporate body either national or foreigner.

This exploration phase includes but is not limited to geological, geophysical, geochemical works, chemical analysis, feasibility survey

The exploration permit is granted for a period that cannot exceed 3 years by a Ministerial Order to be issued by the Minister in Charge of Mining provided the rights prior granted to third parties on the same perimeters.

The permit can be renewed twice pursuant to a Ministerial Order of the Minister in Charge of Mining for consecutive periods that cannot exceed 3 years at each time provided the observation of the provision of the mining law and the mining convention.

At each renewal the granted land shall be reduced to one quarter at least

In the event of application for a renewal, extension or change of the exploration permit is made in accordance with the Mining Law, then the validity of the permit shall be extended by right until a decision on the application is taken.

The duration of the second renewal can be extended exceptionally for a period that cannot exceed 3 years if it is of interest for the Government.

The permit give to the bearer an exclusive right of exploration of minerals within the allotted perimeter and in addition, provided to comply with his/her obligation the right to :

- take samples;
- an exploitation or concession permit ;
- a priority for another exploration permit for any other minerals discovered within his/her allotted perimeter in the course of validity of the first granted permit;
- exclusif right to operate the found deposit of minerals provided that discovery happened within the period of validity of the exploration permit;
- if the deposit is not commercially viable, the bearer of the permit can solicit to be given a retention right for a period that cannot exceed 2.

The exploration permit can be assigned or transferred provided an approval of the Minister of Mining.

## EXPLOITATION

Exploitation title or and mining concession are the permit granted in order to operate and dispose of minerals.

The permit is given by Decree for a period that cannot exceed 5 years renewable. Mining concession is granted for a period of minimum 5 years that cannot exceed 25 years renewable.

L'octroi d'un titre minier d'exploitation entraîne l'annulation du permis de recherche à l'intérieur du périmètre d'exploitation. Toutefois, subsistent les droits de recherche antérieurement détenus sur le reste du périmètre dudit permis de recherche jusqu'à son expiration.

The duration of the permit can be extended in the same terms and conditions of the initial permit .

It can be renewed by decree for one or several periods that cannot exceed 5 years at each time.

Concession can be renewed for a period not exceeding 25 years at each time.

The permit provides the following right:

- exclusif right to operate and dispose of the minerals;
- right to renewal and extension;
- land use;
- right to solicit the change of the permit in the event important additional minerals are found within the allotted;
- real estate right different from ownership that are likely to be given as security;
- right to assign and transfer the title;
- right to transport the minerals or sell the same locally or abroad; and
- right to stable legal, fiscal, administrative etc terms and conditions of stipulated in the mining convention.

## OIL AND GAS

What Rights are Granted to Conduct Oil and Gas Exploration and Production

The right granted for Oil & Gas are identical to those of the mining.

## INDIGENISATION

Are there any Requirements in Relation to the Holding of Equity in Exploration and Mining Projects by Indigenous Peoples

The Government is to be awarded for free 10% of the equity of the resource company that will have to operate the exploitation. The Government can also negotiate with

the private investor another percentage of equity.

Are there any Special Rules or Restrictions Applicable to Foreign Applicants

No, there aren't.

Identify any Rights that the State May have. Does the State have any Rights to Equity in Mining Projects

The Government is to be awarded for free 10% of the equity of the resource company that will have to operate the exploitation. The Government can also negotiate with the private investor another percentage of equity.

## PROCESSING AND BENEFICIATION

Are there any Restrictions on the Export of Minerals

Yes see above.

## DISPOSALS OF RIGHTS AND CONTROLLING INTERESTS

Are there any Statutory Consents Required to Dispose of Rights to Explore and Mine

See above.

Are there any Restrictions on Disposals of Controlling Interests in Entities Holding Exploration or Mining Rights

See above.

## USE OF SURFACE OF LAND INVOLVED IN PROSPECTING AND MINING ACTIVITIES

What are the Rights of the Holder of an Exploration Right or Mining Right to use the Surface Necessary or Incidental to an Exploration or Mining Operation

See above.

## ENVIRONMENTAL

What Legislation Governs Environmental Protection of Exploration and Mining Sites

The permit must be used in respect of any environment requirement imposed either by the Mining law or the Environment Code in addition to the fact that an environment impact survey is to be first conducted.

## NATIVE TITLE AND LAND RIGHTS

Is there any Native Title which has any Implication for the Exploration and Mining Industry

Save the case of possible extension, the land belong to the State or local community. However before granted any permit the Government used to make sure that appropriate land is allotted.

## HEALTH AND SAFETY

The Mining Law provide an obligation to ensure health and safety of individuals

and goods (things).

## CONSTITUTIONAL AND ADMINISTRATIVE LAW

Appeals are provided pursuant to general applicable to the administration

## ROYALTIES AND TAXES

Currently mining companies are tax and custom duties exempted but the regulation may change.

Yes, but the very current low royalties are subject to a process of being changed in the new legislation to come.

# SOUTH AFRICA

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## What laws regulate mining law

South African Mining Law is regulated by the Mineral and Petroleum Resources Development Act, 28 of 2002 ("MPRDA") which is the predominant piece of legislation dealing with acquisitions or rights to conduct reconnaissance, prospecting and mining. The MPRDA became effective on 1 May 2004 and substitutes the erstwhile hybrid system of a common law system with statutory interference. There are several other pieces of legislation which deal with such ancillary issues such as royalties (the Mineral and Petroleum Resources Royalty Act, 2008), title registration (the Mining Titles Registration Act, 1967), and health and safety (the Mine Health and Safety Act, 1996).

## Which Government body/ies administer mining law

The mining industry in South Africa is administered by the Department of Mineral Resources, the head office of which is situated in Pretoria South Africa and each of the nine regions of South Africa have regional offices of the Department of Mineral Resources. There is also a mine health and safety inspectorate which falls under the auspices of the Department of Mineral Resources. In addition there is a Director-General and a Deputy Director-General both of whom have delegated powers down from the Minister to take various decisions as delegatee of the Minister.

## TYPES OF AND MANNER OF ACQUISITION OF RIGHTS

### What rights are required to conduct reconnaissance

Reconnaissance is defined in South African law as "any operation carried out for or in connection with the search for a mineral or petroleum by geological, geophysical and photo-geological surveys that includes any remote sensing techniques but does not include any prospecting operations other than acquisition and processing of new seismic data". In order to conduct a reconnaissance an applicant needs to apply for a reconnaissance permission to the DMR and demonstrate that the applicant has financial resources, technical ability and has lodged a

reconnaissance work programme. Such rights are valid for one year and are not renewable or transferable. The holding of a reconnaissance permission does not grant any exclusivity to apply for, or be granted, a prospecting right or a mining right.

### What rights are required to conduct exploration

In South African law there is a distinction between prospecting and exploration. Prospecting relates to searching for minerals other than petroleum. In order to conduct prospecting for minerals (other than petroleum), an applicant has to apply for and be granted a prospecting right. In order to procure the grant the applicant must apply for an environmental authorisation and consult with interested and affected parties, including land owners and lawful occupiers. The Minister is obliged to grant the prospecting right if the applicant has access to financial resources and technical ability, can conduct the prospecting in accordance with the prospecting work programme and if the prospecting will not result in unacceptable pollution, degradation or damage to the environment. Prospecting rights are granted for a maximum period of 5 years and are renewable once for period of up to 3 years. The holding of a prospecting right grants exclusivity to the holder in regard to an application for a mining right.

### What rights are required to conduct mining

A person wishing to conduct mining for minerals (other than petroleum) needs to apply for a mining right in terms of the MPRDA. In order for the application to be granted, the applicant has to lodge an application for an environmental authorisation and consult with interested and affected parties, including land owners. The Minister must grant the right if the mineral can be mined optimally, the applicant has access to financial resources and technical ability and the mining will not result in unacceptable pollution, ecological degradation or damage to the environment. Furthermore, the applicant has to lodge a mining work programme and a detailed social and labour plan. A mining right is granted for a maximum period of 30 years provided that the holder is entitled to apply for renewal for periods not exceeding 30 years.

## OIL AND GAS

### What rights are required to conduct oil and gas exploration and production

Exploration relates to searching for petroleum. Petroleum relates to liquid, solid hydrocarbons or combustible gas but excludes coal and bituminous shale. In regard to petroleum an applicant has to apply for exploration rights in terms of the Petroleum Chapter of the MPRDA. In regard to production an applicant has to apply for a production right in terms of the Petroleum Chapter of the MPRDA.



## INDIGENISATION REQUIREMENTS

Are there requirements for ownership by indigenous persons or entities

There are no requirements for foreign ownership by indigenous persons or entities in entities holding prospecting rights or mining rights in South Africa. However, there is a requirement that at least 26% of the attributable units of production of prospecting or mining projects should be held by historically disadvantaged South Africans. A mining charter dealing with the transformation of the mining industry to assist the entrance of historically disadvantaged South Africans into the minerals and mining industry applies to all holders of prospecting rights and mining rights. A mining charter was published in 2004 when the MPRDA came into effect but has been substituted by an amended mining charter in 2010.

Are there special rules for foreign applicants

There are no special rules in South Africa in regard to foreign applicants. They have to comply with exactly same criteria for the grant of a right as an indigenous applicant. Prospecting rights and mining rights in South Africa can be held by foreign entities, whether natural or juristic. If a foreign company conducts business in South Africa it would have to register at least as an external company in terms of the Companies Act.

State Equity

The State does not have free carry rights in relation to prospecting or mining projects, nor rights to acquire shareholdings. There is a State owned mining company which itself applies for prospecting rights or mining rights in accordance with the MPRDA.

In the petroleum industry, it is common in exploration rights and prospecting rights for the parties to agree that the State shall have an entitlement of a free carry (up to 5%) and options to acquire further shareholding provided that such shareholding will be contributory. The Amendment Bill referred to in paragraph 3.2 above provides for a 20% free carry in favour of the State with an option to acquire a contributory interest of up to 100%.

## PROCESSING AND BENEFICIATION

Are there special regulatory provisions relating to processing and further beneficiation of mined minerals

The MPRDA provides that before any person intends to beneficiate any mineral mined in the Republic of South Africa outside the Republic, the holder may only do so after written notice and in consultation with the Minister. The holder of a mining right is entitled to process minerals mined under the auspices of a mining right as the holder of a mining right. However, there are further statutory



provisions that are applicable to processing of precious metals and diamonds and these requirements are regulated by the Precious Metals Act, 2005 and the Diamonds Act, 1986 respectively.

The Amendment Bill referred to in paragraph 3.2 above provides that every producer of designated minerals must offer to local beneficiators 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.

Are there restrictions on the export of minerals

There are restrictions on the export of certain minerals, such as diamonds in terms of the Diamonds Act, 1956 and precious metals in terms of the Precious Metals Act, 2005. Precious metals includes gold, silver and the platinum group metals. A permit is required to export and export levies are imposed.

The Amendment Bill referred to in paragraph 3.2 above provides that no person other than a producer that has offered local beneficiators the prescribed percentage of its production of minerals may export designated minerals or mineral products without the Minister's prior written approval.

## DISPOSALS OF RIGHTS AND CONTROLLING INTERESTS

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

The MPRDA contains restrictions on the ability to transfer reconnaissance rights, prospecting rights, mining rights, exploration rights and production rights. The transfer of these or any interest in these through any method of disposal requires the prior written consent of the Minister of Mineral Resources. The Minister is obliged to grant such consent if the transferee satisfies the criteria for the grant of a right in the first place. Disposals are given effect to by cessations of rights which are capable of being registered in the Mining Titles Office.

Are there restrictions on disposals of controlling interests in the entities holding exploration or mining projects

There are change of control restrictions applicable. A disposal of a controlling interest in the company holding a prospecting or mining right requires the prior consent of the Minister. This does not apply to listed entities. The wording in the MPRDA regarding disposals of controlling interests is wide enough probably also to include the changes in controlling shareholding of ultimate holding companies even offshore. There is a recent amendment to the MPRDA which has been approved by Parliament but has not yet become force of law which will provide for a disposal of any interest in a company holding a prospecting right or mining right requiring the prior written consent of the Minister provided that this restriction will only apply



for a disposal of a controlling interest in the case of a listed entity.

## RIGHTS TO USE SURFACE OF LAND

What are the rights of the holder of a right to conduct reconnaissance, exploration or mining to use the surface of land

The rights to use the surface of a holder of a right to conduct reconnaissance, exploration or mining in terms of the MPRDA are extensive. The holder may:

- enter the land to which such right relates, bring his or her employees onto the land and bring any plant, machinery or equipment or build or construction or lay down any surface, underground or undersea infrastructure which may be required for purposes of exploration or mining;
- prospect or mine for his own account;
- remove and dispose of such mineral;
- use water in relation to prospecting or mining activities; and carry out any other activity incidental to exploration or mining.

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 has duties towards the landowner or lawful occupier in terms of consultation, and the holder of a prospecting right or mining right has to compensate the landowner for loss or damage suffered as a result of the conduct of prospecting or mining activities. It is not necessary for the holder of a prospecting right or mining right to purchase land or even enter into an agreement to use the land with the surface owner.

## ENVIRONMENTAL

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

Currently the holder of a prospecting right or mining right is required to have an approved environmental authorisation, prior to the conducting of the relevant activities. In addition, the right to use water is governed by the National Water Act, 1998.

What provisions need to be made for the closure of mines  
The holder of a prospecting right or mining right must furnish during all stages of the project sufficient pecuniary provision for rehabilitation which is reassessed on an annual basis. This is done in terms of a deposit with the DMR, bank guarantee or a trust deed. The principle of pecuniary provision is that there must be sufficient funds at all times in the hands of the DMR apart from the mining company to attend to rehabilitation if there is a premature closure of the mine.

What are the closure obligations of the holder of a reconnaissance right, exploration right or mining right  
The holder of a prospecting right or mining right must apply for a closure certificate within 180 days of ceasing the relevant operation and lodge a closure plan. Furthermore the holder of a prospecting or mining right must comply with all aspects of the environmental authorisation approved in relation to the prospecting right or mining right in regard to closure.

Are there any zoning requirements applicable

Zoning requirements may be applicable and required to be obtained over and above the prospecting right or mining right if there are zoning restrictions in the applicable area. There may be a town planning scheme having application over the relevant area which restricts prospecting or mining without a rezoning application.

## NATIVE TITLE AND LAND RIGHTS

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

Native title or other statutory surface use rights do not have a material impact upon reconnaissance, exploration or mining operations. Holders of such rights would be in the same position as any landowner or lawful occupier in regard to consultation by applicants and holders of prospecting rights or mining rights and the right to receive compensation in the case of damage or loss. Communities owning land do have preferent rights to apply for rights to prospect or mine. Furthermore if any application for a mining right relates to land occupied by a community the Minister may impose such conditions as are necessary to promote the rights and interests of the community.

## HEALTH AND SAFETY

What legislation governs health and safety in mining

There is a separate piece of legislation dealing with health and safety in mining, namely the Mine Health and Safety Act, 1996. Previously, mine health and safety was dealt with in the same ambit as the relevant mining law, namely the Minerals Act, 50 of 1991 but it was removed and placed in a separate piece of legislation as the purpose of the two pieces of legislation is often in conflict.

Are there obligations imposed upon owners, employers, managers and employees in relation to health and safety  
There are extensive obligations imposed upon owners, employers, managers and employees in relation to health and safety, including in relation to statutory appointments, liability, committees, inquest and enquiries.

## ADMINISTRATIVE AND CONSTITUTIONAL ASPECTS

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. One has to exhaust the internal remedies before going to court to set aside an administrative decision on review in terms of the High Court rules. Appeals have to be brought within 30 days of gaining knowledge of the relevant decision.

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

There is a Constitution in South Africa of 1996 which has an impact upon rights to conduct reconnaissance, exploration and mining. Section 25 of the Constitution protects property from being expropriated without just and equitable compensation; property would include prospecting rights or mining rights and is not limited to land. The law must be of the general application and there should be no arbitrary deprivation. It must also be for a public purpose or public interest.

## TAXES AND ROYALTIES

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. To qualify as a mining company, one has to hold a prospecting right or a mining right granted in terms of the MPRDA.

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 based on an earnings before interest and tax formulation.

# TANZANIA

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## What laws regulate mining

The principal legislation regulating mining is the Mining Act, No-15 of 2010 ("the Mining Act"), as well as regulations made under the Act concerning mineral rights, environmental protection, mineral beneficiation, safety and occupational health, mineral trading and mining of radioactive material.

## Which Government Bodies administer mining law

The mining industry is administered by the Ministry of Energy and Minerals. The chief officer relating to mining regulation is the Commissioner for Minerals, a presidential appointee whose responsibility is to oversee the effective implementation of the provisions of the Mining Act. The Minister has a role to play as well, specifically concerning grant of mining licences and related matters. There is a Mining Advisory Board constituted under the Mining Act, with responsibility, among others, to advise the Minister on matters relating to the Mining industry.

The Commissioner of Mines is responsible for the processing of licences applications but Zonal Mines Offices in the regions (under the Ministry) may also be involved in the process.

## TYPES OF AND MANNER OF ACQUISITION OF RIGHTS

What rights are granted to conduct reconnaissance, exploration and mining operations

The Mining Act does not contain provision for a right to conduct reconnaissance. A Prospecting Licence is required to conduct exploration. However, exploration activities may also be undertaken under the various mining licences in addition to mining operations. Under mining operations, there are four categories of mining licence. There are Special Mining Licence (SML), Mining Licence (ML), Gemstone Mining Licence (GML) and a Primary

Mining Licence (PML). SML are issued in respect of large scale mining operations whose capital is not less than USD 100,000,000.00 while a ML is one relating to medium-scale mining operations whose capital investment is between USD 100,000 to 100,000,000.00. GML are reserved for Tanzanian citizens except in the case of joint ventures where 50 per cent of the joint venture interest is controlled by a Tanzanian and PMLs are also restricted to Tanzanian citizens only.

## OIL AND GAS

What rights are granted to conduct oil and gas exploration and production

The principal legislation regulating the exploration and production of the oil and gas sector in Tanzania is the Petroleum (Exploration and Production) Act, 1980 ("the Act"). This Act is due to be amended. The property of all petroleum resources found in reserves is vested in the Government of the United Republic of Tanzania.

A person may make an application for the grant of an exploration licence in respect of any block or blocks. The Minister of Energy and Minerals may, by notice published in, the Government Gazette invite applications for the grant of an exploration licence in respect of the block or blocks specified in the notice and specify the period during which an application may be made. An exploration licence, while it remains in force, confers on the registered holder of the licence, subject to the Act and to the conditions specified in the licence the exclusive right to explore in the exploration area for petroleum, and to carry on such operations and execute such works as are necessary for that purposes. A development licence confers registered holders exclusive right to carry exploration operation in the development area, and to sell or otherwise dispose, of the petroleum recovered.

## INDIGENISATION REQUIREMENTS

Are there any requirements in relation to the holding of equity in exploration and mining projects by indigenous peoples

There is no indigenous ownership requirement under the Mining Act, except the restrictions of ownership of Primary Mining Licence and Gemstone Mining Licences to Tanzanians.

Are there any special rules or restrictions applicable to foreign applicants

Except in the case of Primary Mining Licence which is restricted to Tanzanians or companies exclusively owned by Tanzanians and Gemstone Mining Licence also restricted to Tanzanians in the case of an individual and if in a partnership or joint venture where a Tanzanian must have a fifty percent interest, there are no special rules

applicable to foreigners.

Identify any rights that the State may have. Does the State have any rights to equity in mining projects

The Mining Act provides that Special Mining Licence holders may enter into a Development Agreement with Government and to agree among other things, the grant of a state free carried interest the rate of which shall be negotiated upon between the Government and the minerals rights holder depending on the type of minerals and level of investment.

## PROCESSING AND BENEFICIATION

Are there any requirements to beneficiate minerals mined

Mineral rights holder are obliged under the Mining Act to set aside a certain amount of minerals for local processing. The Mining (Mineral Beneficiation) Regulations, 2010 provide for further procedures regulating beneficiation of mined minerals.

Are there any restrictions on the export of minerals

The Mining Act prohibits the selling or disposing of or export of any raw gold or gemstones except by holders of a Dealer's Licence. The export or import of any radioactive minerals must be in accordance with the Atomic Energy Act. Holders of mineral rights are not required to have a Dealer's Licence in order to export their minerals.

## DISPOSALS OF RIGHTS AND CONTROLLING INTERESTS

Are there any statutory consents required to dispose of rights to explore and mine

A company holding a mineral right shall not without the prior approval of the Licensing Authority transfer its shares if the effect of the transfer would be to give the transferee control of the company. The law provides that the licensing Authority's consent shall not be unreasonably withheld

Are there any restrictions on disposals of controlling interests in entities holding exploration or mining rights

There is no statutory prescription or restriction concerning the nature of a legal entity holding mineral right. However, in the case of medium and large scale mining operations the nature of the legal entity is traditionally a private limited company, incorporated in Tanzania.

## USE OF SURFACE OF LAND INVOLVED IN PROSPECTING AND MINING ACTIVITIES

What are the rights of the holder of an exploration right or mining right to use the surface necessary or incidental to an exploration or mining operation

A mineral right holder may enter the mining area and take all the necessary action to facilitate exploration or mining,



may erect buildings, and any facility on the licence area and stack or dump mineral waste in the manner provided for in the Environmental Management Plan subject to the consent of various government agencies where the land is used for any public purposes and purposes and the consent of the private lawful occupiers. Surface rights users must be compensated for damage to property or crops and if they have to relocate the cost for relocation and that of properties or crop.

## ENVIRONMENTAL

What legislation governs environmental protection of exploration and mining sites

Application for Special mining Licences, Mining Licences or Gemstone Mining Licences must be accompanied by an environmental impact statement and an environmental management plan. The Minister for Mineral may reject an application if the application for a licence is submitted without an environmental impact statement or an environmental management plan while the applicant is not exempted. Within seven days of the date of submitting the application, applicants are obliged to publish their environmental impact statement in the prescribed manner. The licensing authority shall not issue a licence until the expiry of at least 60 days from the date of application. An application for a Special Mining Licence must be accompanied by the applicant's environmental certificate issued in terms of the Environmental Management Act

## NATIVE TITLE AND LAND RIGHTS

Is there any native title which has any implication for the exploration and mining industry

A mineral right holder cannot enter any occupied land without approval of the surface rights holder including any land that is for public or various government uses such as; national parks, forest reserves, game reserves, conservation areas, municipalities, townships, villagers or private lawful occupiers, and after they have reached agreement for compensation through consultation with the local Government and village council, where applicable.

## HEALTH AND SAFETY

What legislation governs health and safety in mining

The principal regulation governing health and safety is the Environmental Management Act No. 20 of 2004 and its Subsidiary Legislation administered by the National Environmental Management Council. These include, in addition the Occupation Health and Safety Act No. 5 of 2003. Other relevant safety and health regulations include:

- The Environmental (Registration of Environmental Experts) Regulation, 2005
- The Environmental Impact Assessment and Audit

Regulation, 2005

- The Environmental Management (Air Quality Standards) Regulations, 2007
- The Environmental Management (Soil Quality Standards) Regulations, 2007
- The Environmental Management (Water Quality Standards) Regulations, 2007
- The Environmental (Solid Waste Management) Regulations, 2009
- The Environmental (Hazardous Waste Control and Management) Regulations, 2009
- Environmental regulations- Strategic Assessment; and
- Environmental Management (Fees and Charges)

## CONSTITUTIONAL AND ADMINISTRATIVE LAW

Is there a constitution which has an impact upon rights to prospect and mine

The Constitution of the United Republic of Tanzania guarantees the right to private ownership of property and state protection of that property and forbids nationalisation of private property without due process of the law which provides for a fair and speedy compensation.

Are there administrative appeals in the mining law

The Commissioner has powers for the adjudication of disputes between rights holders in relation to themselves or third parties other than the Government. Person aggrieved by the decision of the Commissioner exercising judicial powers under the Mining Act may appeal to the High Court.

## ROYALTIES AND TAXES

Are there special rules applicable to taxation of exploration and mining companies

There is a special fiscal regime for mining companies as detailed below:

- US\$ accounting- mining companies may opt to maintain their accounts in the US\$ currency and their tax liability will be assessed and calculated in US\$.
- Corporate income tax - corporate tax is payable under the Income Tax Act, 2006 (Income Tax Act Revised Edition) at rate not exceeding 30 per cent. Income is computed in the manner set out in the Income Tax Act, as may be amended from time to time.
- Depreciation allowance for capital expenditure - depreciation shall be deducted at a rate of 20 per cent on capital expenditure for exploration and development.
- Loss carry forwards- Losses may be carried forward indefinitely until recovered against income.
- Expenditure on another licence area - expenditure on prospecting and mining operations in respect of another licence area may, for the purposes of ascertaining taxable income, be treated as though it

was expenditure incurred in respect of the mining licences.

- Withholding tax on dividends - withholding tax on dividends is at a rate of 10 per cent
- Withholding tax on interest - withholding tax on the interest on foreign loan is at the rate of 10 per cent and accrued interest is deemed a payment, therefore, withholding tax thereon is payable.
- Withholding tax on payment for technical services and on management fees - withholding tax on the above is capped at the rate of 5 per cent, where the technical service fee, or the management fee is paid to a resident person or 15 per cent on a non-resident person.
- Custom duty and on imports of mining equipment and supplies - import duties under the terms of the Customs Traffic Act by a mining company or its subcontractors are at a zero per cent rate during exploration and in the first year of operation, thereafter will not exceed 5 per cent.
- Value Added Tax - VAT special relief has recently been limited to cover only exploration and prospecting activities, while excise duty exemption were abolished in 2009. Holder of Special Mining Licences may enter into a Development Agreement with the Government which may provide fiscal stability such that the tax regime existing on the date of the Development agreement is frozen creating a stable and predictable fiscal regime over the life of the mine.

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

Royalties are chargeable on the gross back value of minerals produced under licence at the rate of 5% for uranium, gemstone, diamonds and 4 and 3% for metallic minerals including gold and other minerals, respectively. Gross value is defined under the Mining Act to mean, the market value of minerals at the point of refining or sale or in the case of consumption within Tanzania, at the point of delivery within Tanzania.

# TOGO

## AQUEREBURU & PARTNERS

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During the past two decades, the Togolese Government, with the support of bilateral and multilateral (UNDP) aid, has provided significant financial effort to estimate the mining potential of the national subsoil. Much work has been done.

Indeed, between 1977 and 1986, a geological survey of the entire territory was made. Geological maps at 1/200 000 (5 cuts) and a synthesis map at 1/500 000, the results of these works, have been published. They constitute a solid basis for any mining works.

The area of 44 000 km<sup>2</sup> selected following mapping was completely covered by the strategic geochemical prospecting.

Interesting targets have been identified and are proposed for investors. They are diamond, gold, base metals (especially zinc), nickel and platinum.

Mine operators find in Togo, among other favorable conditions:

- Quality geological information, outcome of geological and mining work conducted during almost a secular period;
- Mining code that clearly defines the investors' rights and obligations and which provides, among other benefits, for a free transfer of funds and profits;
- Well-structured institutions (a Ministry of Mines and a Head Office of Mines and Geology) to respond promptly and effectively to all the needs expressed by investors towards the state;
- Apart from the aforementioned promising targets, the Togolese government is also keen to highlight other deposits whose study reached the pre-feasibility stage. These are:
  - Limestone and dolomite in the manufacture of cement and lime;
  - Precambrian phosphates for the amendment of the soil;
  - Clays for ceramics;
  - Glass sand for the production of standard bottles;



- Attapuligites and bentonites for the manufacture of drilling mud, pellets for litter and products for the recycling of waste oil;
- Peat, in the field of domestic and industrial energy and soil amendment;
- Artisanal mining of diamond, gold and alluvial rutile;
- Mining of ornamental stones;
- Mining of rock materials for construction and paving of streets;
- And most recently, the discovery and mining of marble which the deposit, at a height of 12m to the ground, can be mined for centuries.

Finally, in order to promote good governance and transparency in the mining sector, the government of Togo decided in 2009 to join the Extractive Industries Transparency Initiative (EITI). He was accepted as a "Candidate" in October 19<sup>th</sup>, 2010 and declared in 2013 to have met the EITI standard. Following this process, annual reports on payments and revenues from the mining sector are published. Togo has published its first report on 12<sup>th</sup> April 2012.

Mining in Togo is certainly subject to certain obligations, but these are outweighed by many benefits given to mining industries.

## RELEVANT AUTHORITIES AND LEGISLATION

The system of mining law in Togo is governed by the Law N° 96/004 of 26<sup>th</sup> February 1996 amended by the Law N° 2003-012 of 4<sup>th</sup> October 2003 related to Mining Code of the Republic of Togo, and the Law N° 2008-008 of 30<sup>th</sup> Mai 2008 concerning outline law on the environment. The scope of these laws covers the prospecting, exploration, exploitation, holding, treatment, transportation, processing and trading of minerals and geothermal deposits on Togolese territory.

The mining activities are conducted under the authority of the Minister of Energy and Mines.

## TYPE OF MANNER AND ACQUISITION OF RIGHTS

Several types of mining title are granted to conduct reconnaissance, exploration and mining operation in Togo. Their condition of issuance, duration and renewal are defined in the Mining Code. They are:

### The prospecting authorization

#### The rights of the holder

The prospecting authorization holder acquires a non-exclusive right to undertake prospecting for requested minerals in a perimeter the surface of which cannot exceed 10,000 km<sup>2</sup>.

The prospecting authorization is valid for a period of 2 years, renewable twice, each for a term of one year and each time with the abandonment of half of the covered area. The holder also has the right to waive all or part of its authorization.

#### Obligations of the Holder

The grant of prospecting authorization or its renewal is subject to the payment of a fixed fee of 150,000 CFA francs. The holder is also subject to payment of an area royalty of 150 FCFA / km<sup>2</sup>, payable every year in advance. The holder must carry out at least 2/3 of the volume of the planned task and submit quarterly reports. The exploration authorization is not divisible, transferable, susceptible to guarantee and cannot be leased.

#### The license of Research

##### The rights of the holder

The License of research entitles its holder an exclusive right to undertake prospecting and research in a perimeter the surface of which cannot exceed 1 000 km<sup>2</sup>. The license of research is valid for a period of 3 years, renewable twice, each for a term of 2 years with each time by relinquishing half the covered surface. It is transferable with the consent of the Minister of Mines

##### Obligations of the holder

The granting of the Exploration Permit or its renewal is subject to the payment of a fixed fee of 300,000 CFA francs. The holder is also subject to payment of a royalty fee of 2250 FCFA / km<sup>2</sup>. These fees are payable every year in advance. He has the obligation to carry at least 2/3 of the volume of the work and submit quarterly reports. The license of research is not divisible, transmitted, susceptible to guarantee and cannot be leased.

#### The license for Mining

The license for mining can be obtained by the holder of the license of research, who has proved he has found a deposit, or by any other person or entity who fulfills the conditions, and for unallocated deposits.

The license for mining is composed of a small-scale license for investments less than or equal to 300 million CFA francs, and a large-scale License for investments exceeding 300 million CFA francs.

##### The rights of the holder

The License for mining gives its holder the exclusive right to undertake exploration, research and mining for requested minerals, and in an area of which cannot exceed 100 km<sup>2</sup>. The small-scale license is valid for a period of 5 years, renewable several times, each for a period of 3 years. As for the large-scale license, it is valid for a period of 20 years, renewable several times, each for a period of 10 years. The license for mining is assignable, transferable and may be used as security with the discretionary approval of the

Minister of Energy and Mines.

#### The obligation of the holder

The obligation of the holder of the license for mining are stated in the articles 33, 34, 35, 36, 37, 38 and 39 of the Mining Code and include, among others, the conduct of the mining operations, the protection of the environment, safety and matters on the employment and the training of staff.

The license of mining is not divisible and cannot be leased. The grant and renewal of mining license are subject to the payment of a fixed fee equal to 600 000 CFA francs for small-scale license and 7.5 million CFA francs for the large-scale license.

The holders are also subject to the payment of annual surface fees equal to 75 000 CFA / km<sup>2</sup> and 150 000 F CFA / km<sup>2</sup> respectively for the small-scale license and large-scale license, and the payment of mining royalties, according to the following list:

On the production of the holders of mining title:

- Construction materials: 100 CFA for cubic meter (m<sup>3</sup>)
- Industrial Minerals other than phosphates: 1% of the market value
- Non-precious ferrous and non-ferrous metals: 2% of the market value
- Precious metals: 3% of the market value
- Precious and semi-precious stones: 5% of the market value
- Other mineral substances: 2% of the market value
- Phosphates: 2% of the market value

On other production:

Precious metals, precious stones: 1% of the market value

Semi-precious Minerals: 2% of the market value

#### OIL AND GAS

The prospecting and production of oil and gas are given the same rights and obligations as other mining products. However, prospecting and exploitation of oil may be authorized only by an agreement of investment, in the form of a production sharing contract, service contract, concession contract or others (Article 40 of the Mining Code). Let us note that exploitation of oil is not yet effective in Togo.

#### INDIGENISATION REQUIREMENTS AND STATE PARTICIPATION

For the protection of the local population, exploration and mining projects must provide for the resettlement of the natives. Moreover, the mining sites have to be restored at the end of the work. (Environment Law:



Article 60).

It is also noted that under Article 34 of the Mining Code, in case of equal qualification, the holder of a mining title should engage first and foremost the Togolese. Similarly, he will use goods and services of Togolese in the event of equal conditions of competition.

The Togolese State may participate in mining activities: a free participation of 10% of the investment capital. An additional 20% of the investment capital can be planned for the benefit of the state and the private sector in Togo. The rights, obligations and the modalities of this participation will be stated in the investment agreement or contract of association.

#### PROCESSING AND BENEFICIATION

Can benefit from the mining right, any person or entity, Togolese or foreigner, who has got the authorization of the Minister of Energy and Mines.

The export of mineral substances is subject to a commercial license granted by the Minister of Energy and Mines. The holders of the mining title are exempted from this authorization for minerals they mine within the perimeter of their titles. Commercial authorization is valid for two years, renewable several times.

#### USE OF THE SURFACE OF LAND INVOLVING IN PROSPECTING AND MINING ACTIVITIES

The holder of a prospecting or mining title has priority over the owner of the land (Article 29 of the Mining Code). He has the right to take and use for free and without any further authorization all building materials that are in the area from which he holds the title for other substances, provided that the use is done for its own needs, and that it does not market these materials.

#### ENVIRONMENT

The environmental protection in the mining sector is governed by Article 35 of the Mining Code. Under this article, operators must avoid at most any impact detrimental to the environment, in particular pollution of land, air and waters, as well as the damage or destruction of flora or fauna. The Article 59 of the outline law N° 2008-005 of 30<sup>th</sup> May 2008 on the environment updates and strengthens the latter obligation by stating that: "mining or quarry operations should be conducted to ensure the rational and sustainable exploitation of natural resources and protection of the environment. Companies should conduct their work using techniques confirmed of the mining industry and take the necessary measures to prevent pollution of the environment, for the management of waste and conservation of forest, wildlife, fisheries and water resources.

Henceforth, mining is subject to a study of environmental and social impact.



#### NATIVE TITLE AND LAND RIGHTS

Mining is done in respect of land rights of the natives. Indeed, Article 29 of the Mining Code states that the holder of a mining title must not hinder the activities of the owner or the lawful occupier of the soil. He should avoid any possible harm to the safety of these persons and their property and is responsible for any loss or damage suffered by them. The latter will also be compensated for the loss of use of soil or other damages caused by the mining.

However, the holder of a mining license may apply to the government to make the lands necessary for the mining permanently at his disposal. The government will proceed with the expropriation for public utility after a just and prior indemnity of the landowner by the holder of the mining title.

#### HEALTH AND SAFETY

The legislations which govern health and safety in the mining sector are the Mining Code, the Law N° 2006-010 of 13<sup>th</sup> December 2006 concerning the Labor Code, the inter-professional collective agreement of Togo of December 20<sup>th</sup>, 2011 and the collective agreement of mining.

According to these legislations, every company must ensure safety and health services to its employees. To this end, it must make available to caregivers suitable premises, medical equipment, medicine and biomedical consumables

#### CONSTITUTIONAL AND ADMINISTRATIVE LAW

Under the Article 27 of the Togolese Constitution: "The right to property is protected by the law. It cannot be struck a blow unless for public utility legally noted and after prior and just indemnity." If these provisions do not preclude from mining, it is however subject to a prior indemnity of the landowners.

The granting of the mining title remains within the remit of the Minister of Energy and Mines. In case of rejection of the application, no recourse is possible outside the application for reconsideration.

#### ROYALTIES AND TAXES

In terms of royalties and taxes, the Togolese state offers many benefits to economic operators of the mining sector. These benefits are related to economic and taxation sector. They include the following:

- The profits are subject to a tax of 40%, one of the lowest among the countries of the sub region.
- Local minority interest: 10% free participation for the state and paying optional participation up to 20%;
- Exemption from Value Added Tax (VAT), with an average rate of 18%, on all goods imported or purchased on the local market; exemption on the purchase of any mineral substance intended for export;
- Exemption from direct taxes for holders of prospecting authorization, exploration licenses; for



the holder of mining license, exemption up to the date of first commercial production;

- Exemption from all customs duties and taxes on imported equipment for mining, and the exploitation of any mineral substance;
- Free transfer of funds and profits. The investment agreements provide other tax benefits, among others, accelerated depreciation and provision for dealing with potential costs of restoration of mining sites.

Summarily, Togo offers a favorable framework for mining investors. Furthermore, Togo has several mineral resources that are yet to be discovered. Such advantages are likely to facilitate the opening of the mining sector in Togo to sub-regional and international markets.

Similarly, for a broader development of the mining sector, and in compliance with the standards set by the partners, Togo envisages the creation of a single database that will centralize main legal, fiscal, social, economic and financial information of the mining sector.

# UGANDA

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What laws regulate mining?

There are various legislations that govern the mining sector in Uganda. Below is a summary of the key laws:

**The 1995 Constitution of Uganda**

The Constitution vests powers in the Parliament of Uganda to make laws regulating the exploitation of minerals, sharing the royalties arising from mineral exploitation, the conditions of payment of indemnities arising out of exploitation of minerals and conditions regarding the restoration of derelict lands. The Constitution further provides that all minerals are held by the government on behalf of the people of Uganda.

**Mining Act 2003**

The Mining Act 2003 repealed and replaced the Mining Act 1964, Cap. 248, with provisions on mining and mineral development, which give effect to the relevant provisions of the Constitution; to vest the ownership and control of all minerals in Uganda in the Government.

The Act also provides for the acquisition of mineral rights; administration; licensing and leases and other related matters.

**Mining Regulations 2004**

The Regulations contain the procedure of applying and acquiring the various licences like prospecting licence, exploration, retention, location, and mining licence among others.

**National Environment Act (NEA Act) 2003**

The Act governs and sets out provisions that guide activities of the mining sector regarding the protection of the environment. Every holder of a mining lease is required to carry out an environment impact assessment in accordance with the provisions of the National Environment Act.



Which Government Bodies administer mining law?

The Ministry of Energy and Mineral Development responsible for the policy direction and accountable for the sector performance.

Directorate of Energy and Mineral Development which provides leadership on the implementation of the mineral policy.

Department of Geological Survey and Mines (DGSM) which is the technical arm of the Ministry of Energy and Mineral Development and is responsible for the administration and management of the mineral sector in Uganda. The Mines Division is responsible for issuing licenses for the exploration and exploitation of identified mineral occurrence.

## TYPES OF AND MANNER OF ACQUISITION OF RIGHTS

What rights are granted to conduct reconnaissance, exploration and mining operations

The Mining Act 2003 provides that any person in Uganda has the right to acquire and search for, retain, mine and dispose of any mineral as long as a licence to authorising the mining activities has been procured obtained. Failure to comply with this provision is a crime and may result into imprisonment or other penalty or both. The Act provides for four types of mineral rights which can only be exercised by holders of mineral licenses namely:

**Prospecting License**

The right to prospect for minerals in Uganda is given to the holder of a prospecting license and authorises participation in mineral prospecting. The right is not transferable. The license is not area specific and gives authority to the holder to look for mineral occurrence of interest in Uganda. The Prospecting License is not renewable and lasts only one year from date of issue. An application for a prospecting licence is made to the Commissioner for Geological Survey and Mines Development in the prescribed form upon payment of the prescribed fee.

**Exploration License**

The license is granted for a duration of up to three years and the maximum area of exploration license is 500 km<sup>2</sup>. The license is renewable for two terms of two years each. Unlike a prospecting license which is not area specific, the exploration license defines the area for exploration and therefore it is a requirement that the application for an exploration license must be accompanied by a map of the area to be explored among other requirements.

**Retention License**

A Retention license is granted to an applicant has identified a mineral deposit within an exploration area of potential commercial significance but is unable to develop the resource immediately by reason of adverse market

conditions and other factors beyond the Applicant's reasonable control. The license is only granted in respect of the exploration area granted in the exploration license is granted for a maximum of two (2) years.

#### Mining lease

The Mining lease is the right granted to authorise mining operations over an area. The application of the Mining Lease should be in a prescribed form and accompanied with the prescribed fee which is made to the Commissioner. The application should indicate financial and technical resources available to the applicant to carry out his obligations under the lease. The form should also be accompanied with a full feasibility study including a plan of the area in respect of which the lease is sought.

#### Mining Location

This is granted to any person who is a Ugandan citizen wishing to carry out small scale prospecting and mining operations. In case of a body corporate, it is only granted to such if at least 51% of the beneficial shareholders of the company are citizens of Uganda.

#### OIL AND GAS

What rights are granted to conduct oil and gas exploration and production

The Petroleum (Exploration, Development and Production) Act 2013 provides for the following rights to conduct oil and gas exploration and production:

- Reconnaissance Permit - This permit is granted to persons who intend to carry out reconnaissance surveys and these are required to apply to the Minister for this license upon payment of a prescribed fee. The license shall be for a geographically delineated area and is non-exclusive which means that it may be granted to more than two persons in respect of the same area. The duration of this license is eighteen months.
- Petroleum Exploration Licence - The licence is granted to authorise exploration of hydrocarbons in a specified area. The license can only be applied for upon the Minister of Energy announcing in the gazette the availability of areas for bidding. In exceptional cases enumerated in the Act, the Minister may receive direct applications for exploration licenses. The duration for this license is two years and may not be renewed more than twice.
- Petroleum Production licence - The holder of a Petroleum Exploration licence shall have exclusive right to apply for the grant of a Petroleum Production License over any block following the discovery of petroleum in their exploration area. The license is granted for a period of twenty (20) years and may be renewed.

#### INDIGENISATION REQUIREMENTS

Are there any requirements in relation to the holding of equity in exploration and mining projects by indigenous peoples

The Mining Act 2003 prohibits any issuance of a mineral right to an individual who is not a citizen of Uganda or a company which is not registered or incorporated under the laws of Uganda.

Are there any special rules or restrictions applicable to foreign applicants

According to the Mining Act 2003, mineral rights cannot be granted to foreign individuals or companies unless the company is registered or incorporated in Uganda. Additionally, foreigners are not eligible for a location license.

Identify any rights that the State may have. Does the State have any rights to equity in mining projects  
No.

#### PROCESSING AND BENEFICIATION

Are there any requirements to beneficiate minerals mined

No. There are generally no mandatory legal requirements under the mining law or regulations to beneficiate minerals mined. However, the President of Uganda issued a directive specifically barring the exportation of iron ore to which there has been no value added or beneficiation.

Are there any restrictions on the export of minerals

Yes. A person who is interested in exporting minerals must obtain a permit from the Commissioner of the Geological Survey and Mines on conditions determined by or under the Act. Any person who exports any mineral from Uganda without complying with the requirements of the Mining Act 2003 commits an offence and may be liable, on conviction, to a fine or imprisonment or both.

Refer above, there is a presidential directive in place that restricts the exportation of iron ore without any beneficiation taking place.

#### DISPOSALS OF RIGHTS AND CONTROLLING INTERESTS

Are there any statutory consents required to dispose of rights to explore and mine

Yes. The Mining Act provides for restrictions on transfers for a mineral right. The Act prohibits any transfer of a Prospecting licence and any transfer for the other licences shall be void unless the Commissioner's consent is given.

The Commissioner of Geological Survey and Mines may give his or her approval for the transfer where the proposed



transferee of the mineral right is a person that controls or is controlled by, or is under joint or common control with, the holder of the mineral right; however, such transferee is not disqualified under any provisions of the Act from holding the mineral right sought to be transferred.

Are there any restrictions on disposals of controlling interests in entities holding exploration or mining rights  
Yes. Any person seeking to dispose of any mineral right should seek the consent of the Commissioner Geological Survey and Mines.

#### USE OF SURFACE OF LAND INVOLVED IN PROSPECTING AND MINING ACTIVITIES

What are the rights of the holder of an exploration right or mining right to use the surface necessary or incidental to an exploration or mining operation  
Generally common law, the holder of an exploration right is entitled to use the surface necessary or incidental to its operations. However the Act restricts this right where the operations are within 200 (Two Hundred) meters of any occupied or temporarily unoccupied house or building. Here, the holder of the exploration license must seek the written consent of the owner of the land.

The holder of a Mineral Right is also entitled to apply for exclusive rights over the whole or any part of the mining area. This is upon request by the owner or lawful occupant of the land on which the mining area is situated to obtain a lease or other rights to use the area upon such terms as to duration or the extent of the land to which the lease shall relate.

#### ENVIRONMENTAL

What legislation governs environmental protection of exploration and mining sites

Under the Mining Act, every exploration licence and mining lease is granted with a condition that the holder of such a license or lease takes all necessary steps to ensure the prevention and minimization of pollution of the environment in accordance with the standards and guidelines prescribed in the National Environment Act.

Further, every holder of an exploration licence or a mining lease MUST carry out an Environmental Impact Assessment (EIA) of his/ her proposed operations in accordance with the National Environment Act.

The holder of an exploration licence or a mining lease MUST procure a certificate of approval of his or her proposed operations from the National Environmental Management Authority (NEMA).



The holder of an exploration licence or a mining lease MUST carry out an annual

environmental audit and keep a record of operations describing how far the operations conform to the approved EIA.

The holder of an exploration licence or a mining lease MUST submit to NEMA an Environmental Management Plan indicating the type and quality of wastes to be generated from any exploration or mining operations they are currently undertaking and the method of final disposal.

Every Exploration Licence or Mining Lease MUST have a condition that the holder submits an Environmental Restoration Plan of the exploration or mining area that may be damaged or adversely affected by his/her exploration or mining operations.

#### NATIVE TITLE AND LAND RIGHTS

Is there any native title which has any implication for the exploration and mining industry

Yes. Article 244(2) of the Constitution of the Republic of Uganda provides that minerals shall be exploited taking into account the rights of:

- Individual Land Owners;
- Local Governments; and
- The Government

Individual land owners under the Mining Act are entitled to compensation or to a share of royalties. In the event that the owner or lawful occupant of any land subject to a mineral right makes a demand to be paid the fair and reasonable compensation for any disturbance of their rights and for any damage occasioned to the surface of the land by the holder's operations, the law grants the land owner or occupant an inherent right to compensation.

The Individual Land Owner, Local Government and the Government are also entitled to a share in the royalties that accrue from exploitation of mineral rights. The owners or lawful occupier of the land subject to mineral rights are entitled to a 3% share, the Local Government 17% and the Government 80%.

#### HEALTH AND SAFETY

What legislation governs health and safety in mining

The Occupational Health and Safety Act, 2006

This Act generally sets out the standard regarding health and safety in employment situations. It sets out the rights and duties of employees, and duties of the employer regarding the health and welfare of employees, the standard at which workplaces must be maintained and sets out general safety requirements that every employer must adhere to.

## CONSTITUTIONAL AND ADMINISTRATIVE LAW

Is there a constitution which has an impact upon rights to prospect and mine? Yes. The Constitution of the Republic of Uganda, 1995 is to the effect that minerals and mineral ores shall be exploited taking into account the interests of the individual land owners, local governments and the Government.

The Constitution vests powers in the Parliament of Uganda to make laws regulating the exploitation of minerals, sharing the royalties arising from mineral exploitation, the conditions of payment of indemnities arising out of exploitation of minerals and conditions regarding the restoration of derelict lands.

The Constitution further provides that all minerals are held by the government on behalf of the people of Uganda.

Are there administrative appeals in the mining law? Yes. There are two types of administrative reviews recognised under the Mining Act.

### Administrative review by the Minister

A person aggrieved by the decision of the Commissioner is allowed to request an administrative review within thirty (30) days after being notified of the decision and the Minister is granted powers to either confirm, set aside or vary the decision complained of.

### Judicial review of the Minister's decision

Any person aggrieved by a decision, order, act or omission of the Minister is allowed to apply to the High Court for judicial review.

## ROYALTIES AND TAXES

Are there special rules applicable to taxation of exploration and mining companies?

Yes. Mining Companies are allowed up to 100% exploration expenditure as a deduction within the year it is incurred. The expenditure must be of a capital nature and must be incurred in searching for, discovering and testing or winning access to deposits of minerals in Uganda. S.36 ITA

Further the Income Tax Rate for Mining Companies is not fixed at 30% as for all other Companies but rather is calculated using a special formula which fluctuates the rate of tax between 25% - 45% depending on several factors.

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

The Mining Act is to the effect that all minerals obtained or mined in the course of prospecting, exploration, mining or mineral beneficiation operations shall be subject to the payment of royalties on the gross value of the minerals

based on the prevailing market price of the minerals at such rates as shall be prescribed.

# ZIMBABWE

## SCANLEN AND HOLDERNESS PRACTITIONERS

### Firm Information

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### RELEVANT LEGISLATION

The basic legislation regulating mining activities in Zimbabwe is the Mines and Minerals Act, [Chapter 21:05] and Regulations made thereunder. It is a 1961 piece of legislation which has suffered minor amendments over the years.

### ADMINISTRATION

The administration of that legislation is the responsibility of the Minister of Mines who generally acts through Mining Commissioners for the various districts and in respect of major decisions acts on the advice of the Mining Affairs Board.

### TYPES OF AND MANNER OF ACQUISITION OF RIGHTS

#### Holding of Mining Rights

Mining rights are held in various forms. The simplest form is a mining claim which is a permit to mine. A single claim will normally cover a very small area. It is common to have several contiguous claims grouped into a block of mining claims. The pegging has to be maintained and annual reports have to be submitted to the Mining Commissioner for the relevant district.

#### Lease

For ease of administration, several claims forming a block can be transformed into a mining lease through an application made in terms of the Act. A mining lease generally confers longer term rights which are renewable in terms of the Act.

#### Rights Conferred

Basically, a holder of Mining Rights is entitled to the exclusive right of mining any ore or deposit of any mineral which occurs within the vertical limits of the area covered by his or her location. The only exclusion will be coal, oil and gas

which are mined in terms of a Presidential Grant.

#### Title Not Impeachable

Their title is not impeachable. The law does not allow impeachment of title to mining claims which have been registered for a period of two years or mining claims which have been consolidated into a mining location.

### MANNER OF ACQUISITION

#### Prospecting

The usual starting point in the acquisition of mining rights is obtaining a prospecting licence which entitles the holder to prospect, peg and register claims in terms of the Act. A registered claim is a mining location where mining activities can take place.

#### Ordinary Prospecting Licence

A prospecting licence can be issued as an ordinary prospecting licence which is valid for two years. The prospectors' licence itself is valid for five years. Both are renewable.

#### Exclusive Prospecting Licence

Additionally, it is competent to obtain an exclusive prospecting order which confers exclusive rights to prospect for specified minerals in any identified location within Zimbabwe. Exclusive prospective orders are issued for a maximum of six years, being three years renewable for a period of three years.

### OIL AND GAS

Coal, oil and gas mining rights are conferred by a special grant granted by the President of Zimbabwe.

An application is made to the Mining Affairs Board which makes a recommendation to the Minister of Mines.

The Minister of Mines makes a recommendation to the President of Zimbabwe. Only the President of Zimbabwe can sign a grant in respect of coal, oil and gas.

After the grant shall have been signed, the nature of the rights granted is the same as that in respect of any other mineral.

#### Indigenization Requirements

At least 51% of the shares in any mining company operating in Zimbabwe should be owned by indigenous Zimbabweans.

An indigenous Zimbabwean is any person who suffered discrimination prior to 18<sup>th</sup> of April 1980, the date of our independence.

A descendant of an indigenous Zimbabwean is an indigenous Zimbabwean. Furthermore, a company



controlled by indigenous Zimbabweans is an indigenous Zimbabwean. A subsidiary of a company controlled by indigenous Zimbabweans is also an indigenous Zimbabwean.

#### Foreign Nationals

No Zimbabwean registered security may be transferred to or allotted to a foreign resident without prior exchange control approval.

Approval has been granted in advance in respect of securities in listed companies where a foreign resident may acquire up to 10% per counter and a group of foreign residents may acquire up to 40% per counter.

### RIGHTS OF THE STATE

#### Dominion

Dominion in all minerals, vests in the President. Miners acquire rights to mine and such rights are protected by law. Where rights are lost in terms of the law, the President's residual ownership is restored unfettered by any encumbrance arising from the granting of the rights.

#### Processing and Beneficiation

Although the law does not require it yet, Government policy encourages local processing and beneficiation of all minerals.

Legislation expected to be enacted soon will provide for mandatory local beneficiation.

Government is expected not to sign mining development agreements which do not provide for specific commitments to local processing and beneficiation.

The nature of the incentives for local beneficiation will be known when the legislation is promulgated.

#### Restrictions on Sale and Export of Minerals

All minerals are sold by the Mineral Marketing Corporation, a parastatal incorporated in terms of the laws of Zimbabwe.

Miners may obtain permits from the Minerals Marketing Corporation to sell minerals in terms of contracts approved by the Minerals Marketing Corporation of Zimbabwe.

Commissions are payable to the Minerals Marketing Corporation of Zimbabwe in respect of all sales and exports of minerals.

#### Disposals of Rights and Controlling Interests

Mining rights cannot be transferred or alienated in any manner without the approval of the Mining Commissioner. In the case of Mining Grants or Mining Leases, the approval of the President is required. The application goes to the Mining Affairs Board which make recommendations to the

Minister and the Minister makes recommendations to the President.

Relinquishment of a controlling interest in any Zimbabwean company requires the approval of the Minister of Youth Development Economic Empowerment and Indigenization.

#### Environmental

The new constitution enshrines environmental rights demanding that every person be afforded a right to an environment that is not harmful to their health or well being and to have the environment protected for present and future generations through reasonable legislative and other measures.

There is an Environmental Management Act in terms of which no mining operations may commence unless an Environment Impact Assessment report will have been prepared, measures to minimize adverse impact on the environment will have been enumerated and an environmental agency established by statute will have issued a certificate allowing the miner to commence mining operations.

#### Customary Land Rights

The Minister may reserve land held under customary land rights against prospecting and mining.

#### Health and Safety

There is environmental management legislation, factories legislation mining regulations and National Social Security regulations providing for details of health and safety requirements on mining operations.

#### Constitutional and Administrative Law

As pointed out above, the new constitution enshrines environmental rights.

The new constitution demands transparency, honesty, cost effectiveness and competitiveness in the negotiation and performance of, inter alia, concessions of minerals and other rights.

#### Royalties and Taxes

All miners pay royalties to the State for exploitation of minerals because all minerals belong to the State.

Royalties are based on production and are payable over and above income tax payable by the miners.

Royalties paid are no longer deductible in the calculation of income tax payable by miners.